

FYI -
National Immigration Forum
Final Comment + Legal Analysis.
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National Immigration Forum

January 21, 1999

Director, Policy Directives and Instructions Branch
Immigration and Naturalization Service
425 I. St., NW,
Room 5307
Washington, D.C. 20536

Re: INS No. 1915-98 ~ Implementation of Section 203 of the Nicaraguan Adjustment and Central American Relief Act

Re: INS Draft Form I-881

Dear Director,

Attached are comments responding to the proposed regulation implementing Section 203 of the Nicaraguan Adjustment and Central American Relief Act. While the comments address the entire proposed rule, our chief concerns are highlighted below.

We are extremely disappointed that the regulation will require those covered by the legislation to *individually prove* they would suffer "extreme hardship" if deported. This requirement contradicts the intent of the legislation—to once and for all resolve the legal limbo of those covered by NACARA. The comment explains at length why the INS should adopt a group-specific "extreme hardship" determination for individuals who are otherwise eligible for NACARA relief. Briefly, a group-specific "extreme hardship" determination should be adopted because:

- The Attorney General has the legal authority to adopt a group-specific determination of "extreme hardship;"
- A group specific "extreme hardship" determination is consistent with the intent of the legislation;
- A number of factors, adding up to "extreme hardship" are common to NACARA-eligible Salvadorans and Guatemalans—including the circumstances under which they fled to the U.S., the destruction caused by Hurricane Mitch in their home countries, and the accompanying disruption of the economies of El Salvador and Guatemala; the health and psychological factors arising from their flight from civil war; and their long-term residence in the United States and consequent assimilation into our society;
- A group-specific "extreme hardship" determination would be administratively efficient, as all eligible class-members will present similar facts in showing extreme hardship.

In the event the Attorney General does not adopt a group-specific "extreme hardship" determination, the guidance on "extreme hardship" that is included in the proposed regulation should be changed. Specifically:

- A factor that may not in itself be determinative may become significant when weighed with all the other circumstances and factors presented by an eligible applicant in trying to prove "extreme hardship."
- Factors that may not be extreme in themselves may, *in the aggregate*, amount to "extreme hardship."
- What is considered "extreme" should not be equated with something that is "unique" to the applicant. Hardship for suspension purposes need not be unique to be extreme.

We also make specific recommendations for changes to the factors that an adjudicator may consider when determining extreme hardship, and suggests that two factors be added:

- The effect on an individual of returning to a place where there has been a flood or other environmental disaster resulting in a substantial disruption of living conditions.
- The difficulty of readjustment to life in the country of origin, including the inability to find a home and heightened vulnerability to criminal violence.

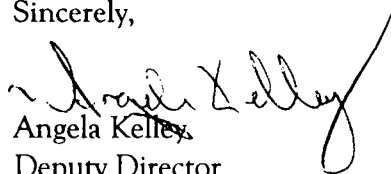
We believe the regulations should be changed to specify that Asylum Officers are authorized to adjudicate *all* NACARA applications. As proposed, the regulations except several groups of Salvadorans and Guatemalans from Asylum Officer jurisdiction.

The regulations should be changed to specify that single absences of 90 days or less, or aggregate absences of 180 days or less should be considered "brief" for the purpose of determining "brief, casual, and innocent" absences from the U.S.

Also included here are comments to the draft form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal pursuant to Section 203 of Public Law 105-100.

We appreciate the INS and EOIR consideration of these comments.

Sincerely,



Angela Kelley

Deputy Director

National Immigration Forum

INS No. 1915-98 – Implementation of Section 203 of the Nicaragua Adjustment and Central American Relief Act

Section 103.7 Fees

We applaud the family cap to the fees, but are troubled that families must apply at the same time in order to benefit from the cap. According to the proposed regulation, family members must submit their “applications of [sic] the same time. Unfortunately, the Supplementary Information at *Federal Register* page 64899 appears to preclude otherwise eligible dependents in proceedings from participating in the family cap. The supplementary materials limit closure to the case of such dependent to “permit the dependent to submit an application for suspension of deportation or special rule cancellation of removal with the service” after the “parent or spouse “of the dependent “has submitted an application for relief with the Service.” The dependent can only submit her or his suspension application after the administrative closing of her or his case. Since this can only take place after the principal has applied himself or herself, the proposed regulation precludes dependents in proceedings from participating in the family cap.

The final regulations should allow all otherwise qualified family members to apply for NACARA benefits together, thereby allowing those family members in proceedings to participate in the family cap. Adjudication of the application of the dependents in question could be withheld pending the administrative closing of the EOIR proceedings. In the alternative, the regulation could be changed to permit families to apply at different times and still benefit from the family cap. Given that the fee is still high, even with the family cap, and that the average Salvadoran has already spent hundreds of dollars in TPS, DED and EAD fees, we urge the INS to permit family members to apply separately and still benefit from the cap.

Section 208.14 Approval, denial, referral or dismissal of application

We recommend that the final regulations allow an asylum applicant who has been granted adjustment of status pursuant to NACARA up to **60 days** to decide whether to pursue his or her asylum application. The extra 30 days would give the applicant more time to consult with counsel and would result in the applicant making an informed choice.

We also recommend that the final regulations require the INS to serve the asylum applicant with a **written notice** advising him or her of the deadline and its significance. The notice would inform certain individuals how they could benefit from pursuing asylum even after they are granted adjustment of status because it would permit them to file a derivative asylum application for their spouse and children. Since well over 90 percent of the intended beneficiaries of NACARA are from Spanish-speaking countries, we recommend that the notice be in Spanish and English for successful NACARA applicants. Without commenting on whether the INS is required to translate such forms, we recommend that notices from the Service and the EOIR be in Spanish and English.

Sec. 240.58 Extreme hardship

Overview of extreme hardship discussion

Our comments to this section are in two parts. We first recommend that the Attorney General adopt a group-specific "extreme hardship" determination for individuals who are statutorily eligible for relief from repatriation under Section 203 of NACARA.¹

In the alternative to a "group-specific "extreme hardship" determination, we also offer recommendations for specific changes in the listed hardship factors in Paragraph (b) of proposed 8 C.F.R. § 240.58; and recommendations additional hardship that the Attorney General should include in the final version of 8 CFR § 240.58.

We believe that the specific changes to the proposed rule offers an interpretation of the term "extreme hardship" under NACARA § 203 that is more consistent with the statute than the interpretation the Department of Justice provided in the proposed regulations. We are disturbed, for example, that the discussion of hardship in the proposed regulation does not address the specific circumstances of the vast majority of NACARA-eligible persons. In the event the Attorney General fails to adopt a group-specific hardship definition, the final regulation should address specific circumstances such as the fact that most of these aliens left the devastation of war, which has unique psychological consequences for returning to their country.

GROUP-SPECIFIC HARDSHIP DISCUSSION

THE ATTORNEY GENERAL HAS THE LEGAL AUTHORITY TO ADOPT A GROUP-SPECIFIC DETERMINATION OF EXTREME HARDSHIP

The Attorney General -- and, by delegation, the INS -- has been accorded broad discretionary authority to interpret, administer and enforce the immigration laws.² The courts generally have deferred to the Attorney General and the INS in the exercise of such authority, unless the INS either (a) acted arbitrarily or capriciously, or abused its discretion; or (b) failed procedurally to exercise its discretionary authority properly.³

In the context of suspension of deportation, the Supreme Court has ruled that the approval of such relief is within the "unfettered discretion" of the Attorney General.⁴ Other courts have held that, in

¹ In the "Group-Specific Hardship Discussion" section of the comment "Class members" refers to all of the Guatemalans and Salvadorans targeted for relief under the Act, including (1) Guatemalans and Salvadorans who either registered for benefits under the settlement agreement in *American Baptist Churches et al. v. Thornburgh* (the "ABC Settlement") or separately filed asylum applications; and (2) Salvadorans who applied for Temporary Protected Status ("TPS").

² See INA 103(a), 8 U.S.C. 1103.

³ See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"); *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (court lacks authority to substitute its discretion for that of the Attorney General) (citing *Hernandez-Cordero v. INS*, 819 F.2d 558, 560-61 (5th Cir. 1987)); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) ("[t]he discretion of immigration officials is exceptionally broad").

⁴ *Jay v. Boyd*, 351 U.S. 345, 354, 357-58 (1956).

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reviewing suspension of deportation determinations, their review is limited to whether there has been "a clear abuse of discretion or a clear failure to exercise discretion."⁵

One circuit court stated that the President has "inherent power [in the immigration area] arising out of the Executive's plenary authority over foreign relations."⁶ As reflected in President Clinton's November 14, 1997 statement about the Act (discussed in more detail below), the potential destabilizing effect on the fledgling democracies in Central America justifies, in the implementation process, minimizing differences in the relief accorded to Nicaraguans and Cubans with the relief given to Salvadorans and Guatemalans.

In considering whether the INS has properly applied the "extreme hardship" standard in suspension of deportation cases, the courts again have deferred to the INS' exercise of discretionary authority, limiting their inquiry to whether the INS abused its discretion in determining whether to grant relief.⁷ In limiting their inquiry in this manner, courts have relied on the Supreme Court statement that the words "extreme hardship . . . are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and [her] delegates. . . ."⁸

In carrying out its duty to uphold the best interests of the United States, the INS may set up general standards to govern the consideration of applications for discretionary relief, as long as such standards are reasonably related to the statutory scheme.⁹ In this regard, in *Fook Hong Mak* the court held that the Attorney General may, by regulation, decide not to use his discretionary power in favor of a particular class, if that "determination is founded on considerations rationally related to the statute he is administering. The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups."¹⁰ The court also recognized that the Attorney General had the authority to select one characteristic as entitling a group to favorable treatment:

⁵ *Adel v. Shaughnessy*, 183 F.2d 371, 372 (2d Cir. 1950). See also *Blanco v. INS*, 68 F.3d 642, 645-46 (2d Cir. 1995) (Attorney General has "broad discretionary power" over eligibility for suspension of deportation) (citing *Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 (1957)); *Babai v. INS*, 985 F.2d 252, 255 (6th Cir. 1993) ("The Attorney General . . . exercise[s] very broad discretion It is [the court's] duty to ensure that this discretion is exercised in a way that is not 'arbitrary, irrational or contrary to law.'" (Citing *Mejia-Carrillo v. INS*, 665 F.2d 520, 522 (6th Cir. 1981))).

⁶ *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950)) ("[t]heoretically, the President has an independent source of power concerning immigration policy, at least with regard to matters that are not the subject of either a statutory mandate or an express prohibition"), *aff'd on other grounds*, 472 U.S. 846 (1985).

⁷ See, e.g., *Luna-Rodriguez v. INS*, 104 F.3d 313, 315 (10th Cir. 1997) (citing *Turri v. INS*, 997 F.2d 1306, 1308 (10th Cir. 1993)); *Hadjimehdigholi v. INS*, --- F.3d ---, No. 96-9543, 1997 WL 622210, *1 (10th Cir. Oct. 9, 1997) ("We review the Board's determination on 'extreme hardship' under the abuse of discretion standard, allowing only limited room for substantive review") (quoting *Dulane v. INS*, 46 F.3d 988, 994 (10th Cir. 1995)).

⁸ *INS v. Wang*, 450 U.S. 139, 144 (1981) (*per curiam*), quoted in *Luna-Rodriguez*, *supra*, 104 F.3d at 315; *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir. 1993) (citing *Wang*, *supra*); *Brice v. INS*, 806 F.2d 415, 419 (2d Cir. 1986) (citing *Wang*, *supra*); *Youssefinia v. INS*, 784 F.2d 1254, 1261 (5th Cir. 1986) (citing *Wang*, *supra*).

⁹ See *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) ("The statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him"), *cert. denied sub nom.*, *Confederation of Iranian Students v. Civiletti*, 446 U.S. 957 (1980); *Unification Church v. Attorney General*, 581 F.2d 870, 877-78 (D.C. App. 1978), *cert. denied*, 439 U.S. 828 (1978); *Fook Hong Mak v. INS*, 435 F.2d 728, 731 (2d Cir. 1970) (the INS determination that a certain class of aliens should not be eligible to apply for adjustment of status was "reasonably related to the statutory scheme").

¹⁰ 435 F.2d at 729-30 (emphasis added).

The administrator has simply determined that the one paramount element creates such "likeness" that other elements cannot be so legally significant as to warrant a difference in treatment. This may be an even "juster justice" than to accord different treatment because of trivial differences of fact; at least it is competent for the administrator to think so.¹¹

This principle was followed in *Singh v. Nelson*, where the court held that INS regulations identifying groups of individuals ineligible for discretionary relief are permissible if "the class is rationally distinguishable from all other classes of individuals who remain eligible for discretionary relief."¹² As the court in *Fook Hong Mak* noted, this principle is equally applicable in reverse -- in deciding whether to grant discretionary relief, the INS may treat a particular group of individuals more favorably if the group is rationally distinguishable from those who do not qualify for such favorable treatment.

A GROUP-SPECIFIC "EXTREME HARDSHIP" DETERMINATION IS RATIONALLY RELATED TO THE ACT'S STATUTORY SCHEME

NACARA, its legislative history, and President Clinton's pronouncements concerning implementation of the Act clearly establish a rational basis for making a group-specific "extreme hardship" determination with respect to applicants for discretionary relief under Section 203 of the Act. As a preliminary matter, the Act itself defines a separate group eligible for special relief from repatriation that is unavailable to those who are not members of the statutorily defined group.¹³

The Act's legislative history further supports a group-specific "extreme hardship" determination for the statute's class members. Senators Connie Mack (R-FL), Bob Graham (D-FL), Spencer Abraham (R-MI), Edward Kennedy (D-MA) and Richard Durbin (D-IL), the Act's principal sponsors in the U.S. Senate, introduced into the Congressional Record an Explanatory Memorandum (the "Memorandum") describing NACARA's purposes and providing a section-by-section analysis of the Act.¹⁴ Describing the purposes of the legislation, the Memorandum states that:

In recognition of the hardship that those eligible for relief suffered in fleeing their homelands and the delays and uncertainty that they have experienced in pursuing legal status in the United States, the Congress directs the Department of Justice and the Immigration and Naturalization Service to adjudicate applications for relief under this Act expeditiously and humanely.¹⁵

Discussing the substantive standards for relief from repatriation under Section 203 of the Act, the Memorandum specifically authorizes the Attorney General to adapt the procedures for adjudicating applications for such relief, stating that "[t]hese cases already have been drawn out enough . . ."¹⁶ Noting the relevance to the "extreme hardship" determination of the "special hardships" faced by

¹¹ *Id.* at 730 (emphasis added).

¹² 623 F.Supp. 545, 554 (S.D.N.Y. 1985).

¹³ The Act also makes certain nationals of specified former Soviet Republics eligible for the same type of relief from repatriation. For consistency and ease of administration, this group also should benefit from a group-specific determination of extreme hardship.

¹⁴ See Congressional Record, S.12266 (November 9, 1997).

¹⁵ *Id.*

¹⁶ *Id.*

NACARA beneficiaries and the "fragile economic and political conditions in their home countries,"¹⁷ the Memorandum states that:

It would be entirely consistent with Congressional intent for the Attorney General to establish procedures that keep to a minimum the burdens an applicant of good character has to shoulder in order to qualify for relief, both in terms of the paperwork that the applicant has to complete and the showings that the applicant has to make.

In addition to recognizing the special circumstances to which the ABC class members have been subjected, application of the foregoing approach would greatly reduce the need for protracted analysis of the more subjective aspects of the suspension standard, thereby reducing the administrative burden on the Immigration and Naturalization Service and minimizing further delays in according relief to these individuals.¹⁸

Floor and other statements by several of the Act's principal sponsors echo the views expressed in the Memorandum. For example, After discussing the special circumstances faced by Salvadorans and Guatemalans made eligible for relief under NACARA,¹⁹ **Senator Abraham**, Chair of the Senate Judiciary Committee's Immigration Subcommittee, explicitly stated that the rules governing relief from repatriation for class members may be amended "further to the special circumstances of that class."²⁰

Senator Kennedy, ranking minority member of the Immigration Subcommittee, decried the unfairness and discriminatory nature of treating Nicaraguans and Cubans more favorably than similarly situated Guatemalans and Salvadorans, suggesting that all of the designated class members should be treated equally.²¹

Senator Mack, one of the authors of the Act, stated that "[i]t would be appropriate for the Attorney General not to challenge applications for relief by eligible class members on hardship grounds . . . "²²

In a December 15, 1997 letter to the Attorney General discussing the legal feasibility of presuming extreme hardship for NACARA beneficiaries, **Senators Abraham, Graham, Kennedy and Mack** stated that the Attorney General is "entirely free to adopt procedures for adjudicating the hardship issue . . . [including] a rule that in light of the length of time they have been here and the difficulties they have faced, *NACARA beneficiaries are entitled to a presumption of extreme hardship.*" (Emphasis added).

In a January 6, 1998 letter to the Attorney General, **Congressman Lincoln Diaz-Balart (R-FL)**, the principal sponsor of the Act in the House of Representatives, stated that "*a generally-applied presumption of hardship will effectuate the elemental restitution envisioned by NACARA.*" (emphasis added)

¹⁷ *Id.*

¹⁸ *Id.* at S. 12267.

¹⁸ *Id.* at S. 12267.

¹⁹ *See id.* at S. 12261.

²⁰ *Id.* at S.12262.

²¹ *Id.* at S.12264.

²² *Id.* at S.12268

Similarly, when President Clinton NACARA into law, he emphasized the Act 's purpose, "asking the Attorney General to consider the ameliorative purposes of this legislation and the unique history and circumstances of the people covered by it in giving effect to its provisions."²³

A GROUP-SPECIFIC "EXTREME HARDSHIP" DETERMINATION WOULD BE CONSISTENT WITH THE "EXTREME HARDSHIP" PRINCIPLE ENUNCIATED IN THE PROPOSED RULE

The proposed rule recognizes that "[r]elevant factors . . . must be considered in the aggregate to determine whether extreme hardship exists. . . . Similarly, an adjudicator should not discount the effect of a factor simply because it is not unique to the individual."²⁴ The proposed rule also recognizes that factors other than those cited may be considered in assessing extreme hardship.²⁵ Consistent with these principles and the applicable case law, a group-specific "extreme hardship" determination for class members is appropriate.

The following "extreme hardship" factors are common to class members as a group:

1. *Circumstances surrounding class members' flight to the United States.* Most class members were effectively forced to leave their countries of citizenship, fleeing conditions of civil war and turmoil. Moreover, until these dangerous conditions abated relatively recently, their only recourse was to remain in the United States -- it was not safe for them to return to their countries of citizenship. As discussed in more detail below, the emotional and psychological impact on a person forced to leave his or her home due to threats of, or actual, violence (whether personal or general) must be weighed heavily in assessing a claim of "extreme hardship."
2. *Current adverse conditions in the countries of repatriation; ability to obtain employment in the countries of repatriation.* The Board of Immigration Appeals ("BIA") increasingly has found that the current conditions in the country to which a person would be repatriated is an important factor in evaluating extreme hardship.^{26/} Even before the devastation wrought by Hurricane Mitch, the Act's legislative history recognized the "fragile economic and political conditions" in the home countries of the class members.^{27/}

The progress made in rebuilding these countries' economies, infrastructures and communities after the end of the civil wars suffered another setback when Hurricane Mitch struck the region in November, 1998. According to a recent report by the U.S. Agency for International Development ("AID"), Hurricane Mitch damaged or destroyed tens of thousands of homes in Central America and more than 190 bridges, adversely affecting millions of inhabitants.^{28/} The damage to the region's infrastructure and economies is estimated in the hundreds of millions of dollars, with extensive losses in the farming and agricultural sectors, which both feeds the local population and accounts for a substantial proportion of the region's export revenues. While Honduras and Nicaragua bore the brunt of the

²³ Presidential Signing Statement, (Nov. 1997).

²⁴ 63 Fed. Reg. at 64904 (citing *Matter of L-O-G*, Int. Dec. #3281 (BIA 1996)).

²⁵ *Id.* at 64903.

^{26/} See, e.g., *In re O.J.O.*, Int. Dec. 3280, 21 I&N Dec. --- (BIA 1996); *In re L.O.G.*, *supra*.

^{27/} See text accompanying note 20 *supra*.

^{28/} See *Central America -- Hurricane Mitch -- Fact Sheet #21*, U.S. Agency for International Development, Bureau for Humanitarian Response, Office of Foreign Disaster Assistance (December 4, 1998).

Hurricane's force, Guatemala and El Salvador were badly damaged as well, and the ongoing effect of the hurricane is being, and will continue to be, felt region-wide for many years to come.^{29/}

Under these circumstances, returning large numbers of Guatemalans and Salvadorans to their home countries after many years in the United States would jeopardize the fragile economic, social and political conditions present in those countries. Most likely would be unable to find work of any kind,^{30/} with the inevitable rise in unemployment leading to increases in tension and resentment against the returning expatriates. In addition to the severe problems of readjusting to life in their country of citizenship after many years in the United States, the returning expatriates likely would be at greater risk from targeted criminal activities based on a perception of relative wealth.^{31/}

Finally, the U.S. citizen and lawful permanent resident children of class members would suffer a wide array of difficulties if forced to leave the United States to live in their parents' countries of repatriation. Such difficulties would include loss of academic/educational opportunities, whether at the elementary, middle school, high school or college level. Moreover, there is little clean water in El Salvador; much of the country's drinking water is contaminated, presenting a serious risk of parasites, especially for class members' children who were raised in the United States and have not developed the immune systems necessary to deal with poor water quality and other unsanitary health conditions in Central America.

3. *Health, psychological and emotional hardship factors.* A number of specific psychological and emotional hardship factors are present in NACARA suspension cases. As noted above, many class members were displaced from their homes and communities during the war and forced to relocate due to bombings and other wartime conditions. The emotional and psychological consequences of losing one's home and way of life is relevant to the "extreme hardship" determination under NACARA, just as "the nature and effect of physical and psychological violence" has been deemed relevant in the context of a hardship claim under the Violence Against Women Act ("VAWA").^{32/}

Second, in gauging the potential psychological impact of repatriating class members, account must be taken not only of the foregoing considerations, but also of the emotional and psychological impact of being forced to leave the United States -- where class members have lived and worked with INS authorization for many years -- for countries where comparable economic and educational do not exist, and personal safety is at risk.

^{29/} According to the Office for U.S. Foreign Disaster Assistance, 240 deaths were reported in El Salvador and 55,864 persons had been displaced by the storm, while 1,000 homes were destroyed and 10,372 homes were damaged. Mitch caused losses to the internal health, water, and sanitation infrastructures in the country, causing a lack of potable water and sanitation. The agricultural sector, which accounts for a significant portion of El Salvador's economy, received the most damage. Losses in food crops vary from 20 percent of the corn crop to 100 percent of the bean crop in some areas. Additionally, some 23,000 domestic farm animals were killed, primarily poultry. The most significant losses were suffered by small landholders.

In Guatemala, 258 persons were reported dead, with 120 missing as of November 9th. 32 bridges and 40 roads have been severely damaged by Hurricane Mitch's flood waters. The U.S. Embassy has estimated that 95 percent of the country's banana crop was damaged, 25-60 percent of the corn, bean, coffee, and sugar crops were destroyed, and 30 percent of the cattle herd was lost. It is estimated that full recovery of both nations from this natural disaster will take several years and hundreds of millions of dollars.

^{30/} See State Department Telex No. 94-San Salvador-004911 (June 15, 1994), reprinted in 71 Interpreter Releases 1322 (October 3, 1994).

^{31/} See, e.g., Ordoñez v. INS, 137 F.3d 1120, 1123-24, 1998 WL 94034 (9th Cir. 1998).

^{32/} See 51 Fed. Reg. 13061, 13067 (March 26, 1996).

Finally, given the phenomenon of widespread fighting over the very small territories of El Salvador and Guatemala, a large number of those who lived through the war years in those countries may be suffering from post-traumatic stress disorders. Medical authorities agree that such disorders are likely to be aggravated by encountering situations that remind the sufferer of the events which produced it, making repatriation especially harmful in such cases.^{33/}

4. *Financial impact of the applicant's departure; special assistance to the United States and the community.* Existing authority supports the proposition that providing voluntary assistance and contributions benefiting the United States or a sector thereof should be considered favorably in assessing a claim of extreme hardship.^{34/} As articulated in connection with the enactment of NACARA, the United States has a strong and long-standing foreign policy interest in ensuring the continuing stability and viability of emerging, yet still fragile, democracies, especially those in Central America. The Salvadoran and Guatemalan communities in the United States have contributed substantially to this goal, remitting estimated hundreds of millions of dollars to their countries of citizenship. These remittances have played a critical role in stabilizing these countries' economies as they make the transition to self-determination, at no cost to the U.S. taxpayer.

The State Department has documented the potential adverse macroeconomic and social consequences of stemming the flow of these remittances.^{35/} These consequences influenced the decision to create and extend DED status to Salvadorans from 1992 to 1994 and to extend, without interruption, their work authorization thereafter.

From a U.S. foreign policy and humanitarian standpoint, remittances to Central America now have taken on added importance. These remittances are expected to contribute substantially to the economic recovery and reconstruction needed in the wake of Hurricane Mitch. Returning many thousands of Salvadorans and Guatemalans to their countries of citizenship not only will impose a substantial additional burden on those countries, but will diminish those people's ability to contribute financially to the rebuilding effort in Central America, increasing the pressure on the United States to appropriate additional funding for such an effort.

5. *Immigration history, including authorized residence in the United States.* Recent cases indicate that residence in the United States pursuant to INS authorization hastens a person's integration and assimilation into U.S. society, thereby increasing the hardship that a person would suffer if repatriated.^{36/} By definition, all those who qualify for relief under NACARA have been permitted to reside and work in the United States with permission from the INS for at least seven years. With the passage of time, most of these class members' ties to the United States have increased dramatically -- ties developed specifically due to their long-time authorized presence in this country.

Under the L.O.G. and Peña-Díaz precedents, these considerations constitute a separate basis for finding extreme hardship in claims by class members for relief under NACARA. The fact that the class

^{33/} Cf. Matter of Louie, 10 I&N Dec. 223 (BIA 1963) (considering medical disability as factor in hardship determination).

^{34/} See Matter of Anderson, 16 I&N Dec. 596, 597 (BIA 1978); Turri, *supra*, 997 F.2d at 1310 (holding that person's contribution to a U.S.-based international program is relevant to a claim of extreme hardship); Gutierrez-Centeno v. INS, 99 F.3d 1529, 1534 (9th Cir. 1996) (holding that caring for patients with disease or disabilities is relevant); Salameda v. INS, 70 F.3d 447, 449-50 (7th Cir. 1995) (holding that charitable and community activities are relevant).

^{35/} See State Department Telex No. 94-San Salvador-004911, *supra*.

^{36/} See In re L.O.G., *supra*. Cf. Matter of Peña-Díaz, Int. Dec. 3225, 20 I&N Dec. 841 (BIA 1994).

members accrued all of their threshold qualifying time in the United States with express permission from the INS should weigh heavily in favor of a group-specific determination of extreme hardship.

Central Americans eligible for relief under NACARA have an especially strong claim in this regard. Since 1990 the U.S. Congress and two Administrations have adopted laws and policies granting Salvadorans protected status in the United States, authorizing them to reside and work in the United States legally. Similarly, most Guatemalans eligible for relief under NACARA have had authorization to obtain permission to reside and work in the U.S. since 1991. Having protected status facilitated their integration into the United States and gave rise to expectations of permanent residence in the United States. As a result, expulsion from the United States would be more psychologically traumatizing and disruptive to them and their family members than it might be for persons who have not been in the United States under color of law.^{37/}

6. *Length of residence in the United States.* All of the class members eligible for relief under NACARA have accumulated more than the seven-year threshold for suspension/cancellation; some have resided in the United States for as long as fifteen years. Even in cases where the applicant has only achieved seven years, length of residence should weigh heavily in favor of ABC class members for the following reason: The INS effectively has required ABC class members to remain in the United States in order to provide them with the neutral asylum adjudications promised them under the ABC settlement agreement. The fact that the INS has contributed to class members' need to remain in the United States during the period of qualifying time should make length of residence weigh more heavily as a hardship factor, in much the same way as an especially lengthy period of residence may be more outcome-determinative than a very short one.^{38/}
7. *The absence of other immediately available means of adjusting to permanent resident status.* As the court recognized in the ABC litigation, many of the Salvadorans and Guatemalans who applied for asylum in the 1980s and early 1990s were denied asylee status based on the application of an improper legal standard to their asylum claims. Had their claims been properly and fairly adjudicated at the time, many if not most of this group -- who would have qualified for (but were not granted) asylum and who now do not have other means of adjusting to permanent resident status -- now would be permanent residents or naturalized U.S. citizens. This circumstance constitutes a separate basis for finding that ABC class members meet the hardship standard necessary to qualify for relief under NACARA.^{39/} Accordingly, these people should be deemed to satisfy the "extreme hardship" standard based on the strength of their original asylum claims.

In addition, class members should not be denied relief from repatriation solely because they might in the future qualify for permanent residence based on sponsorship by a family member. The long delays in the family based priority visa categories, the changing eligibility standards as a result of the 1996 Immigration Act, and the possibility of future limitations on family-based sponsorship make such options tenuous at best. In fact, these class members and their lawful permanent resident spouses and children would face among the most severe hardships of all NACARA applicants if relief were denied to them because they will have to be separated from family members.

^{37/} See In re L.O.G., *supra*.

^{38/} Cf. Matter of H., 5 I&N Dec. 416 (BIA 1953).

^{39/} See Matter of Z., 5 I&N Dec. 419 (BIA 1953) (inability to obtain another status is an element of extreme hardship; it is reasonable to show more leniency to applicant whose ineligibility for another status was through no fault of his own).

In light of the foregoing, a group-specific "extreme hardship" determination would be completely consistent with the principles enunciated in the proposed rule and the pre-existing precedent decisions on the "extreme hardship" standard. Even if that were not the case, however, the Attorney General may promulgate (and has promulgated) regulations that change previously applicable administrative standards. Under Section 103(a) of the INA, the Attorney General is authorized to issue regulations, and her determinations and rulings with respect to all questions of law are controlling.^{40/} The BIA has acknowledged that it must modify its interpretations to be consistent with changes in the regulations.^{41/}

A GROUP-SPECIFIC "EXTREME HARDSHIP" DETERMINATION WOULD FOSTER ADMINISTRATIVE EFFICIENCY AND FUNDAMENTAL FAIRNESS

A group-specific "extreme hardship" determination would relieve adjudicators of the substantial burden of reviewing and assessing each individual hardship claim, thereby reducing the processing time for each application and the aggregate amount of time needed to implement this program. This approach and result would comply with the congressional and presidential directives to implement this program expeditiously and humanely.

Applicants would also benefit from a group-specific "extreme hardship" determination that would take less time to prepare a case than would the individualized extreme hardship determination and would enable community-based legal service providers to assist more individuals.

Finally, such a determination would avoid the disparate treatment likely to be accorded similarly situated applicants based on a case-specific "extreme hardship" determination. By substantially reducing the incidence of inconsistent -- and fundamentally unfair -- treatment of NACARA beneficiaries with similar, if not identical, claims to relief from repatriation.

RECOMMENDATIONS FOR CHANGES IN EXTREME HARDSHIP DEFINITION IF THE ATTORNEY GENERAL REQUIRES AN INDIVIDUALIZED SHOWING

In the event that the Attorney General does not adopt a group-specific definition of extreme hardship, we suggest that the Attorney General include the following series of changes in the final regulations.

In order to provide adequate and consistent direction to adjudicators we suggest that the final regulations include the following well-established principles that appear in the Supplementary Information:

A factor that may not in itself be determinative may become significant or even critical, when weighed with all the other circumstances and factors presented.

^{40/} 8 U.S.C. § 1103(a). See, e.g., *In re Ponce de Leon*, Int. Dec. No. 3261, 21 I&N Dec. --- (BIA 1997) (treating as binding new regulations related to INA Section 212(c) eligibility). If a new regulatory interpretation changes former law, the Attorney General should provide a reasoned explanation for the change. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1767-69 (1991) (upholding HHS regulation because agency provided a reasoned explanation for the change prohibiting funding to groups that discussed abortion as a family planning option).

^{41/} See *In re Ponce de Leon*, *supra*, ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board of Immigration Appeals.").

Relevant factors that may not be considered extreme in themselves must be considered in the aggregate to determine whether extreme hardship exists.

An adjudicator should not discount the effect of a factor simply because it is not unique to the individual. The word "extreme" should not be equated with "unique" and hardship for suspension purposes need not be unique to be extreme.

The above principles are particularly important as applied to the NACARA class as many will demonstrate hardship with a range of factors and it will be to varying degrees. Also, because the applicants will have factors in common, adjudicators should be directed in the regulation to include the above principles, and most importantly, to not penalize class members for not having unique factors establishing hardship.

We recommend that the following sentence be deleted from subsection (b).

(b) To establish extreme hardship, an applicant shall demonstrate that deportation would result in a degree of hardship beyond that typically associated with deportation.

This sentence does not provide any concrete guidance in evaluating what hardships are "typically associated with deportation." For example, forced departure after a lengthy period of authorized residence does typify a consequence, which would be suffered by most NACARA-eligible persons. Therefore, this sentence might be erroneously interpreted to suggest that this hardship is not "extreme" even though this is one of the factors specifically mentioned in the proposed 8 CFR § 240.58(b)(13).

RECOMMENDATIONS FOR SPECIFIC CHANGES IN THE LISTED HARDSHIP FACTORS IN PROPOSED 8C.F.R. § 240.58(b)

Below are recommendations for strengthening some of the factors listed in the subparagraphs in paragraph 8 C.F.R. §240.58(b) of the proposed rule :

- (4) The alien's ability to obtain employment that pays a living wage in the country to which the alien would be returned.
- (7) The financial impact of the alien's departure and of the alien's return to his or her country of origin, including but not limited to, the loss of basic services such as public education and emergency health care to his or her United States citizen or lawful permanent resident children.
- (9) The psychological impact of the alien's deportation, including but not limited to:
 - a) The circumstances under which an individual left his or her country;
 - b) The political consequences of such a return;⁴²
 - c) The inability to continue providing financial support to family members, whether in the U.S. or in the home country; and

⁴² The first two suggestions are taken from the supplementary information to the proposed regulations pg. 64903.

- d) Separation from a person who is not a relative defined in the Act's provisions on extreme hardship for suspension.⁴³
- (12) Contributions to a community in the United States or to the United States, including but not limited to remittances sent to the person's home country.⁴⁴
- (12a) Ties to a community in the United States, including degree of integration into society.⁴⁵
- (13) Immigration history, including authorized residence in the United States, membership in the *ABC* class, and the reasons the individual initially sought to immigrate to the United States; and
- (14) The ability to adjust status to permanent resident status by other means.

RECOMMENDATIONS FOR ADDING ADDITIONAL HARDSHIP FACTORS TO 8 C.F.R. § 240.58(B)

We suggest that the final regulations add the following specific additional factors to the list of factors now in the proposed regulations. These factors should be applied to the applicant and to his/her qualified relative(s):

- The effect on the individual, as well as his or her home community and nation, of returning to a place where there has been a flood, earthquake, drought, epidemic or other environmental disaster resulting in a substantial disruption of living conditions.
- Difficulty of readjustment to life in the country of origin, including but not limited to, the inability to find a home and heightened vulnerability to criminal violence as a result of being identified as having returned from the United States.

The Final Regulations Should List the VAWA Extreme Hardship Factors Contained in VAWA Regulations and INS Memoranda

The Violence Against Women Act has a two-fold purpose of protecting women from violence and to prevent further violence.⁴⁶ VAWA 's overarching goal was to eliminate existing laws and law enforcement practices that condoned abuse or protected abusers.⁴⁷ In its regulations⁴⁸ and

⁴³ This last hardship factor (d) is discussed in cases such as *Antoine-Dorcelli v. INS*, 703 F.2d 19, 21 (1st Cir. 1983) and *Zamora-Garcia v. INS*, 737 F.2d 488, 494 (5th Cir. 1984).

⁴⁴ Congressional NACARA proponents, the administration and elsewhere have noted the remittances from Central Americans to their families and hometowns have contributed to United States' foreign policy goals of promoting the political and economic stability in those countries.

⁴⁵ We have not numbered the proposed new paragraph. Plainly, if the final regulations adopt this suggestion all the subsequent paragraph numbers would change accordingly.

⁴⁶ S. Rep. No. 545, 101st Cong., 2d Sess., at 38 (1990); H.R. Rep. No. 395, 103d Cong., 1st Sess., at 25 (1993).

⁴⁷ H.R. Rep. No. 395, 103d Cong., 1st Sess., at 27 (1993); S. Rep. No. 138, 103d Cong., 1st Sess., at 41 (1993).

⁴⁸ 61 Fed. Reg. 13061-13079 (March 26, 1996).

implementing memoranda,⁴⁹ INS has recognized the remedial nature of the VAWA provisions.⁵⁰ The preamble to the self-petitioning regulations, the INS implementing memoranda and the notices sent by the Vermont Service Center to self-petitioners articulate special factors tailored to the context of domestic violence which apply to battered spouses and children filing self-petitions. Since the language of the VAWA suspension provision parallels that of the self-petitioning law⁵¹ and the BIA has not yet issued a precedent decision addressing the meaning of VAWA extreme hardship,⁵² immigration judges faced with VAWA suspension applications often look to and adopt the special VAWA factors.

By failing to mention the VAWA factors, the proposed regulations undermine the purpose of VAWA. Since the regulations purport to address all relevant extreme hardship factors and they clearly fail to include the VAWA factors that have existed for some time in the self-petitioning context, immigration judges may construe their absence as meaning they are disfavored in the deportation context. Rather than the norm for victims of domestic violence, they will be the exception.

Section. 240.61 Applicability

240.61 (A)(1) THE FINAL REGULATIONS SHOULD DEFINE THE TERM "APPREHENDED AT TIME OF ENTRY" TO CORRECT CURRENT INCONSISTENCIES IN ITS INTERPRETATION

This phrase is taken directly from the *ABC* Settlement Agreement and Section 203 of NACARA. To date, the INS has not uniformly applied this term in violation of the Settlement Agreement. As a result of these inconsistent and mistaken interpretations of the phrase "apprehended at time of entry," *ABC* class members have been incarcerated in violation of the Agreement, deported in violation of the Agreement, and denied benefits to which they are entitled.⁵³ While advocates and the INS do not agree on the meaning of this phrase, the above-mentioned violations involve INS agents' failure to conform to the INS' understanding of the term as defined in the INS' own training materials.⁵⁴

When *ABC* monitors learn of these violations, they report the information to the INS. Upon receiving notice of these violations, INS personnel responsible for national implementation of the *ABC* Settlement Agreement have intervened to reinstate a class member's rights. While we are grateful for the INS relative responsiveness in this regard, the response does not adequately remedy the scope of the problem. In all likelihood, *ABC* monitoring personnel learn of only a small fraction of the overall violations. As a result, there is no remedy for the majority of the class members who are the victims of the INS' mistakes. Moreover, local INS officials have continued to violate the INS' understanding of the phrase over time. In addition, the summary removal provisions of the INA increase the likelihood

⁴⁹ Office of General Counsel, "'Extreme Hardship' and Documentary Requirements Involving Battered Spouses and Children" (Oct. 16, 1998) [hereinafter GC memo]; Office of Programs, "Implementation of Crime Bill Self-petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents" (April 16, 1996).

⁵⁰ See, e.g., GC Memo at 4-5.

⁵¹ The primary variance is that VAWA suspension applicants must show continuous presence for three years pursuant to INA § 244(a)(3), while VAWA self-petitioners must show residency with the abuser instead. See INA § 204(a)(1)(A)(iii).

⁵² See, e.g., *Matter of Gomez-Rivera*; A70 922 256 (BIA-Unpublished-Apr. 23, 1996), in which the Board remanded to a different immigration judge because of due process violations, including the immigration judge's screaming, throwing papers, and prohibiting respondent's counsel from pursuing lines of inquiry relevant to extreme hardship. The new immigration judge allowed evidence of VAWA extreme hardship factors and granted suspension of deportation.

⁵³ *Ibid*

⁵⁴ Immigration and Naturalization Service, Office of International Affairs, ABC Training Materials p.38 (Nov/Dec. 1996).

that the number of such mistakes is increasing. Providing a specific definition of the phrase is one small step to reduce the incidence of these violations.

We suggest that the final regulations define the phrase "apprehended at time of entry" as follows:

The phrase "apprehended at time of entry" means a person who was arrested at a United States port of entry between December 19, 1990, the preliminary approval date of the settlement agreement, and January 31, 1991, the date the court approved the settlement agreement.

SEC. 240.61(2) APPLICABILITY

THE FINAL REGULATION SHOULD DEFINE "FILED AN APPLICATION FOR ASYLUM WITH THE SERVICE" TO INCLUDE INDIVIDUALS WHO FILED A COPY OF THEIR REQUEST FOR ASYLUM WITH THE INS DURING EOIR PROCEEDINGS

Section 3.32 of 8 C.F.R. requires a person in immigration proceedings to file a copy of all applications for relief with the INS, including requests for asylum.⁵⁵ Any person, who complied with the regulation, filed a copy of his or her asylum request with the INS. Under principles of statutory construction, Congress is aware of prevailing administrative interpretations. By linking NACARA eligibility with filing an asylum application with the INS, Congress was aware that anyone who complied with 8 C.F.R. § 3.32 by filing the INS and the EOIR. The final regulation should clarify that Congress did not intend to bar from NACARA benefits a Salvadoran or Guatemalan who filed for asylum with EOIR. To implement Congress' intent, the regulations should specify that an otherwise eligible NACARA applicant who served the INS by April 1, 1990 with a copy of his or request for asylum is eligible for NACARA.

THE FINAL REGULATION SHOULD DEFINE "FILE WITH THE INS" TO INCLUDE INDIVIDUALS WHO FILED A COPY OF THEIR REQUEST FOR ASYLUM WITH THE IMMIGRATION COURT BEFORE THE ATTORNEY GENERAL ESTABLISHED THE EOIR

The final regulations should also specify that a person who filed a request for asylum in immigration proceedings prior to the creation of the Executive Office for Immigration Review is eligible for benefits regardless of whether a certificate of service is on file.

Sec. 240.62 (a) Jurisdiction

THE FINAL REGULATIONS SHOULD EXPAND THE JURISDICTION OF THE OFFICE OF INTERNATIONAL AFFAIRS TO INCLUDE ALL NACARA APPLICATIONS

We applaud the decision to authorize asylum officers to adjudicate most NACARA applicants' suspension and special cancellation applications. We believe that permitting asylum officers who are specially trained in suspension, will yield consistent results (though we still favor a blanket determination of hardship which would overall produce the most consistent adjudications). We are

⁵⁵ See *Lorillard v. Pons*, 434 U.S. 575 (1978) (deeming Congress to be aware of prevailing administrative interpretations when it passes laws).

troubled however that the regulations do not authorize asylum officers to adjudicate all NACARA applications. As contemplated, the following groups will not receive such interviews under the proposed regulations and in fact have no mechanism for even being able to apply for NACARA benefits:

- Salvadorans who registered for TPS but have never filed for asylum;
- Salvadoran and Guatemalan *ABC* registrants who have never filed a request for asylum or filed a request for asylum after the *ABC* filing deadlines, and;
- Salvadoran, Guatemalan, and Eastern European nationals who filed a request for asylum with the INS before April 1, 1990 and whose applications are no longer pending with the Service.

These distinctions will create confusion and do not serve any legitimate policy goals. The INS has no objective basis to fear widespread fraud as the INS can tell from its own records whether an individual is included in one of the covered groups. There is no supplemental filing a Salvadoran or Guatemalan can now submit to become a TPS registrant or *ABC* class member after the fact. As a result, there is no reason to fear fraud. In 1991, the INS examined each individual's identity, nationality and date of entry. A database exists that freezes the possible universe of TPS or *ABC* registrants. No one can now wrongfully claim to have applied for TPS. This is an objective fact that depends on actions taken many years ago, which the INS can verify. Since the Congress intended for these groups to be eligible for NACARA benefits, the INS must provide a mechanism for them to apply.

Sec. 240.62 (1) and (2) Jurisdiction

THE FINAL REGULATIONS CLARIFY THE PHRASE "STILL PENDING ADJUDICATION BY THE SERVICE"

The proposed regulations do not define what it means for an application to be "still pending adjudication." This omission could lead to inconsistent interpretations by INS officials. To ensure consistency, the final regulations should state specify that a case is "still pending adjudication" if an *ABC* class member who is eligible for benefits of the *ABC*...and who has not yet received a final decision on his asylum application" (rather than "a de novo asylum adjudication"). Many *ABC* cases are now frozen at a point post-interview but pre-final decision and the regulations need to include these cases, still at the asylum offices, as within the asylum offices' jurisdiction.

Sec. 240.62(a) Jurisdiction

THE FINAL REGULATIONS SHOULD SPECIFY WHAT THE PHRASE "OTHERWISE MET THE ASYLUM FILING DEADLINE PURSUANT TO THE *ABC* SETTLEMENT AGREEMENT" MEANS

The proposed regulation's description of the Office of International Affairs' jurisdiction to grant or review NACARA cases is very vague. The language that a Salvadoran or Guatemalan must have "otherwise met the asylum filing deadline pursuant to the *ABC* Settlement Agreement" does not let the public or eligible individuals know when the Office of International Affairs has jurisdiction.

We recommend that the phrase be clarified to mean that certain *ABC* class members can still apply for asylum because the INS did not serve them properly them with required notices. The *ABC* Settlement requires the INS to serve an individual notice on certain class members. Unless the INS serves the required notice, a class member continues to be eligible to file an *ABC* asylum application. The

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regulation should expressly state that an *ABC* class could be eligible to file an *ABC* asylum application and for an asylum officer NACARA adjudication if the INS did not properly serve him or her with the notice required under the *ABC* Settlement Agreement.

Exhibit 5 or Notice 5 of the Settlement Agreement illustrates is an example of how the filing deadline is linked to service of proper notice. The *ABC* Settlement Agreement requires the INS to notify Salvadoran class members who applied for Temporary Protected Status (TPS) that they had 90 days from the date of the notice to submit an asylum application. Exhibit or Notice 5, which implements Paragraph 3(c)(1)(b) of the agreement, states:

YOU MUST SUBMIT AN ASYLUM APPLICATION WITHIN 90 DAYS OF THE DATE ON THIS LETTER. (Emphasis in original).

Therefore, the terms of the Settlement Agreement require the INS to permit a Salvadoran who are entitled to receive Notice 5 to submit an *ABC* asylum application until 90 days after she or he receives the notice. If the INS never served Notice 5 on a Salvadoran class member who applied for TPS, then she or he can still file an asylum application that the INS must adjudicate in accordance with the *ABC* settlement agreement.

The Attorney General has consistently recognized that the filing deadline did not apply to an *ABC* class member whom the INS did not properly serve with Notice 5. The United States Department of Justice's training materials acknowledge this exception⁵⁶ The final regulation should state that certain *ABC* class members may still file asylum applications and receive asylum officer adjudication of their NACARA claims if the INS did not properly serve a notice required by the *ABC* Settlement Agreement.

Section 240.63 Application Process

TIME ESTIMATE TO COMPLETE FORM-881 IS FAR TOO LOW—FINAL REGULATIONS SHOULD ALLOW LIMITED USE OF EOIR-40

This section requires that NACARA applications filed with the INS be made using Form-881. It also requires the use of Form-881 for NACARA applications filed with EOIR after the effective date of an interim or final rule. The proposed rule does not make allowance for the many NACARA-eligible individuals who were required to file motions to reopen by September 11, 1998. Though there has been official discussion of an extension, as of this writing, these persons are still required to file a completed application by February 8 1999. They have been encouraged by the INS to use Form EOIR-40 to satisfy this requirement. Although the filing deadline may be extended, many applicants have already submitted their applications or have substantially completed them. The INS has calculated that applicants will spend an average of 12 hours to complete the application (a low estimate in our opinion). That effort should not be squandered because of a form change. Requiring an applicant to discard an already-completed EOIR 40 will also impose a harsh burden on the applicant and on the non-profit community organizations that serve the NACARA eligible communities.

⁵⁶ Immigration and Naturalization Service, Office of International Affairs, ABC Training Materials p.39 (Nov/Dec. 1996).

Applicants who are required to submit a completed suspension/cancellation of removal application in support of their motion to reopen should be allowed to use EOIR-40. When those cases are reopened and remanded to INS for NACARA adjudication, they should not be required to file a new application on Form-881. These individuals expended considerable time and money in complying with INS directions and they should not be penalized for doing so. Should the INS require additional biographic information not available on EOIR-40, we have no objection to requiring a brief supplemental form.

Section 240.64 Eligibility--General

NACARA RELIEF SHOULD BE AVAILABLE TO INDIVIDUALS IN EXCLUSION PROCEEDINGS

The supplementary information to the proposed rule states that "NACARA beneficiaries who leave the country and are paroled back in will no longer be eligible for suspension of deportation since they would be inadmissible to the United States, rather than deportable from the United States." This statement indicates that individuals who prior to their departure were in deportation proceedings, and who returned to the U.S. with advance parole, became subject to exclusion proceedings and ineligible for NACARA suspension. While in some cases we would disagree that exclusion proceedings were appropriate,⁵⁷ this statement would not trouble us if it made it clear that special rule cancellation remains available to such individuals. Because it does not, and the proposed rule is silent in this respect, we will address why NACARA relief should be available to individuals in exclusion proceedings, whether or not they had advance parole.

At the outset, it should be clear that this issue only concerns the NACARA eligibility of individuals who returned to the United States, and were placed in exclusion proceedings, prior to April 1, 1997. Any individuals who returned to the U.S. after that date arguably may be subject to removal proceedings, but if so they would still be eligible for special rule cancellation, which does not require that applicants be "deportable." Thus, it is only the narrow class of NACARA-eligible individuals currently in exclusion proceedings that is at issue.

The NACARA statute demonstrates that Congress intended relief to be available to eligible persons in exclusion proceedings. Thus, in establishing special rules for calculating "continuous physical presence" both for suspension of deportation and cancellation of removal under NACARA, Congress expressly provided that these special rules apply "*regardless of whether the alien is in exclusion or deportation proceedings.*" IIRIRA § 309(c)(5)(C)(i), as amended by NACARA § 203 (emphasis added).

The way to reconcile Congress' intent to benefit NACARA-eligible individuals in exclusion proceedings with the longstanding principle that suspension of deportation is not available in such proceedings is to allow these individuals to apply for special rule cancellation. This can be done by invoking removal rules in the exclusion proceedings under IIRIRA § 309(c)(2) (in cases where the hearing has not yet been held), or by terminating the exclusion proceedings and initiating removal proceedings under IIRIRA § 309(c)(3) (in cases where the hearing has been completed). The regulations should give effect to Congress' intent in this manner.

⁵⁷ For example, the Immigration Act of 1990 expressly provided for "reentry" by means of advance parole for Salvadorans who were granted Temporary Protected Status and who demonstrated emergency and extenuating circumstances requiring their travel abroad. IIRIRA § 303(c)(4). Individuals who traveled abroad on this basis, and who were not given notice that their travel would affect their immigration status, should not have been placed in exclusion proceedings on their return. See *Navarro-Aispura v. INS*, 53 F.3d 233 (9th Cir. 1995); *Matter of G-A-C-*, Int. Dec. 3354 (BIA 1998).

Sec. 240.64 (a) Eligibility-General

THE FINAL REGULATIONS SHOULD RECOGNIZE THAT BEING AN ABC CLASS MEMBER OR TPS OR DED GRANTEE IS A POSITIVE DISCRETIONARY FACTOR IN A NACARA ADJUDICATION

We recommend the following changes in the regulation's approach to continuous physical for suspension and special cancellation of removal. These recommended changes are consistent with Congress' intent for a generous implementation of section 203.

Proposed 8 C.F.R. § 240.64(a) states that the applicant has the burden of establishing that discretion should be exercised. It leaves out administrative case law that provides guidelines for when the Attorney General should exercise discretion favorably. Failing to incorporate those guidelines could lead to inconsistent decision-making.

To promote consistent decision-making, we recommend that a new paragraph be added to section 240.64 that discusses the relationship of authorized presence in the U.S. as an ABC class member and as a TPS or DED grantee to the exercise of discretion.

First, the regulation should explicitly provide that having had these types of authorized presence constitutes a favorable discretionary factor. In *Matter of Pena-Diaz*, Int. Dec. 3225 (BIA 1994), the BIA treated the alien's authorized presence in deferred action status as a favorable discretionary factor. The regulation should be explicit about the three statuses held by the vast majority of NACARA-eligible persons. It would be a poor use of administrative resources to require each adjudicator to decide the issue separately in each case.

Secondly, the regulation should state the legal effect of having had ABC class member, TPS and DED status on the discretionary balancing test. Specifically, the regulation should specify that authorized presence in the U.S. will outweigh all but the most egregious adverse discretionary factors. This is appropriate because authorized presence in these statuses will significantly shape the applicants' extreme hardship showing, closely linking this discretionary factor to the central purpose of the relief. Cf. *Matter of Pula*, Int. Dec. 3033 (BIA 1987) where the Board applied a similar approach to discretion in the asylum context.

Sec. 240.64 (b) Eligibility-General

THE FINAL REGULATIONS SHOULD ADHERE TO THE STATUTORY TEST FOR WHEN CONTINUOUS PHYSICAL PRESENCE ENDS FOR PURPOSES OF CANCELLATION OF REMOVAL

The final regulation should state that single absences of 90 days or less and aggregate absences of 180 days or less shall generally be considered "brief" for purposes of applying the "brief, casual and innocent" standard. Our recommendation would still permit the fact-finder to determine that one of these specified absences was not "casual and innocent" depending on the circumstances (e.g. departure

for the purpose of committing a criminal act. We recommend changing the language of 240.64(b)(1) as follows.

For applications for suspension of deportation made under former section 244 of the Act, as in effect prior to April 1, 1997, the burden of proof is on the applicant to establish that any breaks in continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States. Single absences of 90 days or less and aggregate absences of 180 days or less will be considered to be "brief" although they still may not be considered to have been "casual and innocent" depending on the individual circumstances. Single absences of more than 90 days and aggregate absences of more than 180 days will be evaluated on a case by case basis.

Congress created a test that specified when a person's continuous physical presence ends for special cancellation of removal.⁵⁸ This objective test replaces the brief, casual and innocent standard. By adopting a specific statutory definition, Congress intended to replace the case law developed under the former standard. The language of the proposed regulation rule goes beyond the scope of the statute.

Our suggested view is consistent with the BIA's decision in *Matter of Collado*, Int. Dec. #3333 (BIA 1997) that holds that amendments to INA § 101(a)(13) overrule the *Fleuti* doctrine by implication.⁵⁹ It is unreasonable for the Attorney General to treat the changes to the definition of admission under to INA § 101(a)(13) as eliminating all the former case law, but to retain the case law treating certain absences as automatically interrupting continuous physical presence even though Congress crafted a new objective standard for when continuous physical presence ends for cancellation purposes. The proposed regulation is even more unreasonable since Congress passed NACARA after the BIA decided *Matter of Collado*.⁶⁰

Congress carefully crafted language to determine what conduct precludes a person from establishing continuous physical presence. Had Congress intended for continuous physical presence to end when a noncitizen leaves the United States pursuant to voluntary departure, a deportation or removal order, or whenever the purpose of the departure is to commit an unlawful act it would have said so expressly.

The statutory language lists the length of individual and cumulative absences as the sole factors to end presence automatically. To the extent that the proposed regulation focuses on the cause of the absence it is inconsistent with manifest congressional intent.

The final regulation must include language 1) that clarifies that the termination of continuous physical presence based on the circumstances described in the paragraph only applies to suspension cases and not to special cancellation cases and 2) that the fact-finder may determine that continuous physical presence has been terminated based on these circumstances. Secondly, in suspension cases, there are circumstances in which continuous physical presence should not be automatically terminated based on the circumstances described in the paragraph. For example, there are relatively minor unlawful acts committed during an absence should not trigger the termination of continuous physical presence.

⁵⁸ NACARA 203

⁵⁹ See *Matter of Collado*, Int. Dec. # 3333 (BIA 1997)

⁶⁰ Congress legislates with knowledge of prevailing administrative case law. See, e.g., *Lorillard v. Pons*, 434 U.S. 575 (1978).

Another example is the issue of a departure pursuant to voluntary departure. This rule appears to have been developed in case law involving applicants who intend to return to the U.S. illegally after a voluntary departure.⁶¹ Thus, if after leaving the United States in compliance with a voluntary departure order, an applicant reenters the U.S. legally, the voluntary departure might be considered a "brief, casual and innocent" absence.⁶² Therefore, we recommend changing the proposed regulation so that it is clear that the Service or EOIR *may* determine that continuous physical presence is terminated based on these circumstances rather than making such a determination mandatory. We recommend that the paragraph of the proposed rule be changed as follows to reflect our comments.

For all applications for special cancellation of removal made under this subpart, a period of continuous physical presence may be determined to be terminated whenever an alien is removed from the United States under an order issued pursuant to any provision of the Act or the alien has voluntarily departed under the threat of deportation or when the departure is made for purposes of committing an unlawful act.

Sections 240.65 and 240.66 Eligibility For Suspension Of Deportation And Special Rule Cancellation Of Removal

THE PROPOSED REGULATIONS IGNORE THE PLAIN MEANING OF THE "NOTWITHSTANDING ANY OTHER PROVISION OF LAW" LANGUAGE IN SECTION 203 OF NACARA

Section 240.65(a) of the proposed rule disqualifies NACARA suspension applicants if they are "subject to any bars to eligibility in former section 242B(e) of the Act," or "any other provision of law." Thus, for example, former section 242B(e) contains four bars to relief that apply to aliens who: (1) failed to appear for their deportation hearings and were ordered deported in absentia, (2) failed to depart the United States within an authorized period for voluntary departure, (3) failed to appear for deportation, or (4) failed to appear for an asylum hearing. Where applicable, these bars preclude aliens from most forms of discretionary relief, including suspension of deportation, for a five-year period. Section 240.66(a) of the proposed rule similarly applies the parallel bars of INA §§ 240(b)(7), 240B(d), and 240A(c) to applicants for special rule cancellation. However, in enacting NACARA Congress made special provision for aliens with final deportation orders to reopen their cases to apply for suspension of deportation despite *any* pre-existing legal barriers, with one exception (for aggravated felons):

*Notwithstanding any limitation imposed by law on motions to reopen removal or deportation proceedings (except limitations premised on an alien's conviction of an aggravated felony. . .) any alien who has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by Section 203 of the Nicaraguan Adjustment and Central American Relief Act may file one motion to reopen removal or deportation proceedings to apply for cancellation of removal or suspension of deportation.*⁶³

⁶¹ *Dill v. INS*, 773 F.2d 25,29 (3d Cir. 1985); *McClovin v. INS*, 648 F.2d 935 (4th Cir. 1981); *Barragan-Sanchez v. Rosenberg* 471 F.2d 758 (9th Cir. 1972).

⁶² *Dill v. INS*, 773 F.2d 25,29 (3d Cir. 1985).

⁶³ IIRIRA § 309(g), as enacted by section 203(c) of NACARA (emphasis added).

The INS in the proposed rule apparently interprets this paragraph to apply only to the procedural limitations on motions to reopen in INA § 240(c)(6), but the plain language of the statute is not amenable to such an interpretation. This is so because *there is no provision of law* that bars aggravated felons from filing a motion to reopen. That Congress in this paragraph expressly excepted "limitations premised on an alien 's conviction of an aggravated felony" proves that Congress intended the paragraph to apply to all other limitations to relief, and not just to the statutory limitations on motions to reopen. Otherwise, the express exception for "limitations premised on" aggravated felony convictions is inexplicable.

Thus, it was the intent of Congress to waive *all* other limitations, including substantive bars relating to eligibility for the underlying relief, for NACARA-eligible aliens seeking to reopen their proceedings. By specifically barring aggravated felons, but no other categories, Congress indicated its intent to permit all others to apply for suspension or cancellation if otherwise eligible, notwithstanding bars to eligibility for other than those defined by NACARA.

The overall intent of the NACARA legislation is remedial in nature, and generous by explicit design. Part of this intent is evident in the fact that Congress made special provision for NACARA-eligible aliens to reopen their cases despite having final orders of deportation or removal. It is obvious that many, if not most, NACARA class members who are now in the United States, but who have an outstanding order of deportation or removal, either overstayed voluntary departure or failed to appear for deportation, and presumably would be barred from eligibility under Section 240B(d) or the previous Section 242B(e). It would clearly defeat Congress ' purpose, in making special provision for NACARA motions to reopen, to interpret the statute to bar relief to most individuals in this situation.

ENSURE DEFINITION OF ELIGIBILITY FOR VAWA SUSPENSION CONFORMS TO EXTREME HARDSHIP DEFINITION

Consistent with our comment previously on the VAWA issue, we recommend adding the following new section at the end of 8 C.F.R. § 240.65(d)(4)

"The following extreme hardship factors tailored to the context of domestic violence shall be considered:

- The nature and extent of the physical or psychological consequences of abuse;
- The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);
- The likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the home country would physically or psychologically harm the applicant or the applicant 's child(ren).

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- The applicant's needs and/or needs of the applicant 's child(ren) for social, medical, mental health, or other supportive services which might not be available or reasonably accessible in the home country;
- The existence of laws, social practices, or customs in the home country that would penalize or ostracize the applicant or the applicant 's child(ren) for having been the victim of abuse, or for having taken steps to leave an abusive spouse or father, or for actions taken to stop the abuse;
- The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's child(ren) from future abuse;

INCLUDE THE "ANY CREDIBLE EVIDENCE" STANDARD, AS REQUIRED BY STATUTE, IN THE VAWA DEFINITION

We recommend adding a new section, 8 C.F.R. § 240.65(d)(5):

In acting on applications under section 244(a)(3), the Immigration Judge shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

Sec. 240.67(2) Procedure for interview before an asylum officer

THE FINAL REGULATIONS SHOULD RECOGNIZE PROBATIVE VALUE OF CREDIBLE TESTIMONY

We suggest that the final regulations include a sentence in subsection (2) stating that "The applicant's credible testimony by itself may be sufficient to satisfy the eligibility requirements." In most cases, applicants will be able to provide independent documentation of the various requirements for NACARA. There will be certain cases, however, in which such documentation is not available. For example, there are many NACARA-eligible Guatemalans of Mayan descent who have been homeless for a number of years. Therefore, the regulation should make clear that credible testimony by itself might be sufficient to establish eligibility requirements.

Sec. 240.68 Failure To Appear At An Interview Before An Asylum Interview Or Failure To Follow Requirements For Fingerprinting

Section 240.68 of the proposed regulation provides that failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to interview. The proposed regulation further provides that failure to comply with fingerprint processing requirements without good cause may result in dismissal of the application or waiver of the right to adjudication by an asylum officer. Finally, the proposed regulation provides that failure to appear for interview or fingerprinting shall be excused if the applicant demonstrates that the failure was the result of exceptional circumstances.

The preamble states that an applicant who cannot appear for the scheduled interview should submit a written request for rescheduling, explaining the reasons for the request, and that an unexcused failure to appear for the interview may result in dismissal of the application or referral of the application to the immigration court.⁶⁴

Although the preamble states that an applicant may submit a written request for rescheduling of the interview if he or she is unable to attend, the regulation does not repeat this provision. The regulation should be amended to provide a procedure for rescheduling both interview and fingerprinting. The procedure should be simple and should require only a written statement that the applicant is unable to appear or a telephone call requesting a new appointment. Rescheduling should be generously granted. It is extremely difficult to get in touch with INS in order to reschedule either an interview or fingerprinting. The INS should assign staff to answer telephones so that individuals can reschedule interviews or fingerprinting at a time which is convenient to the applicant and to the Service. This would obviate any need for further rescheduling. The community is very much aware that rescheduling will only serve to delay adjudication, and NACARA applicants are interested in having their cases resolved. Therefore, rescheduling will only be requested when absolutely necessary.

The preamble states that an unexcused failure to appear for fingerprinting may result in dismissal of the application. Our programs report that applicants are often scheduled for fingerprinting at locations which are far from their homes. This means that applicants have to take time off work to travel to be fingerprinted. The INS should ensure that applicants are scheduled for fingerprinting at the closest designated fingerprinting services.

The dismissal of the application for failure to appear for fingerprinting is a disproportionate penalty. The proposed regulation should be amended to provide that failure to appear for fingerprinting will result in the loss of the fingerprinting fee of \$25, and the applicant will be rescheduled for fingerprinting. This monetary penalty is sufficient to ensure compliance with the fingerprinting requirement.

The regulation states that failure to appear for the interview or fingerprinting shall be excused if the applicant demonstrates that such failure was the result of exceptional circumstances. As stated above, the only penalty for failure to appear for fingerprinting should be loss of the fingerprinting fee. Failure to appear for the interview should be excused for good cause, rather than the higher standard of exceptional circumstances.

The exceptional circumstances standard does not appear in the preamble. Moreover, the proposed regulation cites two standards: it states that failure to comply with fingerprinting requirements "without good cause may result in dismissal," and then later states that failure to appear shall be excused if the applicant demonstrates "exceptional circumstances." (emphasis added). These standards are substantially different.⁶⁵ The proposed regulation is confusing because it refers to two very different standards in the same paragraph. The appropriate standard is the lower "good cause" standard.

⁶⁴ 63 Fed. Reg. at 64901.

⁶⁵ Cf. *In re Ali*, Int. Dec. 3332 (BIA 1997) (addressing the exceptional circumstances standard required to excuse a failure to depart following a grant of voluntary departure pursuant to Section 242B(e)(2) of the Act, 8 U.S.C. § 1252b(e)(2) (1994)) and *In re S-A-*, Int. Dec. 3331 (BIA 1997) (addressing lower standard of reasonable cause required to reopen an in absentia order of exclusion). "This standard [reasonable cause] is distinct, and far less demanding, than is the standard of

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If the applicant fails to appear for interview, the following analysis should be applied. There may be cases where it is clear from the application that the application should be granted. In such cases, if the applicant fails to appear for interview inadvertently or for any other reason, the application should be granted without the need for an interview. Cases where the applicant is not clearly eligible for relief, and where an interview is necessary to determine eligibility should be adjudicated under the "good cause" standard. In cases where the asylum officer determines that the good cause standard for failure to appear was not met, the case should not be dismissed but rather should be referred to the immigration court.

In sum, the regulation should be amended to provide a mechanism for rescheduling of fingerprinting and interviews. A request for rescheduling should be made either telephonically or in writing, and INS staff should be assigned to answer the phone. Requests for rescheduling should be generously granted. All fingerprint appointments should be scheduled at the designated fingerprinting service nearest to the applicant's home. The only penalty for unexcused failure to appear for fingerprinting should be the loss of the \$25 fingerprinting fee. Failure to appear for either fingerprinting or interview should be excused upon a showing of good cause. If there is no good cause for failure to appear for the interview, the case should be referred to immigration court, rather than dismissed.

THE FINAL REGULATIONS SHOULD INCORPORATE THE INS' OBLIGATIONS TO RESCHEDULE AN ABC CLASS MEMBER'S CASE AS REQUIRED BY THE ABC SETTLEMENT AGREEMENT

Paragraph 13 of the *ABC* Settlement Agreement provides the procedures that the Attorney General must use for *ABC* class members who do not appear for an asylum interview. Since these interviews are for both asylum and NACARA benefits, the Attorney General is legally bound to follow Paragraph 13 of the Settlement Agreement for *ABC* class members' interviews.

The Service should excuse a failure to appear for a scheduled asylum officer interview or failure to comply with a fingerprinting appointment upon a showing that the applicant did not receive notice of an interview or fingerprinting appointment. The Service should also reschedule an asylum/NACARA interview or fingerprinting appointment notice if the INS sent the notice to a prior address after the applicant informed the INS of an address change.

Flexibility is important in this regard since questionable asylum office policies or errors frequently require an applicant to seek a change in interview date. For instance, the Los Angeles Asylum Office scheduled *ABC* interviews in 1997 at 6:30 in the morning. Many areas did not have early morning bus service to Anaheim, California, making it impossible for applicants dependent on public transportation to arrive on time. Applicants for relief sometimes receive fingerprint appointments at remote fingerprinting offices when there are other fingerprinting offices much closer to the applicant's address.

TO ENSURE CONSISTENCY THE INS SHOULD APPLY ABC SETTLEMENT PROCEDURES TO ALL NACARA ADJUDICATIONS

Approximately ninety percent of NACARA asylum applicants that INS Asylum Officers will interview are *ABC* class members. To ensure consistency and to avoid the foreseeable problems from having two standards, the INS should apply the *ABC* procedures governing failures to appear at interviews to all NACARA interviews. Creating a different procedure for non-*ABC* class members will complicate the

exceptional circumstances." In re S-A-, Rosenberg (dissenting opinion). The reasonable cause standard is akin to a "valid excuse." *Id.*, citing *Matter of Ruiz*, 20 I&N Dec. 91 (BIA 1989).

process and confuse the applicants. In addition, the proposed procedures would unfairly harm applicants who try but do not succeed in contacting INS employees to change interview times. We urge the INS to apply the Paragraph 13 standards to all NACARA interviews that the INS Asylum Officers conduct. At a minimum, the regulations must specify that Paragraph 13 governs any missed joint asylum and NACARA interview for an *ABC* class member.

Section 240.70 (a) Decision by the Service-Service of decision

THE FINAL REGULATIONS SHOULD RELAX THE APPLICANT'S BURDEN TO PROVIDE INTERPRETATION

We strongly urge the INS to provide Spanish-speaking asylum officers or staff to assist in informing applicants of the results of their NACARA application. There appear to be sufficient Spanish-speakers working for INS to allow for this. Because many applicants will travel long distances to return for their decisions, it would be a great burden to require them to bring translators along.

TO PROMOTE EFFICIENCY THE FINAL REGULATIONS SHOULD ALLOW AN ASYLUM OFFICER TO GRANT AN APPLICATION ON THE DATE OF THE INTERVIEW

We recommend that the final regulations allow the Asylum Office the option in its discretion to grant the suspension or special cancellation decision at the time of the interview. Adopting this suggestion will result in significant administrative economy for the Asylum Office. By permitting Asylum Officers to grant suspension and cancellation cases at the time of the interview, it will eliminate the necessity to schedule a follow-up appointment as described in the regulations. We propose this streamlining suggestion for those cases in which the Asylum Officer is certain he or she is going to grant the application. We do not propose the same procedure where the Asylum Officer is intending to refer the case in order to be consistent with the stated Congressional and administration intent that Section 203 of NACARA be implemented in a generous manner. Immigration Judges in the EOIR often grant suspension and other cases on the day of the hearing in proceedings that are significantly more formal than those contemplated in the proposed rule. If this suggestion is adopted, it may also be desirable to modify section 240.67 to restate that the Asylum Officer has the option to grant an application at the time of the initial interview.

We suggest that the Attorney General include the following clause in the first sentence of Section 240.70(a) of the final rule:

- (a) Service of decision. Unless the Asylum Officer has granted the suspension or special cancellation application at the time of the initial interview or otherwise provided by an Asylum Office.

THE FINAL REGULATIONS SHOULD REQUIRE THE INS TO PROVIDE REASONS FOR NOT GRANTING A CASE

The proposed regulations do not require the INS to justify its decisions. Given the humanitarian nature of the program and the complicated nature of the adjudication, it would provide assistance to applicants if they understood the reasoning for not being granted before the asylum office, as well as increase public confidence in INS decision-making if asylum officers indicated the basis for not granting relief.

Section. 240.70 (d) Decision by the Service- Referral of the application

THE FINAL REGULATIONS MUST RECOGNIZE THE INS' OBLIGATIONS UNDER PARAGRAPH 15 OF THE ABC SETTLEMENT AGREEMENT BEFORE REFERRING AN ABC CLASS MEMBER'S CASE TO THE IMMIGRATION COURT

The final regulations should clarify that the Attorney General must follow the procedural and substantive requirements of the *ABC* Settlement Agreement before referring an *ABC* class member's case to an immigration judge. The final regulations should mention specifically the procedures in Paragraph 15 that prevent the INS from referring an *ABC* class member's case to the Immigration Court without:

- (2) informing the applicant of the right to inspect the record of proceedings, including any non-privileged adverse information, and (3) informing the applicant of the opportunity to submit comments or evidence to rebut the notice of intent to deny.

The *ABC* Settlement Agreement does not contemplate an individual appearing to receive a decision. It would appear that the requirement in 8 C.F.R. § 240.70(a) violates the terms of the Agreement.

TO ENSURE CONSISTENCY THE INS SHOULD APPLY PARAGRAPH 15 PROCEDURES TO ALL NACARA ADJUDICATIONS

Approximately ninety percent of NACARA asylum applicants that INS Asylum Officers will interview are *ABC* class members. To ensure consistency and to avoid the foreseeable problems from having two standards, the INS should apply the *ABC* procedures under Paragraph 15 of the agreement to all NACARA interviews. Creating a different procedure for non-*ABC* class members will complicate the process and confuse the applicants.

Sec. 274.a.12 Classes Of Aliens Authorized To Accept Employment

THE FINAL REGULATIONS SHOULD SPECIFY A FILING LOCATION FOR REQUESTS FOR EMPLOYMENT AUTHORIZATION

The final regulations need to indicate whether the INS will accept work authorization applications at service centers or district offices or both.

The Regulation Should Be Amended To "Grandfather" In Applicants Who Were Under 21 On November 19, 1997.

NACARA was signed into law on November 19, 1997, more than a year ago. Yet, the proposed regulation anticipates that applicants will not be able to file applications until a final rule has been promulgated, and the Form I-881 is available. This delay in implementation delays many people in regularizing their status in the United States, but a subset of that group is particularly affected - those minors who turn 21 between November 1997, and the time a decision is made in their parent's application. In order to adjust status as the child of an individual granted suspension of deportation or

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cancellation of removal, the child must show the relationship to the principal applicant. Proposed Rule Section 240.61(a)(4). However, an unmarried son or daughter who is over 21 at the time a decision is made to grant suspension of deportation or cancellation of removal to his or her parent, must in addition show that he or she entered the United States on or before October 1, 1990. Proposed Rule Section 240.61(a)(5). Unmarried sons or daughters who entered the United States after October 1, 1990, and who turned 21 after November 19, 1997, could be deprived of the opportunity to regularize their status because of the INS' delay in implementing this remedial program. In order to avoid frustrating the intent of Congress, the regulation should be amended to "grandfather" in applicants who were under 21 on November 19, 1997.

There is precedent for such an approach. Section 153 of the Immigration of 1990 provided that a juvenile could be granted special immigrant status if, in addition to being declared dependent on a juvenile court, the court determined that he or she was eligible for foster care and that it was not in the juvenile's best interest to be returned to his or her country. Pub. L. 101-649 Section 153 (November 29, 1990). However, the special immigrant juvenile regulations were not promulgated until August 12, 1993. 8 C.F.R. § 204.11. Because of the delay in implementing the program, the regulations grandfathered in juveniles who met the statutory requirements on November 29, 1990, the date the statute was enacted. 8 C.F.R. § 204.11^c(7).

Unmarried sons and daughters of NACARA principals who were under 21 on November 19, 1997, may be prejudiced by the INS delay in implementing the Section 203 regulations, by having to show an additional requirement, entry to the United States by October 1, 1990. The proposed regulation at Section 240.61(a)(4) should be amended to include unmarried sons or daughters who were born on or after November 19, 1976.

TYPGRAPHICAL CORRECTION

The final regulations should correct the typographical error on page 64906 of the supplementary material to the proposed regulation by substituting §212(a)(6)(C)" for §212(a)(C)".

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Comments to Draft INS Form I-881

Part 2. Subsection (b)

Subsection b should be clarified to state that the manner of filing of an asylum application with the Service may have been either by filing affirmatively or with an Office of the Immigration Judge, with service of a copy of that application on an INS attorney. All asylum applications filed with an Office of the Immigration Judge on or before April 1, 1990 were also required by regulation to be served upon an INS trial attorney. See 8 C.F.R. § 3.26 (1991 edition). The service copies of asylum applications were placed in the A-file of each applicant, and became a part of the alien's permanent file with the INS. Copies of asylum applications which were served on INS trial attorneys therefore should be considered to have been "filed ... with the Immigration and Naturalization Service" for purposes of NACARA § 203(a)(1) æ(5)(C)(i)(II).

The practice of INS attorneys who represented the Service in asylum cases before the Offices of the Immigration Judges during the relevant time period was to independently evaluate all asylum applications on their merits, based on the service copies which the attorneys had received. Although the INS attorneys usually decided to oppose applications for asylum, in certain instances the INS attorneys agreed to stipulate to an award of asylum for an applicant, in which cases the immigration judges would grant asylum. No case is known to have occurred in which an immigration judge denied asylum despite a stipulation by the INS to award asylum to the applicant. If the reference to the Immigration and Naturalization Service in NACARA § 203(a)(1)æ(5)(C)(i)(II) was intended to assure that the INS had been given an opportunity to evaluate asylum applications of Salvadorans and Guatemalans prior to April 1, 1990, that purpose was fully satisfied by the service copies of asylum applications which were given to INS trial attorneys during proceedings before the Immigration Judges. Moreover, those service copies were in fact "filed" in the official INS A-file of each alien, and they therefore satisfy the literal language of the eligibility category in NACARA § 203(a)(1) æ(5)(C)(i)(II).

Part 3. Question 1.

The table should be lengthened to allow inclusion of more addresses.

Part 4. Title and Order

The title of the section should be changed to "Financial Status and Employment History and Occupation" to take into account people such as homemakers and students who may not have formal employment.

We suggest that the order of the subdivisions of this Part be changed. The present order is: 1 - present assets, 2 - employment history, 3 - public assistance and 4 - taxes. We suggest revising the order as follows: 1 - employment history, 2 -taxes, 3- public assistance, and 4 - present assets. The

state of a person's present assets is the result of the other three items, so it would be more logically be placed last.

Part 4. Question 2.

The table should be lengthened to allow inclusion of more employers. The language explaining the employment section should be clarified to include all past occupations, not merely paid employment.

The parenthetical reference to unemployment or school attendance should be moved to the first sentence. Suggested language might read as follows:

Provide information about your occupations for the last 7 years (or 10 years if you are applying under the 10 year rule. (List PRESENT OCCUPATION FIRST and work back in time. Include all employment, even if less than full-time. If you did the same type of work for 3 or more employers during any 6-month period and you do not know the names and addresses of those employers, you may state "multiple employers," indicate the city or region where you did the work, list the type of work you did and estimate your average weekly earnings during that period. If your primary occupation in any period was not paid employment, provide a suitable description such as "homemaker," "student," or "unemployed." Periods of unemployment of two months or less may be omitted.)

Part 4. Question 3.

As urged in prior comments to INS concerning this question, we believe that the receipt of benefits is irrelevant to NACARA applicants' good moral character or discretionary eligibility and that the question should be deleted.

In the alternative, the information requested should be limited to cash benefits, not health care or other in-kind assistance such as Medicaid and food stamps, because those programs serve a public purpose which the INS should be promoting, not compromising. At a minimum, information about such programs should be excluded from the question pending issuance of the "comprehensive guidelines" Associate Commissioner Robert L. Bach has promised will be issued to INS field offices about the legal effect of participation public health programs. (See 10/23/98 Bach Letter to Claudia Schlosberg, specifically acknowledging that NACARA eligibility will be considered.) Additionally, information requested on the form should be limited to the applicant—not USC children or other family members who are not part of the application and who would likely suffer if they do not receive benefits due to the concerns about an adverse impact on the NACARA applicant's case.

In our comments to INS on a prior draft of the form, we argued that: (1) NACARA relief should not be denied to those rendered destitute by a flight from persecution, which is the situation of the entire NACARA class, because the exigent circumstances under which such persons flee their countries often make recourse to public assistance inevitable; and that since Congress essentially defined NACARA eligibility by reference to the applicants' status as asylum-seekers, it would be

inconsistent with Congressional intent to preclude a grant of relief on the basis of factors which inhere in their status as asylum-seekers; (2) denying relief on the basis of receipt of benefits, when such relief has historically been available to victims of poverty precisely because applicants of limited means often tend to encounter more extreme economic hardship if deported to poor countries, would be counter to the weight of authority, including two BIA decisions—one reported and one not—granting relief to former benefit recipients; (3) benefits that provide for minimal health, nutritional and safety needs, rather than cash assistance, should be excluded from adverse consideration because of the significant public health consequences of deterring immigrant participation in such programs-- access to which is a high priority for the Clinton administration; and (4) benefits received by USC children and other family members not applying for relief should be excluded from consideration for the same public health reasons. In addition, we provided specific examples of NACARA-eligible individuals who are currently without needed medical treatment because of fear of adverse consequences on their NACARA cases.

Partial response to our arguments was provided in a Response to OMB Comments. The OMB Response stated that because two courts have permitted the receipt of benefits to be considered an adverse discretionary factor, it is fine to ask about it on the application. However, the OMB Response did not address our points that: 1) neither case *required* adverse discretionary consideration, but simply *allowed* such factor to be considered by the agency (i.e., it is a policy decision) and only *under more limited circumstances* than the application now asks about; 2) NACARA applicants are different than the applicants in the two cases because they are all de facto refugees to whom Congress could not have intended to deny status on the basis of such factors; and 3) the decision to include the question on the form *causes deterrence and underutilization of public health and related programs by immigrants and their USC dependents* and is therefore a policy decision which conflicts with what we believe to be a more important federal policy of promoting public health access. We continue to believe that at least with respect to noncash benefits and to USC/nonapplicant family members, this policy decision should not be made at the level of including such items in an application-- but should await more comprehensive resolution of this issue as promised by Associate Commissioner Bach.

The second point made in the OMB Response is that receipt of benefits is relevant to hardship. While we agree with the analysis in the two paragraphs of the Response to OMB that address this point, and would encourage publication thereof in the prefatory comments to the final NACARA regulations, that analysis does not compel inclusion of a separate question about benefits in Part 4, since there is a whole section in Part 9 on hardship where the applicant can opt to include this information *if he or she believes it is relevant*. If this is the primary justification for the question, then a modified version (taking into account our above comments) could be added to Part 9-- asking simply whether the applicant would suffer hardship because of losing benefits.

Part 4. Question 4.

The requirement that applicants submit copies of their tax returns with the application should be discarded. Applicants should record the year they filed taxes on the application, and provide the tax returns, or IRS printouts of tax filings, at the time of interview. The instructions should direct applicants that tax returns, or IRS printouts, will be required at the time of interview. This will permit receipt of applications to begin sooner, and reduce the bulk of attachments to the application.

Part 6 and Part 7.

Part 7 (Information about your Child/Children) should precede Part 6 (Information about your Parent/Parents). The information about children will be pertinent to more applicants than the information about parents.

Part 7. Question 3.

As urged in our prior comments on prior versions of the form, this question should be modified to ask only for wilful failure to support a child, consistent with INS policy on good moral character in the naturalization area, and should be limited to the statutory good moral character period, which is a sufficient period for a person who may have failed to support a child earlier to have reformed his or her character.

Part 8. Questions 1 and 2.

The questions overlap, and should be merged. Question 1 asks the applicant to list the civic or community groups of which he/she is a member. Question 2 asks about the connections the applicant has forged in the community. Question 1 can be incorporated into question 2 as follows: "... and any connections you have to that community, including membership in any political, religious, community or social organizations, association, fund, foundation, club, society, or similar group." This will shorten, somewhat, an already lengthy and complex form.

Parts 8 and 9. (Community Ties and Hardship)

We suggest that a check-off list be provided of all the different hardship factors ultimately identified in the final regulations, and that applicants be instructed to "Check All That Apply".

In addition, applicants should be instructed to respond to the narrative questions in Parts 8 and 9 on separate sheets of paper, with numbers indicating the item to which each response applies. The blank spaces should be eliminated. The applicant should instead be encouraged to submit a separate narrative statement, in order to facilitate the provision of a more complete and organized response by each applicant.

Our experience with other forms such as the I-589 asylum form has shown us that the space required to answer narrative-type questions varies greatly. When answers to individual questions exceed the space allotted, the applicant must continue the answer on a separate sheet of paper. At asylum interviews, the asylum officers then have to flip back and forth from the form to the attachment sheets when reading a client's application. Most attorneys submitting I-589 forms have generally preferred to include supplemental narrative statements explaining their client's cases, since the questions on the I-589 form may not always elicit the information which is most relevant to a client's case. When items on a form require narrative answers it is easier simply to write the answers on separate sheets of paper, with numbers indicating the item to which the answer applies rather than to try to fit narrative answers within the space provided on a form. Even for legal offices which are using computer word processing or computer forms software, responding to narrative-type questions is easier if done solely on attached pages. One example of a form which employs this approach is the I-134, Application for Travel Permission, in which Part 7 on advance parole requires a separate sheet explaining the reasons why the person is requesting advance parole. No space is allotted on the I-131 form itself for that information. This approach makes the form very easy to fill out and easier for an INS officer to evaluate.

On the proposed form I-881, Part 9, items 1 through 11 would be retained as drafted in the proposed form, with modifications of the parenthetical references to attaching additional sheets "as necessary," since the entire responses would be on attached sheets.

Part 9 should also feature a question regarding the circumstances under which the applicant left his/her native country and whether the applicant faces any danger if repatriated. The United States Courts of Appeals for the Ninth and Second Circuits have deemed such factors relevant to a showing of extreme hardship, *Ordonez v. I.N.S.*, 137 F.3d 1120, 1123 (9th Cir. 1998), *Blanco v. I.N.S.*, 68 F.3d 642, 645 (2nd Cir. 1995); the Board of Immigration Appeals employed this factor in its evaluation of extreme hardship for a Nicaraguan, *Matter of O-J-O*, Int. Dec. 3280 (BIA 1996); and the NACARA proposed rules refer to *Ordonez* and *Matter of O-J-O* in their discussion of extreme hardship, Federal Register: November 24, 1998, Volume 63, Number 226, Pages 64895-64913, 64903.

Part 10.

We reiterate here concerns provided in comments to prior versions of the form concerning the period of time about which the applicant must provide the solicited information. In particular, with the exception of questions about conduct that expressly disqualifies the applicant, the information requested should be limited to the applicable statutory period of good moral character. That period is generally long enough for an applicant to show that he or she has reformed his or her character.

MEMORANDUM

January 15, 1999

RE: INS No. 1915-98 -- IMPLEMENTATION OF SECTION 203 OF THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT

In response to the above-referenced proposed rule on Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 63 Fed. Reg. 64895 (November 24, 1998) (the "Proposed Rule"), this memorandum discusses whether a group-specific "extreme hardship" administrative determination legally can and should be adopted for ABC class members who are eligible for relief from repatriation under Section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA" or the "Act"). 1/

I. EXECUTIVE SUMMARY

As explained in greater detail below, there is both legal authority and precedent for making a group-specific "extreme hardship" determination for the ABC class members, and the facts and circumstances support making such a determination in this case. In summary:

- The courts generally have deferred to the Attorney General and the Immigration and Naturalization Service (the "INS") in their exercise of authority under U.S. immigration laws to grant or deny discretionary relief from repatriation, and have upheld the establishment of group-specific standards for consideration of applications for discretionary relief, as long as such standards are reasonably related to the statutory scheme.
- A group-specific administrative determination that the ABC class members meet the "extreme hardship" standard would be consistent with the Act, its legislative history, the "extreme hardship" principles enunciated in the proposed rule, and pre-existing case law on this issue.

1/ For purposes of this memorandum, "ABC class members" refers to all of the Guatemalans and Salvadorans targeted for relief under the Act, which includes not only Guatemalans and Salvadorans who registered for benefits under the settlement agreement in American Baptist Churches et al. v. Thornburgh (the "ABC Settlement"), but also certain other Guatemalans and Salvadorans who separately filed asylum applications, as well as Salvadorans who applied for Temporary Protected Status ("TPS").

- There is clear and recent precedent for granting administrative relief from repatriation under the immigration laws to a specific group of people, even without explicit statutory authority.
- A group-specific “extreme hardship” determination would enhance administrative efficiency in the implementation of Section 203 of the Act and would reduce the likelihood that similarly situated ABC class members would be treated differently.

II. DISCUSSION

Under the Immigration and Nationality Act (the “INA”) in force before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), individuals found to be deportable generally could be granted suspension of deportation if they could establish that (1) they had been continuously physically present in the United States for at least seven years; (2) they are of “good moral character” for the seven-year period; and (3) their deportation would cause “extreme hardship” to themselves or to a spouse, parent or child who was either a U.S. citizen or a permanent resident. ^{2/} NACARA provides that this same statutory standard governs most ABC class members’ applications for relief from repatriation after IIRIRA. ^{3/}

As explained in greater detail below, the INS has the legal authority to adopt a group-specific determination of extreme hardship for the ABC class members who are eligible for relief from repatriation under Section 203 of the Act. Making such a determination would not only be consistent with the Act’s purpose and with the “extreme hardship” principles set forth in the proposed rule and pre-existing case law, but would also foster administrative efficiency and fundamental fairness.

A. The Attorney General has the legal authority to adopt a group-specific determination of extreme hardship.

The Attorney General -- and, by delegation, the INS -- has been accorded broad discretionary authority to interpret, administer and enforce the immigration laws. ^{4/} The courts

^{2/} INA § 244(a)(1); 8 U.S.C. § 1254(a)(1) (1994 & Supp. 1995). A person granted suspension of deportation thereafter was eligible, through a separate administrative procedure, to adjust to permanent resident status. INA § 244(d); 8 U.S.C. § 1254(d) (1994 & Supp. 1995).

^{3/} See NACARA Section 3(b), adding new IIRIRA Section 309(f). Procedurally, those in exclusion or deportation proceedings as of April 1, 1997 may apply for suspension of deportation. See NACARA Section 3(a), amending IIRIRA Section 309(c). Those not in exclusion or deportation proceedings as of April 1, 1997 may apply for cancellation of removal, the relief from repatriation that IIRIRA substituted for suspension of deportation. See NACARA Section 3(b). Certain ABC class members are subject to a higher statutory standard to qualify for relief, while others are ineligible for relief. See id.

^{4/} See INA § 103(a), 8 U.S.C. § 1103.

have generally deferred to the Attorney General and the INS in the exercise of such discretion, unless they either (a) acted arbitrarily or capriciously, or abused their discretion; or (b) failed procedurally to exercise their discretionary authority properly. 5/

In the context of suspension of deportation, the Supreme Court has ruled that the granting of such relief is within the “unfettered discretion” of the Attorney General. 6/ Other courts have held that, in reviewing suspension of deportation determinations, their review is limited to whether there has been “a clear abuse of discretion or a clear failure to exercise discretion.” 7/

Of particular relevance in this context, in Hotel & Restaurant Employees Union v. Smith a federal court affirmed that the INS's decision not to extend voluntary departure to Salvadorans involved foreign policy considerations and was an unreviewable exercise of the Attorney General's discretion. 8/ The President has “inherent power [in the immigration area], arising out of the Executive's plenary authority over foreign relations.” 9/ As reflected in President Clinton's November 14, 1997 statement on the Act (discussed in more detail below), the potential destabilizing effect on the fledgling democracies in Central America justifies, in the implementation process, minimizing differences in the relief accorded to Nicaraguans and Cubans from that given to ABC class members.

5/ See, e.g., Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (stating that “the power over aliens is of a political character and therefore subject only to narrow judicial review”); Perales v. Casillas, 903 F.2d 1043, 1051 (5th Cir. 1990) (holding that the standard of review over the Attorney General's discretion to suspend deportation is strictly limited) (citing Hernandez-Cordero v. INS, 819 F.2d 558, 560-61 (5th Cir. 1987)); Achacoso-Sanchez v. INS, 779 F.2d 1260, 1264 (7th Cir. 1985) (“The discretion of immigration officials is exceptionally broad.”).

6/ Jay v. Boyd, 351 U.S. 345, 354, 357-58 (1956).

7/ Adel v. Shaughnessy, 183 F.2d 371, 372 (2d Cir. 1950). See also Blanco v. INS, 68 F.3d 642, 645-46 (2d Cir. 1995) (Attorney General has “broad discretionary power” over eligibility for suspension of deportation) (citing Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957)); Babaj v. INS, 985 F.2d 252, 255 (6th Cir. 1993) (“The Attorney General . . . exercise[s] very broad discretion It is [the court's] duty to ensure that this discretion is exercised in a way that is not ‘arbitrary, irrational or contrary to law.’”) (citing Mejia-Carrillo v. INS, 665 F.2d 520, 522 (6th Cir. 1981)).

8/ 594 F.Supp. 502, 506-07 (D.D.C. 1984), aff'd in part, 804 F.2d 1256, 1270-72 (D.C. Cir. 1986), rehearing en banc, 846 F.2d 1499 (D.C. Cir. 1988). In vacating the earlier Court of Appeals decision and affirming the District Court decision, the Court of Appeals unanimously held that the Attorney General's decision was unreviewable. See 846 F.2d at 1510 (Mikva, J.); 846 F.2d at 1511 (Silberman, J.).

9/ Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (citing Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950)) (“Theoretically, the President has an independent source of power concerning immigration policy, at least with regard to matters that are not the subject of either a statutory mandate or an express prohibition.”), aff'd on other grounds, 472 U.S. 846 (1985).

In considering whether the INS has properly applied the “extreme hardship” standard in suspension of deportation cases, the courts again have deferred to the INS’s exercise of discretionary authority, limiting their inquiry to whether the INS abused its discretion in determining whether to grant relief. ^{10/} In limiting their inquiry in this manner, courts have relied on the Supreme Court statement that “[t]he words ‘extreme hardship’ . . . are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and [her] delegates.” ^{11/}

In carrying out its duty to uphold the best interests of the United States, the INS may set up general standards to govern the consideration of applications for discretionary relief, as long as such standards are reasonably related to the statutory scheme. ^{12/} In this regard, in Fook Hong Mak the Second Circuit held that the Attorney General may, by regulation, refuse to use his discretionary power with respect to a particular class, if such refusal “is founded on considerations rationally related to the statute he is administering. The legislature’s grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups.” ^{13/} By the same token, as the court also recognized, the Attorney General may, by regulation, select one characteristic as entitling a group to favorable treatment:

The administrator has simply determined that the one paramount element creates such “likeness” that other elements cannot be so legally significant as to warrant a difference in treatment. This may be an even “juster justice” than to accord different treatment

^{10/} See, e.g., Luna-Rodriguez v. INS, 104 F.3d 313, 315 (10th Cir. 1997) (citing Turri v. INS, 997 F.2d 1306, 1308 (10th Cir. 1993)); Hadjimehdigholi v. INS, No. 96-9543, 1997 WL 622210, *1 (10th Cir. 1997) (unpublished disposition) (“We review the Board’s determination on ‘extreme hardship’ under the abuse of discretion standard, allowing only limited room for substantive review.”) (quoting Dulane v. INS, 46 F.3d 988, 994 (10th Cir. 1995)).

^{11/} INS v. Wang, 450 U.S. 139, 144 (1981) (*per curiam*), quoted in Luna-Rodriguez, *supra*, 104 F.3d at 315; Jaramillo v. INS, 1 F.3d 1149, 1153 (11th Cir. 1993) (citing Wang, *supra*, at 144); Brice v. INS, 806 F.2d 415, 419 (2d Cir. 1986) (quoting Wang, *supra*, at 144); Youssefinia v. INS, 784 F.2d 1254, 1261 (5th Cir. 1986) (citing Wang, *supra*, at 144).

^{12/} See Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (“The statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him.”), *cert. denied sub nom. Confederation of Iranian Students v. Civiletti*, 446 U.S. 957 (1980); Unification Church v. Attorney General, 581 F.2d 870, 877-78 (D.C. Cir. 1978) (recognizing INS’s authority to administer regulations for granting change in nonimmigrant status), *cert. denied*, 439 U.S. 828 (1978); Fook Hong Mak v. INS, 435 F.2d 728, 731 (2d Cir. 1970) (holding that the INS’s determination that a certain class of aliens was ineligible to apply for adjustment of status was “reasonably related to the statutory scheme”).

^{13/} 435 F.2d at 729-30 (emphasis added).

because of trivial differences of fact; at least it is competent for the administrator to think so. ^{14/}

This principle was followed in Singh v. Nelson, in which a federal district court held that INS regulations identifying groups of individuals ineligible for discretionary relief are permissible if “the class is rationally distinguishable from all other classes of individuals who remain eligible for discretionary relief.” ^{15/} As the court in Fook Hong Mak noted, this principle is equally applicable in reverse -- in deciding whether to grant discretionary relief, the INS may treat a particular group of individuals more favorably if the group is rationally distinguishable from those who do not qualify for such favorable treatment.

B. A group-specific “extreme hardship” determination for ABC class members is rationally related to the Act’s statutory scheme.

In this case, the Act, its legislative history, and President Clinton’s pronouncements concerning implementation of the Act clearly establish a rational basis for making a group-specific “extreme hardship” determination with respect to ABC class members’ (as well as designated family members’) applications for discretionary relief under Section 203 of the Act. As a preliminary matter, the Act itself defines ABC class members as a separate group eligible for special relief from repatriation that is unavailable to those who are not members of the statutorily defined group. ^{16/}

The Act’s legislative history further supports a group-specific “extreme hardship” determination for ABC class members. Senators Connie Mack, Bob Graham, Spencer Abraham, Edward Kennedy and Richard Durbin, the Act’s principal sponsors in the U.S. Senate, introduced into the Congressional Record an Explanatory Memorandum describing NACARA’s purposes and providing a section-by-section analysis of the Act. ^{17/} Describing the purposes of the legislation, the Senators stated:

In recognition of the hardship that those eligible for relief suffered in fleeing their homelands and the delays and uncertainty that they have experienced in pursuing legal status in the United States, the Congress directs the Department of Justice and the

^{14/} Id. at 730 (emphasis added).

^{15/} 623 F.Supp. 545, 554 (S.D.N.Y. 1985).

^{16/} The Act also makes certain nationals of specified former Soviet Bloc countries eligible for the same type of relief from repatriation. For consistency and ease of administration, this group also should benefit from a group-specific determination of extreme hardship.

^{17/} See Explanatory Memorandum Regarding Title II of the D.C. Appropriations Portion of the Omnibus Appropriations Bill, reprinted at 143 Cong. Rec. S12266 (daily ed. Nov. 9, 1997) (the “Explanatory Memorandum”).

Immigration and Naturalization Service to adjudicate applications for relief under this Act expeditiously and humanely. 18/

Discussing the substantive standards for relief from repatriation under Section 203 of the Act, the Explanatory Memorandum specifically authorizes the Attorney General to adapt the procedures for adjudicating applications for such relief, stating that “[t]hese cases have already been drawn out enough . . .” 19/ Noting the relevance to the “extreme hardship” determination of the “special hardships” faced by NACARA beneficiaries and the “fragile economic and political conditions in their home countries,” 20/ the Explanatory Memorandum states that:

it would be entirely consistent with Congressional intent for the Attorney General to establish procedures that keep to a minimum the burdens an applicant of good character has to shoulder in order to qualify for relief, both in terms of the paperwork that the applicant has to complete and the showings the applicant has to make.

In addition to recognizing the special circumstances to which the ABC class members have been subjected, application of the foregoing approach would greatly reduce the need for protracted analysis of the more subjective aspects of the suspension standard, thereby reducing the administrative burden on the Immigration and Naturalization Service and minimizing further delays in according relief to these individuals. 21/

Floor and other statements by several of the Act’s principal sponsors echo the views expressed in the Explanatory Memorandum:

- After discussing the special circumstances faced by Salvadorans and Guatemalans made eligible for relief under NACARA, Senator Abraham, Chair of the Senate Judiciary Committee’s Immigration Subcommittee, explicitly stated that the rules governing relief from repatriation for ABC class members may be amended “further to the special circumstances of that class.” 22/
- Senator Kennedy, ranking minority member of the Immigration Subcommittee, decried the unfairness and discriminatory nature of treating Nicaraguans and Cubans more favorably than

18/ Id.

19/ Id.

20/ Id.

21/ Id. at S12266-S12667.

22/ Id. at S12261-S12262.

similarly situated Guatemalans and Salvadorans, suggesting that all of the designated class members should be treated equally. 23/

- In their Explanatory Memorandum, Senators Mack, Graham, Abraham, Kennedy and Durbin stated that “[i]t would be appropriate for the Attorney General not to challenge applications for relief by eligible class members on hardship grounds . . .” 24/
- In a letter to the Attorney General discussing the legal feasibility of presuming extreme hardship for NACARA beneficiaries, Senators Abraham, Graham, Kennedy and Mack stated that the Attorney General is “entirely free to adopt procedures for adjudicating the hardship issue . . . [including] a rule that in light of the length of time they have been here and the difficulties they have faced, NACARA beneficiaries are entitled to a presumption of extreme hardship.” 25/
- In a letter to the Attorney General, Congressman Lincoln Diaz-Balart, the principal sponsor of the Act in the House of Representatives, stated that “a generally-applied presumption of hardship will effectuate the elemental restitution envisioned by NACARA.” 26/

Similarly, when he signed NACARA into law, President Clinton emphasized the Act’s purpose, “asking the Attorney General to consider the ameliorative purposes of this legislation and the unique history and circumstances of the people covered by it in giving effect to its provisions.”

C. A group-specific “extreme hardship” determination for ABC class members would comport with precedent administrative and judicial case law and with the “extreme hardship” principle enunciated in the proposed rule.

The Board of Immigration Appeals (“BIA”) has issued several precedent decisions outlining the criteria to be considered in defining “extreme hardship.” The BIA’s decision in Matter of Anderson, is generally considered to be the starting point in defining the “extreme hardship” standard. In that case the BIA listed a number of factors to be considered in adjudicating whether extreme hardship had been proven. The factors mentioned by the BIA included: age of the subject; family ties in the United States and abroad; length of residence in the United States; conditions in the country to which the individual is returnable, including economic and political conditions; condition of health; financial status including occupational

23/ Id. at S12264.

24/ Explanatory Memorandum, supra note 22.

25/ Letter to Attorney General Janet Reno (Dec. 15, 1997) (emphasis added).

26/ Letter to Attorney General Janet Reno (Jan. 6, 1998) (emphasis added).

and business ties; community ties or contributions; immigration history; and the possibility of other means of adjustment of status. 27/

In Anderson and the subsequent BIA precedent decisions further defining the term “extreme hardship,” the BIA made it clear that an individual need not prove all of the above nine factors. Indeed, an individual might prove hardship through other factors not mentioned in Anderson. “This list was not meant to preclude considerations of aspects of hardship which do not fit squarely within one of these factors.” 28/ Where one factor is particularly strong, that factor alone may be sufficient to prove extreme hardship even in the absence of other hardship factors. For example, economic hardship may be “extreme” in itself if there is complete inability to find work. 29/ Separation from family members and the resulting hardship may rise to the level of extreme hardship without proof of the other hardship factors. 30/

The Proposed Rule recognizes that “[r]elevant factors . . . must be considered in the aggregate to determine whether extreme hardship exists. . . . Similarly, an adjudicator should not discount the effect of a factor simply because it is not unique to the individual.” 31/ The proposed rule also recognizes that factors other than those cited may be considered in assessing extreme hardship. 32/ Finally, the term “extreme hardship” is not one of fixed and inflexible meaning. The BIA has stated that a narrow definition of this term is permitted by the adjudicator but “is not mandated either by the Supreme Court or by our published case law.” 33/ Consistent with these principles and the applicable case law, a group-specific “extreme hardship” determination for the ABC class members is appropriate.

In applying the criteria outlined by the BIA first in Anderson and the subsequent precedent BIA decisions, there are several hardship factors that all class members share.

27/ See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).

28/ See In re O-J-O, Int. Dec. 3280, 21 I&N Dec. --- (BIA 1996).

29/ See Carette-Michel v. INS 749 F.2d 490 (8th Cir. 1984).

30/ See Babai v. INS, 985 F.2d 252 (6th Cir. 1993); Ramos v. INS, 695 F.2d 181 (5th Cir. 1983).

31/ Proposed Rule, supra, 63 Fed. Reg. at 64904 (preamble) (citing In re L-O-G, Int. Dec. 3281, 21 I&N Dec. --- (BIA 1996)).

32/ Id. at 64903.

33/ See In re Pilch, Int. Dec. 3298 (BIA 1996); See also In re L-O-G, supra.

1. Current adverse conditions in the countries of repatriation; ability to obtain employment in the countries of repatriation. The BIA increasingly has found that the current conditions in the country to which a person would be repatriated is an important factor in evaluating extreme hardship. ^{34/} Even before the devastation wrought by Hurricane Mitch, the Act's legislative history recognized the "fragile economic and political conditions" in the home countries of the ABC class members. ^{35/}

In this regard, El Salvador and Guatemala still are suffering from the long and difficult armed conflict that destroyed much of their economies and infrastructures, and the unemployment rates in both countries remain high. In many cases, the homes and communities that ABC class members fled during the armed conflict were destroyed completely, and family members and friends either killed or dislocated.

El Salvador is the smallest country in Central America and, with a population of 5.8 million people sharing an area of approximately 21,000 square kilometers, one of the most densely populated countries in the Western Hemisphere. The country has a limited natural resource base and no remaining agricultural frontier. About 60 percent of the population live in rural areas, and over 80 percent of agricultural producers work in farms of less than 3 hectares. ^{36/} El Salvador's per capita income in 1997 was US\$ 1,810. Even though progress has been made to alleviate poverty, preoccupying poverty indicators still persist, especially in the rural areas, mainly due to the high levels of unemployment and underemployment. ^{37/}

The State Department report for Guatemala paints a dimmer picture: Approximately 80% of the population lives in poverty, with 59% in "extreme poverty." ^{38/} The State Department report details the extremely poor economic and social conditions in these countries, which affect men, but especially women and children. In a recent precedent decision the BIA relied almost exclusively on the State Department report on conditions in Nicaragua to find extreme hardship for a single 24-year old Nicaraguan male with eleven years of unlawful presence in the United States. ^{39/}

The progress made in rebuilding these countries' economies, infrastructures and communities after the end of the armed conflict suffered another setback when Hurricane Mitch

^{34/} See, e.g., In re O-J-O, *supra*; In re L-O-G, *supra*.

^{35/} See text accompanying note 20, *supra*.

^{36/} World Bank Report, at 1 (February 1998).

^{37/} IDB Report, at 3 (March, 1998).

^{38/} See Department of State Country Report, "Country Reports on Human Rights Practices for 1997," at 520.

^{39/} See O-J-O, *supra*.

struck the region in the fall of 1998. According to a recent report by the U.S. Agency for International Development ("AID"), Hurricane Mitch damaged or destroyed tens of thousands of homes in Central America and more than 190 bridges, adversely affecting millions of inhabitants. ^{40/} The damage to the region's infrastructure and economies is estimated in the hundreds of millions of dollars, with extensive losses in the farming and agricultural sectors, which both feeds the local population and accounts for a substantial proportion of the region's export revenues. The interdependency within the region makes all countries vulnerable to outbreaks of epidemics. Epidemic levels of cholera, leptospirosis and dengue have been reported, and dead animals have infected the water supply. ^{41/} While Honduras and Nicaragua bore the brunt of the Hurricane's force, Guatemala and El Salvador were badly damaged as well, and the ongoing effect of the hurricane is being, and will continue to be, felt region-wide for many years to come. ^{42/}

In the medium and long-term, all of the Central American countries will have to face the same challenges. Because of the high degree of political, economic, social and cultural interdependence that exists among these nations, the lack of opportunities in any given country would immediately and inevitably provoke the displacement of people towards neighboring nations, just as occurred in the 1980s, due to the internal conflicts within some Central American countries. This could bring about uncontrolled social conflicts that, if not adequately controlled, could lead to serious political tensions among countries in the region.

Under these circumstances, returning large numbers of Guatemalans and Salvadorans to their home countries after many years in the United States would jeopardize the

^{40/} See Central America -- Hurricane Mitch -- Fact Sheet #21, U.S. Agency for International Development, Bureau for Humanitarian Response, Office of Foreign Disaster Assistance (December 4, 1998).

^{41/} Id.

^{42/} According to the Office for U.S. Foreign Disaster Assistance, 240 deaths were reported in El Salvador, and 55,864 persons had been displaced by the storm, while 1,000 homes were destroyed and 10,372 homes were damaged. Mitch caused losses to the internal health, water, and sanitation infrastructures in the country, causing a lack of potable water and sanitation. The agricultural sector, which accounts for a significant portion of El Salvador's economy, received the most damage. Losses in food crops vary from 20 percent of the corn crop to 100 percent of the bean crop in some areas. Additionally, some 23,000 domestic farm animals were killed, primarily poultry. The most significant losses were suffered by small landholders.

In Guatemala, 258 persons were reported dead, with 120 missing as of November 9th. 32 bridges and 40 roads have been severely damaged by Mitch's flood waters. The U.S. Embassy has estimated that 95 percent of the country's banana crop was damaged, 25-60 percent of the corn, bean, coffee, and sugar crops were destroyed, and 30 percent of the cattle herd was lost. It is estimated that full recovery of both nations from this natural disaster will take several years and hundreds of millions of dollars.

fragile economic, social and political conditions present in those countries. Most likely would be unable to find work of any kind, 43/ with the inevitable rise in unemployment leading to increases in tension and resentment against the returning expatriates. In addition to the severe problems of readjusting to life in their country of citizenship after many years in the United States, the returning expatriates likely would be at greater risk from targeted criminal activities based on a perception of relative wealth. 44/

Finally, the U.S. citizen and lawful permanent resident children of ABC class members would suffer a significant reduction in their quality of life if forced to leave the United States to live in their parents' countries of repatriation. The quality and scope of social services (health, education, potable water, electricity, etc.) that are offered in these countries are comparably lower than those offered in the United States. Additionally, access to social services would be aggravated by the new demands presented by those returning from abroad; these countries could not provide the quality and coverage of services for the incoming population in the short-term to the level of the United States. For example, in El Salvador, approximately 65,000 children will not have access to schooling, due to lack of infrastructure and damages caused by Hurricane Mitch. 45/ This situation would be aggravated with the influx of children looking for a space in the school system.

2. **Immigration history, including authorized residence in the United States.** Recent cases indicate that residence in the United States pursuant to INS authorization hastens a person's integration and assimilation into U.S. society, thereby increasing the hardship that a person would suffer if repatriated. 46/ In this case, ABC class members have been permitted to reside and work in the United States with permission from the INS for at least seven years. With the passage of time, most of these class members' ties to the United States have increased dramatically -- ties developed specifically due to their long-time authorized presence in this country.

Under the L-O-G and Peña-Díaz precedents, these considerations constitute a separate basis for finding extreme hardship in claims by ABC class members for relief under NACARA. The fact that the ABC class members accrued all of their threshold qualifying time in the United States with express permission from the INS should weigh heavily in favor of a group-specific determination of extreme hardship.

43/ See State Department Telex No. 94-San Salvador-004911 (June 15, 1994), reprinted in 71 Interpreter Releases 1322 (October 3, 1994).

44/ See, e.g., Ordoñez v. INS, 137 F.3d 1120, 1123-24, 1998 WL 94034 (9th Cir. 1998).

45/ See El Diario de Hoy (January 12, 1999).

46/ See In re L-O-G, supra. Cf. Matter of Peña-Díaz, Int. Dec. 3225, 20 I&N Dec. 841 (BIA 1994).

Salvadorans eligible for relief under NACARA have an especially strong claim in this regard. Since 1990 the U.S. Congress and two Administrations have adopted laws and policies granting Salvadorans protected status in the United States, authorizing them to reside and work in the United States legally. Having protected status facilitated their integration into the United States and gave rise to expectations of permanent residence in the United States. As a result, expulsion from the United States would be more psychologically traumatizing and disruptive to them and their family members than it might be for persons who have not been in the United States under color of law. 47/

3. **The absence of other immediately available means of adjusting to permanent resident status.** As the court recognized in the ABC litigation, many of the Salvadorans and Guatemalans who applied for asylum in the 1980s and early 1990s were denied asylee status based on the application of an improper legal standard to their asylum claims. Had their claims been properly and fairly adjudicated at the time, many if not most of this group -- who would have qualified for (but were not granted) asylum and who now do not have other means of adjusting to permanent resident status -- now would be permanent residents or naturalized U.S. citizens. This circumstance constitutes a separate basis for finding that ABC class members meet the hardship standard necessary to qualify for relief under NACARA. 48/

In addition, ABC class members should not be denied relief from repatriation solely because they might in the future qualify for permanent residence based on sponsorship by a family member. First, in many if not most cases, such relief would not be available for many years, creating hardship for those who either would have to leave the United States pending immigrant visa availability or remain in the United States in perpetual limbo. Furthermore, because of changes stemming from IIRIRA (particularly the new affidavit of support requirements), the prospects for being granted permanent resident status are uncertain, even when an immigrant visa becomes available. The changing eligibility standards and the possibility of future limitations on family-based sponsorship make such options tenuous at best.

These class members and their U.S. citizen and lawful permanent resident spouses and children would face among the most severe hardships of all NACARA applicants if relief were denied to them. In effect, they would have to choose between all leaving the United States until the ABC class member becomes eligible to seek permanent resident status based on family sponsorship (with no guarantee that such status would be granted) or splitting the nuclear family, with no guarantee of future reunification. Accordingly, ABC class members with close family ties in the United States should be deemed to have stronger, not weaker, claims of extreme hardship.

47/ See In re L-O-G, *supra*.

48/ See Matter of Z, 5 I&N Dec. 419 (BIA 1953) (inability to obtain another status is an element of extreme hardship; it is reasonable to show more leniency to applicant whose ineligibility for another status was through no fault of his own).

Finally, if other means of obtaining lawful permanent resident status were available they would have applied long ago for such status, rather than wait for the implementation of NACARA. By previously registering for TPS, or under the ABC Settlement, or filing for asylum, they have expressed their desire to permanently legalize their status in this country. NACARA is the first and only way available to accomplish this status.

4. **Length of residence in the United States.** All of the ABC class members eligible for relief under NACARA have accumulated more than the seven-year threshold for suspension/cancellation; some have resided in the United States for as long as fifteen years. Even in cases where the applicant has only achieved seven years, length of residence should weigh heavily in favor of ABC class members for the following reason: The INS effectively has required ABC class members to remain in the United States in order to provide them with the neutral asylum adjudications promised them under the ABC Settlement. The fact that the INS has contributed to class members' need to remain in the United States during the period of qualifying time should make length of residence weigh more heavily as a hardship factor, in much the same way as an especially lengthy period of residence may be more outcome-determinative than a very short one. 49/

5. **Circumstances surrounding class members' flight to the United States.** Most ABC class members effectively were forced to leave their countries of citizenship, fleeing conditions of armed conflict and turmoil. Moreover, until these dangerous conditions abated relatively recently, their only recourse was to remain in the United States -- they felt that it was not safe for them to return to their countries of citizenship. As discussed in more detail below, the emotional and psychological impact on a person who was forced to leave his or her home due to threats of (or actual) violence (whether personal or general) must be weighed heavily in assessing a claim of "extreme hardship."

6. **Health, psychological and emotional hardship factors.** A number of specific psychological and emotional hardship factors are present in NACARA suspension cases. First, given the phenomenon of widespread fighting over the very small territories of El Salvador and Guatemala, a large number of those who lived through the armed conflict in those countries may be suffering from post-traumatic stress disorders. Medical authorities agree that such disorders are likely to be aggravated by encountering situations that remind the sufferer of the events that produced it, making repatriation especially harmful in such cases. 50/

Second, as noted above, many ABC class members were displaced from their homes and communities during the armed conflict and forced to relocate due to bombings and other wartime conditions. The emotional and psychological consequences of losing one's home and way of life, while not necessarily susceptible to medical diagnosis, is relevant to the

49/ Cf. Matter of H., 5 I&N Dec. 416 (BIA 1953).

50/ Cf. Matter of Louie, 10 I&N Dec. 223 (BIA 1963) (considering medical disability as factor in hardship determination).

“extreme hardship” determination under NACARA, just as “the nature and effect of physical and psychological violence” has been deemed relevant in the context of a hardship claim under the Violence Against Women Act (“VAWA”). 51/

Third, in gauging the potential psychological impact of repatriating ABC class members, account must be taken not only of the foregoing considerations, but also of the emotional and psychological impact of being forced to leave the United States -- where class members have lived and worked with INS authorization for many years -- for countries where comparable economic and educational do not exist.

7. **Financial impact of the applicant's departure; special assistance to the United States and the community.** Existing authority supports the proposition that providing voluntary assistance and contributions benefiting the United States or a sector thereof should be considered favorably in assessing a claim of extreme hardship. 52/ As articulated in connection with the enactment of NACARA, the United States has a strong and long-standing foreign policy interest in ensuring the continuing stability and viability of emerging, yet still fragile, democracies, especially those in Central America. The Salvadoran and Guatemalan communities in the United States make staggering contributions to their countries of citizenship. Salvadorans in the United States sent an estimated \$1.2 billion in 1997 to El Salvador, or an average of \$3,000 per Salvadoran residing in the United States. This figure represents 29% of the country's sources of foreign exchange. Guatemalans, whose population size in the United States is far smaller, nevertheless send back over \$400 million a year. 53/ These remittances have played a critical role in stabilizing these countries' economies as they make the transition to self-determination, at no cost to the U.S. taxpayer.

In light of Central America's present circumstances, remittances not only will help to maintain a stable macroeconomic environment, but in some cases represent the only source of income for many Central American victims affected by the hurricane. In the reconstruction and economic recovery phase, the loss of family remittances could have harmful effects for the region. Before, remittances were an additional source of income for many recipient families. Now, for many remittances are the only source of income keeping them afloat.

51/ See 51 Fed. Reg. 13061, 13067 (March 26, 1996).

52/ See Matter of Anderson, *supra*; Turri, *supra*, 997 F.2d at 1310 (holding that person's contribution to a U.S.-based international program is relevant to a claim of extreme hardship); Gutierrez-Centeno v. INS, 99 F.3d 1529, 1534 (9th Cir. 1996) (holding that caring for patients with disease or disabilities is relevant); Salameda v. INS, 70 F.3d 447, 449-50 (7th Cir. 1995) (holding that charitable and community activities are relevant).

53/ Waller Meyers, *Migrant Remittances to Latin America: Reviewing the Literature*, Inter-American Dialogue and The Tomas Rivera Policy Institute (May 1998).

Additionally, the inflows of family remittances have been a fundamental pillar to sustain the economies of the region, particularly during its most difficult times, such as the current crisis. As noted above, it is estimated that in 1997, Salvadorans alone sent back to Central America \$1.2 billion, representing more than 10% of El Salvador's GDP. Likewise, family remittances represent a very significant source of income to the economies of the other Central American countries.

The State Department has documented the potential adverse macroeconomic and social consequences of stemming the flow of these remittances. 54/ These consequences influenced the decision to create and extend DED status for Salvadorans from 1992 to 1994 and to extend, without interruption, their work authorization thereafter.

From a U.S. foreign policy and humanitarian standpoint, remittances to Central America now have taken on added importance. These remittances are expected to contribute substantially to the economic recovery and reconstruction needed in the wake of Hurricane Mitch. Returning many thousands of Salvadorans and Guatemalans to their countries of citizenship not only will impose a substantial additional burden on those countries, but will diminish those people's ability to contribute financially to the rebuilding effort in Central America, increasing the pressure on the United States to appropriate additional funding for such an effort.

Moreover, ABC class members' contributions benefit not only people abroad, but also communities within the United States. Salvadorans and Guatemalans participate actively in religious, grassroots and community organizations, supporting them economically and culturally. Many cities in the United States have recognized this contribution, designating special days to celebrate Salvadoran and Guatemalan culture. Also, many cities in the United States have sought to develop sisterhood ties with cities in the region, recognizing the important presence of cultural ties between these cities and El Salvador and Guatemala.

* * *

All ABC class members eligible to seek relief under Section 203 of the Act share at least the first four factors, and in many cases more factors that the BIA has cited as relevant in numerous precedent decisions. Depending on the circumstances of the case, extreme hardship may be found where an individual possesses one or two of the Anderson factors. 55/ This class of applicants shares at least four factors, and in many cases more BIA-recognized hardship factors. For example, a large segment have had U.S.-born children since arriving in the United States. Many have developed property ties by purchasing homes or employment ties through long periods of employment with the same company. Many are involved in their children's schools, local churches, or other community groups. Family, property, employment and community ties are all hardship factors outlined by the BIA as relevant to the issue of hardship.

54/ See State Department Telex No. 94-San Salvador-004911, supra.

55 / See O-J-O, supra.

In light of the foregoing, a group-specific “extreme hardship” determination would be completely consistent with the principles enunciated in the proposed rule and the pre-existing precedent decisions on the “extreme hardship” standard. Even if that were not the case, however, the Attorney General may promulgate (and has promulgated) regulations that change previously applicable administrative standards. Under Section 103(a) of the INA, the Attorney General is authorized to issue regulations, and her determinations and rulings with respect to all questions of law are controlling. 56/ The BIA has acknowledged that it must modify its interpretations to be consistent with changes in the regulations. 57/

D. Precedent exists for making a group-specific “extreme hardship” determination with respect to ABC class members.

There is clear and recent precedent for granting relief from repatriation to a specific group of people, even without an enabling change in the underlying statutory authority. Responding to the Chinese Government's repression of pro-democracy advocates in the People's Republic of China (the “PRC”), in June 1989 President Bush announced that visa extension requests by Chinese students in the United States would be given sympathetic review. 58/ Soon thereafter, the Attorney General directed the INS to defer until June 5, 1990 the enforced departure of most Chinese nationals then in the United States, and the INS issued detailed instructions implementing this policy. 59/

Believing these administrative measures to be inadequate, in the fall of 1989 Congress passed legislation to confer protected status to Chinese nationals in the United States. 60/ In vetoing this legislation as a limitation on his “ability to manage foreign

56/ 8 U.S.C. § 1103(a). See, e.g., *In re Ponce de Leon*, Int. Dec. No. 3261, 21 I&N Dec. --- (BIA 1997) (treating as binding new regulations related to INA Section 212(c) eligibility). If a new regulatory interpretation changes former law, the Attorney General should provide a reasoned explanation for the change. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1767-69 (1991) (upholding HHS regulation because agency provided a reasoned explanation for the change prohibiting funding to groups that discussed abortion as a family planning option).

57/ See *In re Ponce de Leon*, *supra* (“A regulation promulgated by the Attorney General has the force and effect of law as to this Board of Immigration Appeals.”).

58/ Tom Raum, “Bush Calls for World to Stand With Young Man Who Braved Tanks,” *Associated Press*, June 5, 1989, available in Westlaw, ALLNEWS library, ASSOCPR file.

59/ See June 6, 1989 letter from Attorney General Dick Thornburgh to INS Commissioner Alan Nelson; June 7, 1989 and June 21, 1989 cables from INS Deputy Commissioner James L. Buck to all field offices (File CO 243.69-P).

60/ Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong., 1st Sess. (1989).

relations,” President Bush nevertheless ordered, and the INS implemented through detailed directives, certain administrative measures to protect Chinese nationals in the United States, including (1) irrevocable waiver of the two-year home country residence requirement that applied to certain exchange visitors; (2) the application of a more lenient standard -- “enhanced consideration” -- to asylum applications based on the Chinese Government's policy of forced abortion and coerced sterilization; (3) assurance of continued lawful immigration status and work authorization for those in the United States as of June 5, 1989, the date of his original pronouncement; and (4) deferral of the institution of deportation proceedings for those eligible for deferred enforced departure. 61/ Significantly, each of the foregoing administrative measures involved granting discretionary relief to a specified group of people based on the application of group-specific general standards in cases that normally would have been considered on their individual merits.

In an April 11, 1990 Executive Order, President Bush reaffirmed and further expanded the earlier-announced administrative measures, which again had been criticized as inadequate. 62/ Subsequently, Congress passed and President Bush signed into law the Chinese Student Protection Act of 1992, which allowed eligible Chinese nationals to apply for permanent resident status under special rules and procedures that were more lenient than the rules and procedures applicable to others. 63/ Discussing the reasons for the legislation, the Act's legislative history noted that Congress had acted “on several occasions to regularize the immigration status of persons who were present in the United States for a significant amount of time and who faced an uncertain future if returned to their home countries.” 64/ Though the underlying statute did not specifically grant relief to the spouse and minor children of the principal beneficiary, the implementing regulations did, 65/ again demonstrating the INS's

61/ See November 30, 1989 Memorandum of Disapproval signed by President George W. Bush; December 1, 1989 and January 4, 1990 cables from INS Commissioner Gene McNary to all field offices (File CO 243.69-P).

62/ Policy Implementation With Respect to Nationals of the People's Republic of China, Executive Order 12711, 55 Fed. Reg. 13897 (April 11, 1990). The courts later ruled that these administrative measures did not effectively overrule administrative denials of asylum applications based on the Chinese Government's policy of coercive family planning practices. See Chen v. INS, 95 F.3d 801, 804-05 (9th Cir. 1996); Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995), cert. denied, 116 S.Ct. 1271 (1996). In so doing, however, the courts merely ruled that the measures had not been implemented properly, not that the INS lacked the requisite authority to adopt and apply the measures. See Chen, 95 F.3d at 804-05; Zhang, 55 F.3d at 747-49; Chai v. Carroll, 48 F.3d 1331, 1340 (4th Cir. 1995).

63/ See Pub. L. No. 102-404, 106 Stat. 1969 (Oct. 9, 1992), codified at 8 U.S.C.A. § 1255.

64/ H.R. Rep. No. 102-826, pt. II (1992), reprinted in 1992 U.S.C.C.A.N. 1355 (noting prior extension of permanent resident status to Cubans, Haitians, Ethiopians, Afghans, Poles, Soviets, and Vietnamese).

willingness to confer relief from repatriation administratively through an implementing regulation.

In August 1994 the INS retreated from its earlier position of granting "enhanced consideration" to asylum applications involving coercive family planning policies, instructing INS officials to follow BIA precedent on the issue in deciding whether to grant such applications. ^{66/} In so doing, however, the INS said that Chinese nationals denied asylum under the BIA precedent nevertheless could be granted stays of deportation if they expressed a credible fear of the PRC's coercive family planning policies. ^{67/}

The foregoing measures reflect administrative decisions to grant relief from repatriation to particular groups of people. Moreover, while generally consistent with congressional intent in passing the Emergency Chinese Immigration Relief Act of 1989, the measures were adopted and implemented without enabling statutory authority. In this case, adopting a group-specific "extreme hardship" determination for ABC class members would be consistent with congressional intent in passing NACARA and the President's pronouncements on implementation of the Act.

E. A group-specific "extreme hardship" determination would foster administrative efficiency and fundamental fairness.

As noted above, all of the ABC class members share common "extreme hardship" circumstances. Accordingly, from an administrative efficiency standpoint, it makes no sense to require each adjudicator to consider separately each applicant's "extreme hardship" claim. The Justice Department's limited resources would be better devoted to focusing on other aspects of each applicant's eligibility for relief -- e.g., is the applicant in fact a member of the class, has the applicant engaged in conduct rendering him/her ineligible for relief -- than to soliciting repetitive "extreme hardship" information that is known to be true for the class as a whole.

A group-specific "extreme hardship" determination would relieve adjudicators of the substantial burden of reviewing and assessing each individual hardship claim, thereby reducing significantly the processing time for each application and the aggregate amount of time needed to implement this program. This approach and result would comply with the congressional and presidential directives to implement this program expeditiously and humanely.

^{65/} See Interim Rule, Adjustment of Status; Certain Nationals of the People's Republic of China, 58 Fed. Reg. 35,832, 35,833 (July 1, 1993).

^{66/} See Memorandum from INS Deputy Commissioner Chris Sale (Aug. 5, 1994).

^{67/} Id. In establishing enhanced processing procedures for Chinese nationals who fear coercive family planning practices, a June 7, 1996 memorandum from INS Deputy Commissioner Chris Sale reiterated the general policy set forth in the August 5, 1994 memorandum.

In addition to allowing the Justice Department to consider these cases more expeditiously, a group-specific “extreme hardship” determination would substantially reduce the burden of preparing individual applications. Proving extreme hardship is the most time-consuming and expensive aspect of preparing a suspension of deportation application. According to the INS’s own estimates, approximately 240,000 ABC class members are eligible to apply for relief from repatriation under Section 203 of NACARA. ^{68/} Based on the number of potential applicants and the amount of time it takes to prepare an application based on an individualized claim of extreme hardship, service providers such as the Central American Resource Center (“CARECEN”) and Central American Legal Assistance (“CALA”) estimate that they will be able to handle only a relatively small number of cases each year.

Given the complexity of the application process, those who are unable to obtain assistance from service providers such as CARECEN and CALA almost certainly will have to hire attorneys to represent them in this process. Many cannot afford to do so, and those who can will have less money to remit to their families in their countries of citizenship. As a result, money that otherwise would support the restoration effort in Central America instead will go to legal services.

Finally, a group-specific “extreme hardship” determination also would reduce the current disparity in suspension approval rates from court to court and district to district, giving rise to unequal treatment of similarly situated people. This disparity -- which can only truly be explained by the fact that adjudicators across the country currently apply different hardship standards in similar cases -- can be redressed by mandating an “extreme hardship” finding for all ABC class members. Even if a group-specific “extreme hardship” determination were made, adjudicators would retain the discretion to deny relief in appropriate cases for other reasons.

^{68/} In fact, this figure might significantly underestimate the actual number of potential applicants, which includes spouses and children of class members.

**MASSACHUSETTS IMMIGRANT & REFUGEE ADVOCACY COALITION**

105 Chauncy Street, 9th Floor, Boston, MA 02111

Voice & TTY (617) 350-5480 • fax: (617) 350-5499

January 21, 1999

Ms. Julie Fernandez
Domestic Policy Council
Old Office Building, Room 224
Washington, D.C. 20502

Dear Ms. Fernandez:

We the undersigned are writing to express our profound concern regarding the proposed regulations published in the Federal Register on November 24, 1998, re: the implementation of the Nicaraguan Adjustment and Central American Relief Act (NACARA). This Act requires Salvadorans and Guatemalans to prove on a case-by-case basis that they would suffer "extreme hardship" if they were deported. We believe that the regulations should be changed to give Salvadorans and Guatemalans covered by NACARA a blanket determination of having met the extreme hardship requirement for Suspension of Deportation or Special Rule Cancellation of Removal.

We are disappointed that the regulations propose a burdensome process and do not contain the presumption that these individuals will suffer extreme hardship if deported. Many of the Salvadorans and Guatemalans covered by the legislation came here fleeing persecution during the civil wars of the 1980's. Once here, they were denied asylum. If treated fairly in the first place, many of these individuals would be by now permanent residents or U.S. citizens.

Another reason the regulations should be changed is that, in the wake of Hurricane Mitch, a Salvadoran or Guatemalan who is unable to successfully complete the burdensome process the regulations propose will be deported to countries partially destroyed by the storm. We hope that the changed situation in Central America will encourage you to rethink the requirement that individuals prove extreme hardship.

Finally, the regulations will prevent many individuals from successfully completing the process-not because they would not suffer hardship if deported, but because they will not be able to afford the legal help they will need. The requirement that individuals prove hardship will leave out many individuals whom the legislation intended to protect from deportation.

It is our hope that when the regulations are finalized, they will not require individuals to prove on a case- by- case basis that they will suffer extreme hardship if deported. NACARA was intended to provide an expeditious and humane avenue to legal status in the United States for those covered by the legislation. It would be unfortunate if overly burdensome regulations prevented the generous intent of the legislation from being realized.

Thank you.

Sincerely,



Muriel Heiberger

Director, Massachusetts Immigrant and Refugee Advocacy Coalition

On behalf of the undersigned organizations:

ACLU of Massachusetts
Allston-Brighton Healthy Boston Coalition
American Friends Service Committee
American Red Cross
Asian American Civic Association
Boston Elder INFO
Bowdoin Street Health Center
Cambodian Mutual Assistance Associates
Cambodian Mutual Assistance Association
Cambridge Health Alliance
Care Services Project
Catholic Social Services
Catholic Social Services
Center for Health and Human Services
Centro Las Americas
Centro Latino de Chelsea
Community Action Committee
Community Economic Development Center of
Southeastern Massachusetts
Community Teamwork Inc.
Concilio Hispano
East Boston Ecumenical Community Council
Elder Services of the Merrimack Valley, Inc.
EMH Productions
Everywoman's Center
Family Development Fund
The Frosina Information Network

Boston
Brighton
Cambridge
Boston
Boston
Boston
Dorchester
Lowell
Lowell
Cambridge
Fitchburg
Fall River
Hyannis
Bedford
Worcester
Chelsea
Cape Cod and Islands

New Bedford
Lowell
Cambridge
Boston
Lawrence
Gloucester
Amherst
Lawrence
Boston

AHEC Community Partners	Amherst
Greater Boston Catholic Charities	Somerville
Greater Boston Chinese Golden Age Center	Boston
Greater Lawrence Community Action Council, Inc.	Lawrence
Greater Lawrence Family Health Center, Inc.	Lawrence
Harvard St. Health Center	Dorchester
Haverhill Hispanic Coalition	Haverhill
Immigrant Workers' Resource Center	Boston
International Institute of Boston	Boston
Jewish Family and Children's Services	Newton
Jewish Family Services New American Center	Lynn
Jewish Federation of Central Massachusetts	Worcester
Jewish Federation of the Berkshires	Pittsfield
Korean-American Citizens League of New England	Lee, NH
Latino Health Institute	Boston
Lawrence Family Development and Education	Lawrence
Marlboro Emergency Services Foundation	Marlboro
Massachusetts Alliance of Portuguese Speakers	Cambridge
Massachusetts English Plus Coalition	Boston
Massachusetts General Hospital	Charlestown
Massachusetts Extended Care Federation	Newton Lower Falls
Mayor's Office of Human Services	Somerville
MGH Charlestown Health Care Center	Charlestown
Montachusett	Fitchburg
New Hope, Inc	Webster
North Shore Community Action Program	Peabody
Longmeadow Council on Aging	East Longmeadow
Political Asylum/ Immigration Representation Project	Boston
Rape Crisis Center—Llamanos Hablemos Hotline	Worcester
Seton Asian Center	Lawrence
Shore Support	New Bedford
Somerville Center for Adult Learning Experiences	Somerville
Somerville Human Rights Commission	Somerville
South Boston Community Health Center	Boston
Spanish American Center, Inc	Leominster
Spanish Program	Lawrence
Springfield Vietnamese American Civic Ass.	Springfield
St. Elizabeth's Medical Center	Brighton
The Welcome Project, Inc.	Somerville
Western Massachusetts Housing Alliance	Worcester
Workers' Education Program, U Mass Dartmouth	Dartmouth

cc: Scott Busby, National Security Council, Maria Echaveste, Executive Office of the President, Director, INS Policy