IMPLEMENTATION AND TRAINING WITH RESPECT TO EXTREME HARDSHIP

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The proposed rule implementing Section 203 of NACARA codifies, for the first time, the relevant factors governing extreme hardship determinations in suspension of deportation and special rule cancellation of removal cases. This codification is one of many decisions the Department has made in order to provide an accessible, efficient, and open adjudication process. Most notably, many Section 203 applicants will be able to apply for relief with the INS, and will have their cases heard in the first instance by trained asylum officers in a non-adversarial setting. Because many Section 203 applicants are likely to be unrepresented, the Department has taken great care to ensure that the concept of extreme hardship is adequately explained and identified within the proposed regulation. Moreover, the Department has created a special application form for Section 203 applicants which is designed to ask questions that help the individual explain all relevant factors regarding extreme hardship.

Training on this substantive legal standard, as well as on specific country conditions, has always been a component of the plan to prepare asylum officers to review Section 203 cases. In light of Hurricane Mitch, the Department will increase its emphasis on country conditions training and will make use of the INS Office of International Affairs Resource Information Center to gather accurate, specific information on El Salvador and Guatemala, region by region.

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The RIC will also be involved in identifying country conditions experts who can participate in panel discussions at the INS Section 203 training for asylum officers. The country specific training for El Salvador and Guatemala is expected to span at least one day and will be further supplemented by extensive training on the legal standard for extreme hardship. The INS estimates that at least half of the substantive legal training will be devoted to training on the issue of extreme hardship. At least some of that training can be focused on eliciting information specific to the hardship that may be caused by the storm. INS trial attorneys can also receive the same information on the regulations and country conditions provided to the asylum officers.

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U.S. Department of Justice
Immigration and Naturalization Service

FACSIMILE TRANSMITTAL COVER SHEET

TRANSMITTED TO:

Office:

Attention To: Julie Fernandez

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Date Transmitted: ~~11/~~ 12/1

Number of Pages Transmitted: COVER + 1

Comments: Julie,
Here is the training summary. We will fax the analysis of the presumption issue tomorrow
Mary

PLEASE DELIVER IMMEDIATELY

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Beverly 6659f

Background: INS yesterday released regulations implementing the Nicaragua and Central American Adjustment Act (NACARA), which was enacted in 1997. Under NACARA, Nicaraguans and Cubans were given automatic permanent residence, while Salvadorans and Guatemalans were granted only an opportunity to be considered for permanent residence status under more generous suspension of deportation rules than otherwise would apply. The President criticized the disparate treatment offered by the Congress and noted that the Administration would seek to address the disparities in the implementation process. Advocacy groups have urged the Attorney General to adopt a blanket rule for Salvadorans and Guatemalans that would ensure that they all would get permanent status; the Administration has decided that it would not be appropriate to go this far but has proposed revisions to the procedures for adjudicating the cases of Guatemalans and Salvadorans that will treat them more favorably than otherwise would be the case.

Talking Points

- The NACARA legislation was enacted over a year ago and the Department of Justice has been working hard since then to develop regulations that fairly and generously interpret that law.

- The proposed regulations were close to final before Hurricane Mitch hit; we did not think it appropriate to hold up their publication any longer while we considered appropriate immigration action we might take in response to Mitch.

- **The regulations are only proposed rules;** we will be looking forward to receiving public comments over the next 60 days before final regulations are issued.

- We are developing a comprehensive immigration policy response to the situation of Central Americans in the United States in light of Hurricane Mitch. We will be considering the situation of Central Americans from all four countries in developing this response.

MEMORANDUM

January 8, 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").

This analysis was prepared with the assistance of T. Clark Weymouth, an attorney with Hogan & Hartson L.L.P. Mr. Weymouth is registered under the Foreign Agents Registration Act on behalf of the Embassy of the Republic of El Salvador. Additional information concerning this registration is on file at the U.S. Department of Justice, Washington, D.C.

- 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

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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.

courts 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

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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)); 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)).

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).

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.

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:

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).

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. 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:

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").

> 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. 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/

18/ Id.

19/ Id.

20/ Id.

21/ Id. at S12266-S12667.

22/ Id. at S12261-S12262.

- 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. 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

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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).

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 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 civil wars 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 civil wars have been destroyed completely, and family members and friends either killed or dislocated. Moreover, as a result of the peace accords, former combatants were given priority consideration for scarce arable land, much of which was previously owned by those who fled to the United States.

The economic and social conditions are extremely poor. For example, the most recent State Department report on country conditions in El Salvador indicates that 50% of all children under five years of age have some nutritional deficiency. 36/ The State Department report for Guatemala paints a dimmer picture: Approximately 80% of the population lives in poverty, with 59% in "extreme poverty." 37/ 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. 38/

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 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

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

35/ See text accompanying note 20, supra.

36 / See, Department of State Country Report, "Country Reports on Human Rights Practices for 1997," at 527.

37 / See Country Report at page 520.

38 / See O-J-O, supra.

inhabitants. 39/ 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. Epidemic levels of cholera, leptospirosis and dengue have been reported, and dead animals have infected the water supply. 40/ 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. 41/

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, 42/ 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. 43/

39/ 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).

40/ Id.

41/ 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.

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

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

Finally, the U.S. citizen and lawful permanent resident children of ABC 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.

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. 44/ 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-Diaz 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.

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. 45/

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

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

45/ See In re L-O-G, supra.

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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. 46/

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.

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

46/ 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).

hardship factor, in much the same way as an especially lengthy period of residence may be more outcome-determinative than a very short one. 47/

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 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."

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 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 that produced it, making repatriation especially harmful in such cases. 48/

Second, as noted above, many ABC 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, while not necessarily susceptible to medical diagnosis, 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"). 49/

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, and personal safety is at risk.

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

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

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

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

considered favorably in assessing a claim of extreme hardship. 50/ 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. 51/ 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. 52/ 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.

* * *

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. 53/ This class of applicants shares at least four factors, and in many cases more

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50/ 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).

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

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

53 / See O-J-O, supra.

BIA-recognized hardship factors. For example, a large segment have had U.S. born children since their arrival 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.

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. 54/ The BIA has acknowledged that it must modify its interpretations to be consistent with changes in the regulations. 55/

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. 56/ 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. 57/

54/ 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).

55/ 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.").

56/ 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.

57/ 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).

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. 58/ In vetoing this legislation as a limitation on his "ability to manage foreign 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. 59/ 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. 60/ 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. 61/ 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

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

59/ 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).

60/ 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).

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

time and who faced an uncertain future if returned to their home countries." 62/ Though the underlying statute did not specifically grant relief to the spouse and minor children of the principal beneficiary, the implementing regulations did, 63/ again demonstrating the INS's 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. 64/ 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. 65/

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.

62/ 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).

63/ 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).

64/ See Memorandum from INS Deputy Commissioner Chris Sale (Aug. 5, 1994).

65/ 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.

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.

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. 66/ 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.

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

MEMORANDUM

January 7, 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 Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, Proposed Rule, 63 Fed. Reg. 64895 (November 24, 1998), 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").

This analysis was prepared with the assistance of T. Clark Weymouth, an attorney with Hogan & Hartson L.L.P. Mr. Weymouth is registered under the Foreign Agents Registration Act on behalf of the Embassy of the Republic of El Salvador. Additional information concerning this registration is on file at the U.S. Department of Justice, Washington, D.C.

- 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/ After IIRIRA, NACARA provides that this same statutory standard governs most ABC class members' applications for relief from repatriation. 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

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.

courts 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 properly 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

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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)); 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)).

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).

justifies, in the implementation process, minimizing differences in the relief accorded to Nicaraguans and Cubans from that given to ABC class members.

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:

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 were ineligible to apply for adjustment of status was "reasonably related to the statutory scheme").

13/ 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. 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:

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) (hereinafter Explanatory Memorandum).

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. 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, 22/ 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." 23/

18/ Id.

19/ Id.

20/ Id.

21/ Id. at S12266-S12667.

22/ See 143 Cong. Rec. S12261-S12262 (daily ed. Nov. 9, 1997) (statement of Sen. Abraham).

23/ Id. at S. 12262.

- 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. 24/

- 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 . . . " 25/

- 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." 26/

- In a January 6, 1998 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." 27/

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 Board's decision in Matter of Anderson, is generally considered to be the starting point in defining extreme hardship standard. In that case the Board listed a number of factors to be considered in adjudicating whether extreme hardship had been proven. The factors mentioned by the

24/ Id. at S. 12264.

25/ Explanatory Memorandum, supra note 22.

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

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

Board 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 and business ties; community ties or contributions; immigration history and the possibility of other means of adjustment of status.28/

In the Anderson case and the subsequent Board precedent decisions further defining the term "extreme hardship", the Board 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."29/ 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.30/ Separation from family members and the resulting hardship may rise to the level of extreme hardship without proof of the other hardship factors.31/

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." 32/ The proposed rule also recognizes that factors other than those cited may be considered in assessing extreme hardship. 33/ Finally, the term "extreme hardship" is not one of fixed and inflexible meaning. The Board has stated that a narrow definition of this term is permitted by the adjudicator but "is not mandated either by the Supreme Court of by our published case law."34/ Consistent with these principles and the applicable case law, a group-specific "extreme hardship" determination for the ABC class members is appropriate.

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

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

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

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

32/ Proposed Rule, supra, 63 Fed. Reg. at 64904 (preamble) (citing In re L-O-G, Int. Dec. No. 3281, 21 I&N Dec. --- (BIA 1996)).

33/ Id. at 64903.

34 / See In re Pilch, Int. Dec. 3298 (BIA 1996); See also In re L-O-G Int. Dec. 3281 (BIA1996).

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

1. 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. 35/ 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. 36/

In this regard, El Salvador and Guatemala still are suffering from the long and difficult civil wars 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 civil wars have been destroyed completely, and family members and friends either killed or dislocated. Moreover, as a result of the peace accords, former combatants were given priority consideration for scarce arable land, much of which was previously owned by those who fled to the United States.

The economic and social conditions are extremely poor. For example, the most recent State Department report on country conditions on El Salvador indicates that 50% of all children under five years of age have some nutritional deficiency. 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 describes extremely poor economic and social conditions in these countries which affect men, and especially women and children. The Board in a recent precedent decision 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 civil wars suffered another setback when Hurricane Mitch 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

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35/ See, e.g., In re O.J.O., supra; In re L.O.G., supra.

36/ See text accompanying note 20 supra.

37 / See, Department of State Country Report, "Country Reports on Human Rights Practices for 1997" at page 527.

38 / See Country Report at page 520.

39 / See O-J-O-, supra.

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. 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/

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, 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/

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 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.

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).

Finally, the U.S. citizen and lawful permanent resident children of ABC 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.

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. 45/ In this case, under Paragraphs 18 and 19 of the ABC settlement agreement, all of the ABC class members qualifying 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-Diaz 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.

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. 46/

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

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

46/ See In re L.O.G., supra.

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. 47/ Accordingly, these people should be deemed to satisfy the "extreme hardship" standard based on the strength of their original asylum claims.

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 the 1996 immigration act (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 NACARA 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, NACARA class members with close family ties in the United States should be deemed to have stronger, not weaker, claims of extreme hardship.

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 ABC, 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

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47/ 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).

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. 48/

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 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."

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 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. 49/

Second, as noted above, many ABC 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, while not necessarily susceptible to medical diagnosis, 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"). 50/

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, and personal safety is at risk.

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

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

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

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. 51/ 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 contributions to their countries of citizenship are staggering. Salvadorans in the U.S. sent an estimated $1.2 billion in 1997 to El Salvador, or an average of $3,000 per Salvadoran residing in the U.S. This figure represents 29% of the country's sources of foreign exchange. Guatemalans, whose population size in the U.S. is far smaller, sent back over $400 million a year. 52/ 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. 53/ 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.

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All ABC class members eligible to seek relief under Section 203 will share at least the first four factors, and in many cases more factors that the BIA has cited as relevant in numerous precedent decisions. Extreme hardship may be found where an individual possess

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51/ 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).

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

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

one or two of the Anderson factors depending on the circumstances of the case.54/ This class of applicants share at least four factors, and in many cases more Board recognized hardship factors. For example, a large segment have had U.S. born children since their entry in 1980's or 1990. 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 also hardship factors outlined by the BIA as relevant to the issue of hardship.

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. 55/ The BIA has acknowledged that it must modify its interpretations to be consistent with changes in the regulations. 56/

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

There is clear and recent precedent for the Administration and the INS to grant 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. 57/ Soon thereafter, the Attorney General directed the

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54 / See O-J-O, supra.

55/ 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).

56/ 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.").

57/ 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.

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. 58/

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. 59/ In vetoing this legislation as a limitation on his "ability to manage foreign 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. 60/ 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. 61/ 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

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58/ 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).

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

60/ 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).

61/ 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).

rules and procedures applicable to others. 62/ 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." 63/ Though the underlying statute did not specifically grant relief to the spouse and minor children of the principal beneficiary, the implementing regulations did, 64/ again demonstrating the INS's 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. 65/ 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. 66/

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"

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

63/ 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).

64/ 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).

65/ See Memorandum from INS Deputy Commissioner Chris Sale (Aug. 5, 1994).

66/ 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.

claim. The Justice Department's limited resources would be better devoted to focusing on other aspects of each applicant's eligibility for relief -- i.e., 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.

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 of ABC class members are eligible to apply for relief from repatriation under Section 203 of NACARA. 67/ 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 home countries. As a result, money that otherwise would support of the restoration effort in Central America instead will go to legal services.

Finally, a group-specific "extreme hardship" determination also would eliminate 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.

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

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

December 15, 1997

The Honorable Janet Reno
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 1145
Washington, D.C. 20530

Dear Attorney General Reno:

We understand that you are considering various options for implementing Title II of the D.C. Appropriations Act, the "Nicaraguan Adjustment and Central American Relief Act" (NACARA), especially as it pertains to the provisions creating a special transition rule governing cancellation of removal for certain categories of applicants. We accordingly thought it would be appropriate to share our views with you on this subject.

As you no doubt are aware, because this title was added on the floor as part of an amendment, no Committee Report was written to accompany it. Instead, Senator Mack, the sponsor of the original version of the floor amendment on this subject that ultimately became Title II, inserted a statement in the Congressional Record. That statement represented the views of the sponsor and his cosponsors as well as the views of the Chairman and Ranking Member of the relevant Subcommittee of the authorizing Committee. It contains our views concerning a number of provisions that bear on the issues you are considering. We enclose it for your consideration. We see no need to restate the specific points it addresses, although we would like to reiterate our strong encouragement that, in recognition of the delays and uncertainties that the beneficiaries of these provisions have already experienced in seeking legal status in the United States, the Administration do everything in its power to adjudicate their applications for relief expeditiously and humanely.

A number of questions have been raised since enactment of the legislation concerning how much flexibility the Administration has concerning the procedures to set up for implementation of the provisions relating to suspension of deportation and cancellation of removal. In particular, it has been suggested that since the language of the special transition rule for cancellation of removal established in section 309(f) of IIRIRA (as added by NACARA) is based on language contained in former section 244 of the Immigration and Nationality Act, the procedures for implementing the special rule therefore must in every respect track those currently in place to implement section 244. It has also been suggested that any failure to do so would of necessity create a discrepancy in the way NACARA itself is applied. This would inevitably result, it has been suggested, because some of the beneficiaries of the new transition rules were in deportation proceedings as of April 1, 1997, and hence their applications for relief would be in the form of suspension of deportation under section 244 of the INA, whereas others were not, and hence would have their applications for relief adjudicated under the cancellation of removal special rule of section 309(f) of IIRIRA. The only alternative, it has been suggested, would be to have any special procedural rules for handling section 309(f) applications also govern applications under section 244 filed by NACARA beneficiaries, which in turn would create arbitrary distinctions between the handling of different applications under section 244.

We would like to address the second point first. We believe the premise that any beneficiary of NACARA who was in deportation proceedings as of April 1, 1997 must have his or her application for relief adjudicated under section 244 is mistaken. IIRIRA's original transition rules make it plain that the Attorney General has complete discretion to take an individual in deportation proceedings as of April 1, 1997 and instead place that person in removal proceedings. See section 309(c)(1)-(3). Nothing in NACARA modified this authority, and indeed, one of the amendments made by NACARA to subsection 309(c)(5) makes clear that NACARA specifically contemplated that this authority would remain available and could be used to vitiate the "stop time" effect NACARA would otherwise give to old "orders to show cause." See IIRIRA section 309(c)(5)(B) (added by NACARA). NACARA also went out of its way to make clear that section 309(c)'s special rules on physical presence and cancellation of removal would apply to any NACARA beneficiary seeking cancellation of removal "regardless of whether the alien [was] in exclusion or deportation proceedings before the title III-A effective date." See IIRIRA section 309(c)(5)(C)(i) (as amended by NACARA). Hence, if a different set of procedures were developed for implementing section 309(f), the various discrepancies giving rise to the second concern could be avoided by the simple expedient of placing all NACARA beneficiaries in deportation proceedings before April 1, 1997 who wished to have their cases considered under the new procedures in removal proceedings instead. This would eliminate any discrepancies among NACARA beneficiaries that would be caused by establishing procedures for adjudicating IIRIRA section 309(f) cancellation applications that differ from those used for adjudicating INA section 244 suspension applications by having all the NACARA beneficiaries proceed under IIRIRA section 309(f).

This leaves only the question whether even if it creates no discrepancies among NACARA beneficiaries, there is nevertheless a problem with having one set of procedures for adjudicating applications of non-NACARA beneficiaries under former section 244 of the INA and a different set of procedures for adjudicating applications under IIRIRA section 309(f). we would respectfully suggest that there is nothing wrong with such an approach. To begin with, we agree that section 309(f)'s language draws heavily on the legal standards set out under former section 244. But as a general matter, neither section 244 of the INA nor new section 309(f) of IIRIRA details the procedural rules for adjudicating applications under either section. This is in contrast to former section 242(b)'s specification of the procedures for determining deportability, as well as in contrast to current section 240's specification of procedures for determining both admissibility and deportability, including the allocation of the burden of proof with respect to each determination. Accordingly, in our view, if you were to decide tomorrow that section 244 procedures should be changed, you would be free to change them, provided you did so in compliance with any other statutory or constitutional requirements. Accordingly, we see no reason why you are not equally free to set up different procedural rules for adjudicating applications under new section 309(f), such as, for example, creating a presumption of hardship if an applicant for relief meets certain prerequisites.[1]

We would also point out that Congress made a conscious decision to create a special transition rule for NACARA applicants' cancellation of removal claims. At various times in the

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[1]Section 244 does allocate the burden of proof on one issue. It states that an applicant for suspension of deportation must "prove[] that during all of [the] period [of required continuous presence] he was and is a person of good moral character." The very fact that 244 specifies the allocation of the burden of proof in that instance, however, is further evidence that its failure to specify anything on the point with respect to the "hardship" determination was a deliberate decision to leave the issue open for administrative resolution under that provision. Similarly, new section 309(f)'s failure to borrow the "prove" language even on the "good moral character" issue likewise indicates a Congressional intention to leave the matter of the allocation of the burden of proof to be resolved by you in whatever manner you believe will advance the purposes of NACARA--although we would note that with respect to that determination, in contrast to the hardship determination, we see no policy reason for departing from currently established procedures.

There is one other difference between the language of former section 244 of the INA and new section 309(f) of IIRIRA that is worth noting. Section 244 stated that the Attorney General might grant relief "in the case of an alien who ... is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." Section 309(f) of IIRIRA, in contrast, states that the Attorney General may grant relief if "the alien ... establishes that removal would result in extreme hardship to the alien or the alien's spouse parent, or child, who is a citizen of the United states or an alien lawfully admitted for permanent residence." "Establishes" could be interpreted to mean "proves by a preponderance of the evidence," since that is one of its ordinary meanings; but it can equally plausibly be interpreted to mean a showing that falls well short of proof by a preponderance of the evidence, since "establish" is used in that fashion as well in both ordinary and legal language. Cf., e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357 (1977) (stating that the complainant must establish a prima facie case of discrimination by "offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act"); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (to avoid summary judgment under Rule 56, a party opposing a motion must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.") Since the word is ambiguous and both interpretations reasonable, you are free to choose either construction under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

legislative process, it considered two other alternatives: placing the rule governing these applications under section 240A of the INA (as was proposed in the original bill on this subject transmitted by the Administration and introduced by Senator Mack and others) or placing them under former section 244 (as was proposed in a later version of the legislation offered by Senator Mack as an amendment to the D.C. Appropriations bill). Congress rejected both alternatives in favor of a special transition rule uniquely applicable to these cases. While no reason was given for this decision at the time, we would suggest that one natural rationale for it is that Congress believed these applications to be special cases, and hence that it was preferable to create a separate statutory scheme in part to leave the Administration more free to develop appropriate procedures for adjudicating them without being too closely bound by either the procedures for adjudication of applications under section 244 or section 240A of the INA.

Thus, it seems to us that you are entirely free to adopt procedures for adjudicating the hardship issue under section 309(f) that differ from those used to adjudicate the issue under former section 244 of the INA, and that these can include 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.

Sincerely,

Edward M. Kennedy
Ranking Member
Subcommittee on Immigration

Spencer Abraham
Chairman
Subcommittee on Immigration

Bob Graham

Connie Mack

Spencer Abraham

Chairman, Immigration Subcommittee
Senate Judiciary Committee
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ARMY CORPS OF ENGINEERS FUNDING (Senate - November 09, 1997)

Mr. MACK. Mr. President, I ask unanimous consent that a section by section analysis of Title II of the D.C. appropriations portion of the omnibus appropriations bill be printed at this point in the Record.

There being no objection, the material was ordered to be printed in the **Record**, as follows:

[Page: S12266]

Explanatory Memorandum Regarding Title II of The D.C. Appropriations Potion of the Omnibus Appropriations Bill Submitted by Messrs. Mack, Graham, Abraham, Kennedy, and Durbin

PURPOSES OF THE BILL

The purpose of this Act is to ensure that nationals of certain specified countries who fled civil wars and other upheavals in their home countries and sought refuge in the United States, as well as designated family members, are accorded a fair and equitable opportunity to demonstrate that, under the legal standards established by this Act, they should be permitted to remain, and pursue permanent resident status, in the United States.

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.

SECTION-BY-SECTION ANALYSIS

Section 201--Short title

This Act may be cited as the `**Nicaraguan** Adjustment and Central American Relief Act.'

Section 202--Adjustment of status of certain Nicaraguans and Cubans

This section provides for Nicaraguans and Cubans who came to the United States before December 1, 1995 and have been continuously present since that time to adjust to the status of permanent residents provided they make application to do so before April 1, 2000. The Act also extends this benefit to the spouses, children, or unmarried sons or daughters of those individuals. This portion of the Act is modeled on the Cuban Adjustment Act.

Section 203--Modification of certain transition rules

Section 203 of the bill modifies the transition rules established in Section 309 of the Illegal Immigration and Immigrant Responsibility Act of 1996 ('IIRIRA'), Public Law No. 104-208; division C; 110 Stat. 3009-627.

Section 203(a) amends the transition rule governing eligibility for suspension of deportation for those who were in exclusion or deportation proceedings as of April 1, 1997, the effective date of IIRIRA. Under the rules in effect before then, on otherwise eligible person could qualify for suspension of deportation if he or she had been continuously physically present in the United States for seven years, regardless of whether or when the Immigration and Naturalization Service had initiated deportation proceedings against the person through the issuance of an order to show cause ('OSC') to that person. As a result, people were able to accrue time toward the seven-year continuous physical presence requirement after they already had been placed in deportation proceedings.

IIRIRA changed that rule to bar additional time for accruing after receipt of a 'notice to appear,' the new document the Act created to begin 'removal' proceedings, the repatriation mechanism IIRIRA substituted for deportation and exclusion proceedings. Over a strong dissent, a majority of the Board of Immigration Appeals in Mater of N-J-B- interpreted IIRIRA Section 309(c)(5) to apply not only prospectively in removal cases initiated by means of this new document but also retroactively to those who were in exclusion or deportation proceedings initiated by an order to show cause. On July 10, 1997 Attorney General Reno vacated and took under review the BIA's decision in Matter of N-J-B-.

Section 203(a) generally codifies the majority decision in Matter of N-J-B- by stating explicitly that orders to show cause have the same 'stop time' effect as notices to appear. Excepted from retroactive application of the 'stop time' rule are (1) those whose cases are terminated and reinitiated pursuant to IIRIRA Section 309(c)(3); and (2) those who, based on their special circumstances, are eligible for relief from repatriation under this Act, as described below.

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As defined in Section 203(a) of the Act (amending IIRIRA Section 309(c)(5)), those who are eligible for relief under the Act (referred to hereinafter as `Eligible Class Members') include:

Salvadorans who entered the United States on or before September 19, 1990 and who, on or before October 31, 1991, either registered for benefits under the settlement agreement in American Baptist Churches, et al. v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (the `ABC Settlement') or applied for temporary protected status.

Guatemalans who entered the United States on or before October 1, 1990 and registered for benefits under the ABC Settlement.

Salvadorns and Guatemalans not included in the foregoing groups but who applied for asylum on or before April 1, 1990.

Nationals of the Soviet Union (or any of its successor republics), Latvia, Estonia, Lithuania, Poland, Czechoslovakia (or its successor republics), Romania, Hungary, Bulgaria, Albania, East Germany and Yugoslavia (or its successor republics) who entered the United States on or before December 31, 1990 and applied for asylum on or before December 1991.

Under Section 203(a) of the bill, the foregoing Eligible Class Members may pursue and be granted suspension of deportation or cancellation of removal without having their continuous physical presence in the United States terminated as of the date of service of an order to show cause or notice to appear. As Section 203(a)'s amendment to section 309(c)(5)(C)(i) of IIRIRA makes clear, these class members are eligible for this treatment even if they were not in proceedings on or before April 1, 1997.

Also eligible for relief from repatriation under this Act are those who, at the time an Eligible Class Member is granted relief from repatriation under this Act, are either (1) the spouse or child (as defined in Section 101(b)(1) of the Immigration and Nationality Act) of such person; or (2) the unmarried son or daughter of such person, provided that, if the unmarried son or daughter is 21 years of age or older when the parent is granted relief under this Act, the son or daughter must establish that he or she entered the United States on or before October 1, 1990.

Those who otherwise would be eligible for relief but have been convicted of an aggravated felony (as defined in Section 101(a) of the Immigration and Nationality Act) are not eligible for relief. Moreover, those deemed ineligible for relief under this Act may not seek judicial review of this decision.

Section 203(b) of the bill adds a new subsection (f) to the IIRIRA Section 309 transition rules. Under this new provision, Eligible Class Members who were not in exclusion or deportation proceedings as of April 1, 1997 may apply for cancellation of removal--the relief from repatriation replacing `suspension of deportation,' which was available under the pre-IIRIRA rules--and adjustment to permanent resident status under a special set of standards, subject to the following limitations:

Generally speaking, Eligible Class Members will be eligible for cancellation of removal and adjustment of status if they can establish that: (1) they have been physically present in the United States for a

continuous period of seven years immediately preceding the date of application for relief; (2) they have been of good moral character during that period; and
(3) removal would result in `extreme hardship' to the person or to a spouse, parent or child who is either a U.S. citizen or lawful permanent resident.

Those who are inadmissible or deportable because of certain offenses--including engaging in certain activities threatening U.S. national security (8 U.S.C. 212(a)(3), 237(a)(4)); conviction of an aggravated felony at any time after admission (8 U.S.C. Sec. 237(a)(2)(A)(iii); or participating in the persecution of others (8 U.S.C. 241(b)(3)(B)(ii))--are ineligible for cancellation of removal and adjustment of status.

Those who are inadmissible or deportable because of certain other offenses--including engaging in specified criminal activity (8 U.S.C. 212(a)(2), 237(a)(2)); or failure to comply with certain INS rules, including engaging in document fraud (8 U.S.C. Sec. 237(a)(3))--are eligible for cancellation of removal and adjustment of status if they can establish that (1) they have been physically present in the United States for a continuous period of ten years immediately following the event that otherwise would constitute a ground for removal; (2) they have been a person of good moral character during that period; and (3) removal would result in exceptional and extremely unusual hardship to the person or to a spouse, parent or child who is either a U.S. citizen or lawful permanent resident.

ARMY CORPS OF ENGINEERS FUNDING (Senate - November 09, 1997)

These standards generally echo the standards for suspension of deportation that had been in effect until IIRIRA. Nothing in these standards is intended to preclude the Attorney General from adapting the procedures under which Eligible Class Members' applications for cancellation or suspension are to be adjudicated in a manner appropriate to the circumstances of the individuals whose cases are before her. These cases have already been drawn out enough as a result of the uncertainties about the applicable standard brought about by the changes to the law made by IIRIRA and uncertainties about the meaning of those changes.

In particular, given the special solicitude Congress is showing toward the Eligible Class Members by enacting this legislation in large measure to see to it that their claims are fairly adjudicated, it would, for example, be entirely consistent with that intent for the Attorney General to direct INS attorneys to consider the special hardships undergone by them and the fragile economic and political conditions in their home countries as relevant to the extreme hardship determination. For this reason, it would also be appropriate for the Attorney General not to challenge applications for relief by Eligible Class Members on hardship grounds if the applicant satisfies the seven-year presence and good moral character requirements. This would be similar to the approach taken by President Bush in the context of the review of asylum applications by Chinese nationals based on China's policy of forced abortion and coerced sterilization. See November 30, 1989 Memorandum of Disapproval signed by President Bush; December 1, 1989 and January 4, 1990 cables from INS Commissioner Gene McNary to all field offices (File CO 243.69-P); Executive Order 12711 (April 11, 1990); 55 Fed. Reg. 13897 (April 13, 1990). More generally, 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 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. Adoption of such an approach would be entirely consistent with Congress' intentions in adopting this legislation, and with its interest in seeing to it that any future difficulties these people may experience in getting a final resolution of their status here to be kept to a minimum.

Section 203(c) of the bill permits Eligible Class Members previously placed in deportation or removal proceedings who claim eligibility for relief from repatriation under the Act to file a single motion to reopen such proceedings to pursue relief from repatriation; such relief might otherwise have been barred on procedural grounds. The Attorney General must designate a time period not greater than 240 days within which motions to reopen must be filed; the time period must begin within 60 days after the date of enactment of this Act. We note that because a number of the Eligible Class Members arrived in this country with no understanding of the court system and no English, some may have had court proceedings initiated against them and been tried in absentia. Others were minors too young to remember that they had been in immigration court. As a result they may not know that they have final orders of deportation entered against them. We encourage all elements of the Department of Justice and the Immigration and Naturalization Service to work to facilitate making that information available to these individuals, including by affirmatively serving notice on Eligible Class Members subject to such orders. We also note that nothing herein prevents the Attorney General from adopting an approach to the deadlines set out here consistent with application of ordinary tolling principles. Finally, we note that if an Eligible Class Member files a motion to reopen and it is determined that the applicant would qualify for some other form of relief, such as adjustment on the basis of an approved visa with a current priority date, that could be adjudicated far more easily than a suspension application, that relief may be granted instead.

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Section 203(d) establishes certain temporary reductions in the number of visas made available in the `other workers' and `diversity' immigration categories. Beginning in FY 1999, up to 5,000 fewer visas shall be made available on an annual basis in the diversity category. A similar annual reduction shall be made in the `other workers' category, but that reduction shall not begin to be made until everyone with an approved petition for a visa in this category as of the date of enactment of the Act has had a visa made available to him or her. The total reduction in the visas issued under these two categories shall equal the total number of individuals described in subclauses I, II, III, and IV of section 309(c)(5)(C) of IIRIRA, as amended by this Act, who are granted cancellation of removal or suspension of deportation under the Act. Each category shall absorb half of the reductions.

[Page: S12267]

Section 204--Limitation on cancellations of removal and suspensions of deportation

IIRIRA established a 4,000-person annual limit on the Attorney General's ability to grant relief from repatriation. Eligible Class Members and designated family members, as well as those who were in deportation proceedings as of April 1, 1997 and who applied for suspension of deportation under INA Section 244(a)(3) (as in effect before IIRIRA), are excepted from this annual limit.

These exceptions to the 4,000-person limit having been made, it is expected that that limit should accommodate the remaining annual flow of successful suspension and cancellation applications. Should that projection prove erroneous, however, nothing in this Act is intended to prevent the Attorney General and those adjudicating suspension or cancellation applications on her behalf from pursuing the course that she has been following to this time of entering provisional grants of suspension or cancellation of deportation but postponing a final decision on the application until a slot becomes available. In no case is it Congress's intent that an otherwise meritorious application should be finally denied, and the applicant deported or removed, because the 4,000-person limit has been reached.

Mr. BIDEN. Mr. President, I am pleased to support this legislation. Included within this appropriations bill is historic legislation, produced on a bipartisan basis in the Foreign Relations Committee, regarding the institutional structure of, and funding for, American foreign policy. This important legislation to reorganize the foreign policy agencies of the U.S. Government and authorize the payment of U.S. arrearages to the United Nations is similar to a bill approved by the Senate last June by a vote of 90-5. Unfortunately, the bill which the Senate overwhelmingly approved has been bogged down in conference with the other body over an issue which has no relevance to this bill.

I am therefore grateful to the Chairman and Ranking Member of the Appropriations Committee, Senator **Stevens** and Senator **Byrd**, for agreeing to include provisions of our legislation in this bill.

I can assure my colleagues that the decision to include the authorization bill in an appropriations bill was not taken lightly. The Chairman of the Foreign Relations Committee, Senator **Helms**, and I sought to do so after careful consultation with the Senate leadership. But because two major elements of this bill are so critical to American foreign policy, the Chairman and I believed that we could not afford to delay this bill until next year. I hope my colleagues will agree.

ORRIN G. HATCH, UTAH, CHAIRMAN

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

December 2, 1998

The President
The White House
Washington, DC 20520

Dear Mr. President:

We are writing to encourage renewed leadership by the Administration on refugee resettlement. On September 30, 1998, we wrote to you expressing our concern about the proposed refugee admissions levels for FY 1999. Despite these concerns, the final Presidential determination remained the same as the proposed refugee admissions level, apparently because of budget decisions made last January. In order to avoid a recurrence of this problem in the coming fiscal year, we are communicating our views on this question now, so that the Administration can consider them in formulating its recommendation for the FY 2000 budget.

Our policy on refugees is important not only in terms of its effect on the United States, but also in terms of its effect on other countries' decisions. American leadership by example is important. As a leader in refugee policy, the United States has an obligation to maintain a strong refugee program. Meeting this obligation reaffirms our country's fidelity to our most cherished values and our long-standing humanitarian tradition of assisting the persecuted and oppressed. By maintaining a vigorous refugee resettlement program, we also set an example that other nations can follow.

We are concerned that America is falling short in our traditional leadership role in international refugee policy. Refugee admission ceilings have declined by more than 40 percent in recent years, from 142,000 in FY 1992 to 78,000 in FY 1999. At the same time, the decline in the number of refugees in other parts of the world has been much less, and there has also been a decrease in refugee burden-sharing among our friends and allies.

Since turmoil and civil strife in a number of major areas in the world continue, we had expected your decision to increase admission levels by 5,000 in FY 1998 to set a new direction for U.S. policy. However, FY 1999 saw a reduction of 5,000 in the refugee admissions ceiling, back down to 78,000.

In particular, we reiterate the concerns in our September 30 letter about specific areas of the world and the need for increased leadership by the United States in these areas. This increased leadership includes eliminating structural impediments and program criteria that prevent legitimate refugees from qualifying for and gaining access to interviews, and from being erroneously denied refugee status by adjudicators.

In the former Yugoslavia, pressure continues to increase on our allies to return Bosnians to situations that may be unsafe. We believe that the United States should maintain or increase current levels for Bosnian refugees, so that our refugee policy will be consistent with our foreign policy and our humanitarian objectives in the region.

In addition, we understand that the situation in Kosovo remains fluid. We believe that additional refugee numbers either within the former Yugoslavia sub-ceiling or in an expanded and funded unallocated reserve are necessary to take into account the Kosovar Albanians who will require permanent resettlement as a necessary durable solution.

In the former Soviet Union, we are concerned by the continuing uncertainty and the rise of religious intolerance. It will send an unacceptable signal to the leaders of the former Soviet Union if U.S. refugee admissions from that region continue to decline in the face of such intolerance and ongoing persecution. Within the past few weeks, the Russian Duma refused to condemn anti-Semitic accusations made by a Duma deputy general. The Communist-Nationalist Governor of Krasnodar has talked openly of dark Zionist plots and boasts of Cossacks at his command ready to burn down the homes of certain ethnic groups.

The situation is of equal concern for other religious groups and in other Newly Independent States. Even before the recent wave of economic and political turmoil, World Relief reported that, "Religious and ethnic minorities in the former Soviet Union continue to face persecution in the form of harassment by local government officials, loss of employment and employment opportunities, denial of educational opportunities, police interrogation, imprisonment, arson, and on occasion, violent attacks." Reports of efforts to prosecute Jehovah's Witnesses in Moscow indicate that the situation continues to worsen.

Another area of concern is the plight of unaccompanied minors. The United Nations High Commissioner for Refugees estimates that approximately 1 million unaccompanied refugee minors exist in the world today. Yet, in the last year, only one unaccompanied minor was resettled in the United States. We understand that the State Department has asked the United States Catholic Conference and the Lutheran Immigration and Refugee Service for guidance and assistance in properly identifying unaccompanied minors in need of resettlement. This is a significant step in the right direction and we hope that it will result in increased admissions.

Also of great concern are refugee women identified at risk by the UNHCR. Other resettlement countries, such as Canada, Denmark, New Zealand, and Australia, have established specific programs to resettle and offer comprehensive services to women who have been raped, suffered other sexual violence and exploitation, or other forms of abuse. The United States, as a leader in women's rights, should adopt a similar program.

Burma continues to be one of the world's most repressive countries. Approximately 200,000 Burmese are scattered throughout the region. Several thousand of them are pro-democracy activists, students, and advocates for greater ethnic political autonomy. Because of the threat of persecution, they may never be able to return to Burma. We urge that increased attention be given to the plight of Burmese refugees.

We also believe that more effective action is needed in the Near East and South Asia, particularly for Iraqis, Iranians, Afghans, and Algerians who face persecution if they return to their native lands.

We commend your recommendation to increase the FY 1999 refugee ceiling for Africa. Access to refugee groups in Africa is a major challenge and we strongly support your decision to establish an office in Dakar to facilitate the processing of these refugees. We feel that the situation in Sierra Leone and Great Lakes needs increased monitoring and cooperation with nongovernmental organizations to identify refugees in need of resettlement in the United States.

Strong bipartisan support has long existed in Congress for the refugee program. We are confident that you will receive such support for increased admissions. Previous levels of refugee admissions of 90,000 to 100,000 per year, which represent only a small fraction of the total number of immigrants to the United States, would be in keeping with our great tradition.

We look forward to working closely with you in the coming months to achieve the goal of restoring U.S. international leadership in refugee policy.

Sincerely,

Edward M. Kennedy
Ranking Member
Subcommittee on Immigration

Spencer Abraham
Chairman
Subcommittee on Immigration

Patrick J. Leahy
Ranking Member

Orrin G. Hatch
Chairman