

U.S. Department of Justice
Immigration and Naturalization Service



FACSIMILE TRANSMITTAL COVER SHEET

TRANSMITTED TO:

Office: Maria Echaveste
Julie Fernandez
Attention To: James Costello
Telephone No.: () - 456-1907
FAX No.: () - 456-5581
514-6897

TRANSMITTED FROM:

Office: Office of the General Counsel (HQCOU)
Name of Official: Mary Giovagnoli
Telephone No.: (202) 514-2895 616-0659 (home 202
FAX No.: (202) 514-0455/8044 332
7087)

Date Transmitted: 11/21/98

Number of Pages Transmitted: COVER+ 10

Comments: Summary of NACARA-203 regulation
per Ms Echaveste's request

PLEASE DELIVER IMMEDIATELY

INS Summary of Proposed Rule Implementing Section 203 of NACARA

Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries

OVERVIEW

The Department of Justice (Department) has submitted to the Federal Register the proposed rule implementing Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) for anticipated publication on November 24, 1998. This paper briefly summarizes the scope of the proposed rule and addresses, in particular, those portions of the rule most likely to receive public comment. Because this rule implements a new program affecting approximately 300,000 or more individuals, development of the program required significant interagency cooperation within the Department, and also involved extensive consultation with community and legal advocacy groups representing the affected populations. Consequently, the proposed rule reflects to the extent possible the administration's desire to consider the ameliorative effects of NACARA in the course of implementing the special provisions of suspension of deportation and cancellation of removal set forth in the statute.

This rule proposes to amend Department regulations by offering certain beneficiaries of NACARA who currently have asylum applications pending with the Immigration and Naturalization Service (INS), and their qualified dependents, the option of applying to the INS for suspension of deportation or cancellation of removal ("special rule cancellation of removal") under the statutory requirements set forth in NACARA. The Immigration Court will retain exclusive jurisdiction over most suspension of deportation and special rule cancellation of removal

is this
only for
those
who have
asylum
applications
pending?
What about
non-ABC
class members?

applications submitted by NACARA beneficiaries who have been placed in deportation or removal proceedings.

In addition, the rule proposes to compile and codify the relevant factors and standards for extreme hardship identified within existing case law in order to provide a more uniform and focused mechanism for evaluating this aspect of a person's eligibility for suspension of deportation or special rule cancellation of removal.

BACKGROUND

With certain exceptions, section 203 of NACARA permits certain Guatemalans, Salvadorans, and nationals of former Soviet bloc countries to apply for suspension of deportation or cancellation of removal under standards similar to those that existed prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Specifically, NACARA exempts qualified Guatemalans, Salvadorans, and nationals of former Soviet bloc countries from the "stop-time" rule, a provision contained in IIRIRA that limits the calculation of continuous physical presence, for purposes of suspension or cancellation eligibility, to the time period from date of entry into the United States to the date that a charging document is served against the individual and he or she is placed in immigration proceedings. In addition, section 203(b) of NACARA created a special rule for cancellation of removal for NACARA beneficiaries who have not been placed in deportation proceedings. Special rule cancellation of removal permits these individuals to apply for cancellation of removal under standards that are generally the same as those for suspension of deportation.

Section 204 of NACARA also amended the Act to exempt qualified NACARA beneficiaries from the limit on the number of individuals who may be granted suspension of deportation and cancellation of removal, and adjustments of status pursuant thereto, each year.

SCOPE OF PROPOSED RULE

The proposed rule amends 8 CFR section 240 by adding subpart H, relating to applications for suspension of deportation and special rule cancellation of removal under section 203 of NACARA. The rule reiterates the categories of eligible persons listed in Section 203 of NACARA and then sets forth the criteria under which a NACARA beneficiary may apply with the INS, the procedures that will be followed during the interview, eligibility criteria for relief, how decisions will be issued by the INS and the circumstances under which the INS will refer an applicant to the immigration court. Other amendments to Chapter 8 include identifying factors relevant to extreme hardship, authorizing NACARA applicants to apply for employment authorization, establishing the fees for applications, and establishing a new form, the I-881, that will be used for all Section 203 NACARA applications.

SUBMISSION OF APPLICATIONS TO INS

Under the proposed rule, asylum officers' jurisdiction to consider applications for suspension of deportation or special rule cancellation of removal falls into two categories: persons described in Section 203 of NACARA who currently have asylum applications pending before the INS (primarily registered ABC class members)¹ and the eligible spouses, children and unmarried sons or daughters of those individuals. Although a spouse, child, unmarried son, or unmarried daughter ("dependents") is not statutorily eligible to apply for such relief unless the "principal" spouse or parent has been granted suspension of deportation or cancellation of removal, the proposed rule permits dependents to submit applications for relief at the same time

¹ Specifically: (1) a Guatemalan or Salvadoran national who applied for asylum with the Service on or before April 1, 1990, and whose asylum application is pending with the Service;

(2) an ABC class member who is eligible for benefits of the ABC settlement agreement and who has not yet had a de novo asylum adjudication with the Service, under the terms of the settlement agreement;

as the principal applicant or while the principal's application is pending with the INS. In most cases, the principal and all dependents will be interviewed together, and a determination regarding the dependents' eligibility will be made immediately after the determination of the principal's eligibility. Even when a principal's application has been granted, however, some dependents may not be eligible for relief, as NACARA requires a dependent to independently establish that he or she meets all eligibility requirements, including a period of continuous physical presence.

With respect to aliens who have been placed in deportation or removal proceedings, this proposed rule gives authority to asylum officers to consider applications for suspension of deportation or special rule cancellation of removal submitted by qualified applicants only if an immigration judge has administratively closed those proceedings or the Board has continued those proceedings because (1) the applicant is entitled to a de novo asylum adjudication pursuant to the ABC settlement agreement; (2) the applicant is an ABC class member with a final order of deportation who is entitled to a de novo asylum adjudication pursuant to the ABC settlement agreement, has filed and been granted a motion to reopen under section 203(c) of NACARA and has requested that the reopened proceedings be closed in order to file for suspension of deportation before the Service; or (3) the applicant is the spouse, child, unmarried son, or unmarried daughter of a NACARA beneficiary who is eligible to apply for, and has applied for, suspension of deportation or special rule cancellation of removal with the Service, and the Immigration Court or the Board has administratively closed or continued the proceedings to permit the applicant to submit an application for suspension of deportation or special rule cancellation of removal with the Service.

(3) a national of a former Soviet bloc country who meets the application eligibility criteria in section 203 of NACARA and who has an asylum application pending with the Service.

All other persons in deportation or removal proceedings who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA must apply for this relief before the Immigration Court. A person who is not in proceedings and who is ineligible to apply with the Service for discretionary relief under section 203 of NACARA will not be permitted to submit an application unless and until he or she is placed in removal proceedings. Under section 203 of NACARA, there is no deadline for filing an application for special rule cancellation of removal. The decision to place an alien in proceedings lies solely within the discretion of the Service.

FORM, FEE, WORK AUTHORIZATION

✓ Under the proposed rule, applications for relief under NACARA will be submitted on Form I-881, a form designed to assist unrepresented individuals identify and explain the relevant eligibility criteria, particularly those relating to extreme hardship. The proposed rule permits NACARA applicants to apply for employment authorization, on a separate form, at the time they submit the Form I-881.

The application fee for adjudication by the INS will be \$215 for a single applicant, with a maximum family cap of \$430. The fee for applications submitted to the immigration court will continue to be \$100 per individual or family, the current fee required of suspension or cancellation applicants. The difference in the fee structure is the result of the nature of the funding for the two agencies. The INS is required by law to recover the costs of all adjudications, while the Executive Office for Immigration Review receives funding to support the costs of immigration court proceedings. The justification for the higher fee and the manner in which it was calculated are explained in great detail in the supplemental information accompanying the proposed rule.

ELIGIBILITY FOR RELIEF

Because the eligibility criteria for suspension of deportation can be found only in the statute as it existed prior to IIRIRA, and the criteria for special rule cancellation of deportation can be found only in NACARA, the proposed rule contains all relevant information regarding the statutory requirements for suspension of deportation or special rule cancellation of removal.²

Continuous Physical Presence

Although special rule cancellation of removal virtually mirrors suspension of deportation, certain statutory provisions are different. Most notably, for purposes of calculating continuous physical presence, suspension of deportation applicants must establish that any departures from the United States were brief, casual and innocent, while special rule cancellation applicants are only instructed that any departure or departures exceeding 90 days or 180 days in the aggregate breaks the period of continuous physical presence. In order to treat applicants for both forms of relief in a consistent and fair manner, the proposed rule clarifies that applicants for special rule cancellation of removal will be required to show that absences of a shorter duration are brief, casual and innocent. In this way, the rule ensures that the principles established in the caselaw governing suspension of deportation—for instance, the determination that a departure under an order of deportation or the threat of an order of deportation breaks continuous physical presence—will be applied equally to persons applying for special rule cancellation of removal.

² Generally, an applicant for either form of relief must meet the following eligibility requirements (more restrictive requirements apply to persons who have been convicted of certain crimes): (1) the applicant been physically present in the United States continuously for at least 7 years before applying for the relief; (2) the applicant is and has been a person of good moral character during those 7 years of physical presence; and (3) removal from the United States would result in extreme hardship to the applicant, or to the applicant's spouse, parent, or child, who is a United States citizen or alien lawfully admitted for permanent residence.

Extreme Hardship

The proposed rule also provides, for the first time, a codification of the factors that may be considered when evaluating extreme hardship. Under this proposed rule, asylum officers will be required to consider suspension of deportation and special rule cancellation of removal applications under the same legal standards that govern adjudication by the Immigration Court.

✓ The rule will be binding on both asylum officers and immigration judges.

The proposed rule is not intended to overturn or modify existing case law. Nor does it intend to limit the development through case law of other relevant factors. Instead, codification is intended to assist adjudicators, attorneys, and applicants to identify factors that may be relevant to an extreme hardship determination in the context of an application for suspension of deportation or special rule cancellation of removal.

This proposed rule maintains the flexibility of the existing standard by identifying broad factors that have been cited in existing precedent decisions as relevant to the evaluation of whether deportation would result in extreme hardship to the alien or to his or her qualified relative. These factors are (1) the age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation; (2) the age, number, and immigration status of the alien's children and their ability to speak the native language and adjust to life in another country; (3) the health condition of the alien or the alien's child, spouse, or parent and the availability of any required medical treatment in the country to which the alien would be returned; (4) the alien's ability to obtain employment in the country to which the alien would be returned; (5) the length of residence in the United States; (6) the existence of other family members who will be legally residing in the United States; (7) the financial impact of the alien's departure; (8) the impact of a disruption of educational opportunities; (9) the psychological impact of the alien's deportation or removal; (10) the current political and

economic conditions in the country to which the alien would be returned; (11) family and other ties to the country to which the alien would be returned; (12) contributions to and ties to a community in the United States, including the degree of integration into society; (13) immigration history, including authorized residence in the United States; and (14) the availability of other means of adjusting to permanent resident status.

The rule notes that the evaluation of extreme hardship remains a discretionary determination that must be made on a case-by-case basis, but it also reminds adjudicators that an applicant is not required to present all the listed factors. The rule also indicates that the fact that an applicant's case for extreme hardship is not unique does not reduce the possibility that it may be extreme hardship for that individual or his or her relevant family members. Similarly, the supplemental information notes that the conditions under which an applicant fled his or her country may continue to be relevant in assessing extreme hardship if returned to that country.

INTERVIEW PROCESS

The proposed rule explains in detail the procedures that will be used in scheduling applicants, as well as the nature of the interview. These procedures are virtually identical to the procedures currently used by the asylum office for the assessment of asylum applications.

Interviews will be conducted in a non-adversarial setting. The applicant will be required to provide an interpreter if he or she does not wish to proceed in English. An applicant may be represented by an attorney at ^{no} cost to the government, and the attorney may present a short statement at the completion of the interview. Applicants will be scheduled for a fingerprinting appointment prior to their interview; the INS must receive clearance on the fingerprints prior to granting an application.

In most cases, the applicant will be given a notice to return to the Asylum Office to pick up the decision and, if necessary, to be served charging documents placing the person in removal proceedings. If the applicant appears eligible for suspension of deportation or special rule cancellation of removal, the applicant will be asked to concede deportability or admissibility, as relief may only be granted to someone who is either deportable from or inadmissible to the United States. Under the rule, asylum officers will not be authorized to make such a finding, and therefore, the applicant must voluntarily concede, in writing, that he or she is unlawfully present in the United States. An applicant will not be asked to make this concession if the application will be referred to the immigration court for further proceedings.

What if a person is not eligible for suspension of removal?

ELIGIBILITY DETERMINATIONS

If an applicant has applied for asylum and suspension of deportation or special rule cancellation of removal with the INS, the applications will be considered concurrently and the applicant will be granted relief where appropriate. Generally, under the proposed rule, an applicant's case will only be referred to an immigration judge when the INS finds that the applicant is not clearly eligible for suspension of deportation or special rule cancellation of removal and is ineligible for asylum. In certain cases, however, the applicant may exercise his or her option to continue to pursue a determination that he or she is ineligible for asylum before the immigration court. The process for referring the asylum applications of ABC class members depends on the terms of the settlement agreement, and is explained in detail in the supplemental information accompanying the proposed rule.

The INS may refer a suspension of deportation or special rule cancellation of removal application to the Immigration Court under other conditions as well, including a determination that the individual only qualifies for relief under the provisions relating to criminal aliens or

battered spouses, it appears that relief should be denied as a matter of discretion; the applicant declines to concede inadmissibility or deportability; or the applicant fails to appear for an interview or for a fingerprint appointment, and such failure to appear is unexcused. In the case of an unexcused failure to appear for an interview or for fingerprinting, the Service may refer the application to the Immigration Court without conducting an interview, or the Service may dismiss the application.

TRAVEL OUTSIDE THE UNITED STATES

Applicants for suspension of deportation or special rule cancellation of removal under NACARA are subject to present rules and procedures governing advance parole. Nothing in NACARA authorizes travel outside the United States for beneficiaries. Those NACARA beneficiaries who leave the country without first obtaining advance parole and who are inadmissible under section 212(a)(C) or 212(a)(7) may be subject on their return to expedited removal under section 235(b) of the Act.

*but even if
get advanced
parole,
no longer
eligible
for
suspension*

NACARA beneficiaries who leave the country and are paroled back in will no longer be eligible for suspension of deportation since they would be inadmissible to the United States, rather than deportable from the United States.

COMMENT PERIOD

The public will have 60 days from the date of publication to comment on the proposed rule.

NATIONAL SECURITY COUNCIL

OFFICE OF MULTILATERAL AND HUMANITARIAN AFFAIRS

FAX COVER SHEET

**NATIONAL
SECURITY
COUNCIL**17th & Penn, N.W.
Washington, D.C.
20504Did you get a complete,
clear transmission? If not,
please call:

(202) 456-9141

From: Scott Busby 456-9141 (phone) 456-9140 (fax)**To:** Julie Fernandez

6:55 PM

Date/Time:**No. of pages to follow:** 10**RE:**NACRA charges

Morton John T

From: Mary E Giovagnoli
Sent: Monday, October 05, 1998 4:52 PM
To: Morton John T
Subject: Proposed Honduran amendments

John:

I am faxing you a copy of a draft version of proposed amendments to Sections 202 and 203 of NACARA as well as section by section comments. As I'm sure Bo told you, we have taken the opportunity to put together a package of amendments that would do more than simply add the Hondurans to the list of eligible 203 applicants. (For the Hondurans alone, only two changes would be necessary:

adding them to the list contained in 309(c)(5)(C)(i) and setting a period of time for motions to reopen).

This is very much a draft, but what we've tried to do is address implementation problems with which you are probably very familiar. Most notably, we have included family unity provisions that would delete the nationality requirement for spouses and kids under NACARA 202 and a modified suspension/adjustment provision for spouses and kids under 203. In the 203 context, a spouse, child, unmarried son or unmarried daughter would be eligible to adjust their status following a grant to the parent or spouse, assuming that certain criteria are met (we are essentially eliminating the the continuous physical presence requirement and extreme hardship requirement, while preserving other eligibility requirements). The other proposed changes—permitting persons in exclusion proceedings to apply for suspension of deportation, permitting persons who have received advance parole to continue to apply for suspension although they would be inadmissible, rather than deportable, upon their return to the U.S., fixing the discretionary bars to relief problem (one of the big headaches of the MTR regulation)—go to specific problems regarding groups that appear to be unintentionally excluded from relief. EOIR has seen the draft and asked us to include language in the motion to reopen striking "made eligible by NACARA" and simplifying it by inserting "persons described in 309(c)(5)(C)(i)". I've done this, we have mixed feelings about it over here, as we are worried that it might be too broad. They are looking into other fixes and have promised to get back to me today. Right now, they aren't so crazy about the proposal to give spouses and children a break or to extend suspension to include persons in exclusion proceedings. We hope to offer you another version by tomorrow that reflects whatever agreements we can come to. I must say, however, that I think the family unity provisions are extremely worthwhile, will save us tons of time and administrative headaches, and are an example of good will.

Mary

DRAFT

Sec. (1) Section 202 of the Nicaraguan Adjustment and Central American Relief Act, HR 1565, Pub.Law 105-100, 111 Stat. 2193 (November 19, 1997) (as amended by Pub.Law 105-119, 111 Stat. 244) (NACARA) is amended in subsection (d) by striking subclause (A) of subparagraph (1).

* *

Sec. (2) Section 203 of NACARA is amended in subsection (a) by striking subparagraph (1) and inserting in lieu thereof—

(1) IN GENERAL.—Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; division C; 110 Stat. 3009-627) is amended to read as follows:

"(5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

"(B) EXCEPTION FOR CERTAIN ORDERS.—In any case in which the Attorney General elects to terminate and reinstitute proceedings in accordance with paragraph (3) of this subsection, paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply to an order to show cause issued before April 1, 1997.

"(C) SPECIAL RULE FOR CERTAIN ALIENS GRANTED TEMPORARY PROTECTION FROM DEPORTATION.—

"(i) IN GENERAL.—For purposes of calculating the period of continuous physical presence under section 244(a) of the Immigration and Nationality Act (as in effect before the title III-A effective date) or section 240A of such Act (as in effect after the title III-A effective date), subparagraph (A) and paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply in the case of an alien, regardless of whether the alien is in exclusion or deportation proceedings before the title III-A effective date, who has not been convicted at any time of an aggravated felony (as defined in section 101(a) of the Immigration and Nationality Act) and—

"(I) was not apprehended after December 19, 1990, at the time of entry, and is—

"(aa) a Salvadoran national who first entered the United States on or before September 19, 1990, and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al. v. Thornburgh (ABC), 760 F. Supp.

DRAFT

796 (N.D. Cal. 1991) on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or

"(bb) a Guatemalan national who first entered the United States on or before October 1, 1990, and who registered for benefits pursuant to such settlement agreement on or before December 31, 1991;

"(II) is a Guatemalan or Salvadoran national who filed an application for asylum with the Immigration and Naturalization Service on or before April 1, 1990;

"(III) is an alien who entered the United States on or before December 31, 1990, who filed an application for asylum on or before December 31, 1991, and who, at the time of filing such application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

(IV) is a Honduran national who filed an application for asylum on or before December 31, 1991.

"(ii) AVAILABILITY OF RELIEF TO ALIENS IN EXCLUSION PROCEEDINGS AND TO THOSE ALIENS WHOSE DEPARTURES ARE AUTHORIZED BY THE ATTORNEY GENERAL.—(I) An alien described in subsection 309(e)(5)(C)(i) of this section who was placed in exclusion proceedings prior to the title III-A effective date may apply for suspension of deportation provided that

(aa) if the alien applies for relief under Section 244(a)(1) of the Act as in effect prior to the title III-A effective date, he or she is not inadmissible under paragraph (2) or (3) of section 212(a) of the Act as in effect prior to the title III-A effective date and is not a person described in section 243(h)(2)(A) or paragraphs (2), (3), or (4) of section 241(a) of the Act as in effect prior to the title III-A effective date; or

(bb) if the alien applies for relief under Section 244(a)(2) of the Act as in effect prior to the title III-A effective date, he or she is not a person described in section 243(b)(2)(A) of the Act as in effect prior to the title III-A effective date, and is inadmissible under paragraph (2) or (3) of section 212(a) of the Act as in effect prior to the title III-A effective date, or is a person described in paragraphs (2), (3), or (4) of section 241(a)

DRAFT

of the Act as in effect prior to the title III-A effective date.

(II) Aliens described in section 309(c)(5)(C)(i) who were placed in deportation or exclusion proceedings prior to the title III-A effective date and who, during the course of those proceedings, depart the United States pursuant to authorization by the Attorney General, shall remain eligible to apply for suspension of deportation provided that they are not inadmissible under paragraph (2) or (3) of section 212(a) of the Act, and meet the eligibility requirements set forth in section 244 of the Act as in effect prior to the title-III effective date.

"(iii) LIMITATION ON JUDICIAL REVIEW.—A determination by the Attorney General as to whether an alien satisfies the requirements of this clause (i) is final and shall not be subject to review by any court. Nothing in the preceding sentence shall be construed as limiting the application of section 242(a)(2)(B) of the Immigration and Nationality Act (as in effect after the title III-A effective date) to other eligibility determinations pertaining to discretionary relief under this Act."

Sec. (3) Section 203 of NACARA is further amended in subsection (c) to read as follows—

(c) MOTIONS TO REOPEN DEPORTATION OR REMOVAL PROCEEDINGS.—Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; 110 Stat. 3009-625), as amended by subsection (b), is further amended by adding at the end the following:

"(g) MOTIONS TO REOPEN DEPORTATION OR REMOVAL PROCEEDINGS.—

"(g) MOTIONS TO REOPEN DEPORTATION OR REMOVAL PROCEEDINGS.— Notwithstanding any limitation imposed by law on motions to reopen removal or deportation proceedings (except limitations premised on an alien's conviction of an aggravated felony (as defined in section 101(a) of the Immigration and Nationality Act)), any alien who ~~has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by section 203 of the Nicaraguan Adjustment and Central American Relief Act~~ is described in subsection 309(c)(5)(C)(i) of this section may file one motion to reopen removal or deportation proceedings to apply for cancellation of removal or

DRAFT

suspension of deportation. The Attorney General shall designate a specific time period in which all such motions to reopen are required to be filed. The period shall begin not later than 60 days after the date of the enactment of the Nicaraguan Adjustment and Central American Relief Act and shall extend for a period not to exceed 240 days, except in the case of persons described in subsections 309(c)(5)(C)(i)(VI) , 309(c)(5)(C)(ii)(I) of this section, for whom the filing period shall begin not later than 60 days after the date of enactment of [name of this amendment] and shall extend for a period not to exceed 240 days.

"(2) An alien described in section 309(c)(5)(C)(i) of IIRIRA, as amended by this Act, who is otherwise eligible for—

(A) suspension of deportation pursuant to section 244(a) of the Immigration and Nationality Act, as in effect before the title III—A effective date; or

(B) cancellation or removal, pursuant to section 240A(b) of the Immigration and Nationality Act and section 309(f) of IIRIRA; shall not be barred from applying for such relief by operation of section 240B(d) of the Immigration and Nationality Act, as in effect before the title III—A effective date, or 242B(c)(2), (3), or (4) as in effect prior to April 1, 1997. Nothing in this subsection shall preclude an alien from filing a motion to reopen pursuant to sections 240(b)(5)(C)(ii) of the Immigration and Nationality Act, or 242B(c)(3)(B) as in effect before the title III—A effective date."

Sec. (4) Section 203 of NACARA is further amended by adding the following subsection—

(g) Treatment of Spouses and Children-- Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; 110 Stat. 3009-625), as amended by subsection (b), is further amended by adding at the end the following:

(h) Treatment of Spouses and Children— A spouse or child (as defined in section 101(b)(1) of the Immigration and Nationality Act), or an unmarried

DRAFT

son or unmarried daughter 21 years of age or older of an alien who (i) is described in subsection 309(c)(5)(C)(i) of this section and (ii) has been granted suspension of deportation or special rule cancellation of removal, may be granted the same status as that of the alien, regardless of whether the spouse, child, or unmarried son or unmarried daughter 21 years of age or older was in exclusion, deportation or removal proceedings and regardless of whether such applicant has a final order of deportation, provided that the spouse, child, or unmarried son or unmarried daughter 21 years of age or over, is listed on the alien's application for suspension of deportation or special rule cancellation of removal, is present in the United States at the time the alien's application for suspension of deportation is granted, the relationship exists at the time the application is granted, and that he or she

- (A) has not been convicted at any time of an aggravated felony, as defined in section 101(a) of the Immigration and Nationality Act; and
- (B) is not an alien described in section 241(b)(3)(B)(i) of such Act.; and
- (C) is not inadmissible under paragraph (2) or (3) of section 212(a) of the Act or deportable under paragraph (2), (3), or (4) of section 237(a) of such Act; and
- (D) has been a person of good moral character for the seven year period preceding the grant of suspension of deportation or special rule cancellation of removal to the parent or spouse ; and
- (E) in the case of a son or daughter who is 21 years of age or older at the time the alien parent's status is adjusted under this section, the son or daughter entered the United States on or before October 1, 1990.

DRAFT

Section by Section Commentary on Proposed Amendments to the Nicaraguan Adjustment and Central American Relief Act

In General

The Nicaraguan Adjustment and Central American Relief Act (NACARA) provides certain Cubans, Central Americans, and nationals of the former Soviet bloc the opportunity to seek relief from removal by expanding the availability of certain forms of discretionary relief available to these groups. Section 202 of NACARA permits eligible Cubans and Nicaraguans who have been physically present in the United States as of December 1, 1995 to apply for adjustment of status to that of lawful permanent resident. Section 203 of NACARA permits certain Salvadorans, Guatemalans, and nationals of former Soviet bloc countries to apply for suspension of deportation or cancellation of removal without regard to the "stop-time" provisions contained in Section 309(c)(5) of IIRIRA or 240A(d)(1) of the Act, as amended by IIRIRA. Congress also created a "special rule for cancellation of removal" in Section 203(b) of NACARA that permits qualified aliens from these countries to apply for cancellation of removal under standards that basically mirror suspension of deportation.

The amendments to NACARA proposed in this legislation expand the availability of relief under section 203 to include Hondurans who applied for asylum in the United States on or before December 31, 1991. The proposed amendments also address technical problems that have become apparent to Department of Justice personnel and members of the affected communities in the course of promulgating regulations for the implementation of sections 202 and 203 of NACARA.

Section 1

Subsection (d) of Section 202 permits spouses and children of those Nicaraguans and Cubans whose status is adjusted on the basis of paragraph (b) of Section 202 to apply for and receive adjustment of status, generally without regard to the length of time the spouse or child has been physically present in the United States. Although it appears that Congress intended to ensure family unity by this measure, subsection (d)(1)(A) limits the availability of this form of relief to spouses or children who are Nicaraguan or Cuban. Section 1 of the proposed amendment would eliminate this requirement, thereby ensuring that Section 202 beneficiaries are not separated from family members of another nationality.

Section 2

Section 203(a) of NACARA amends Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to exempt certain individuals from provisions of IIRIRA relating to the calculation of continuous physical presence for the purpose of suspension of deportation or cancellation of removal (the "stop-time" rule). As amended by NACARA, Section 309(c)(5)(C)(i) of IIRIRA sets forth the categories of persons exempt from this provision. Section 2 of the proposed amendment adds

DRAFT

Hondurans who applied for asylum prior to December 31, 1991 to the list of persons eligible to apply for relief without regard to the stop-time rule. The proposed amendment would also delete those provisions of Section 309(c)(5)(C)(i) of IIRIRA which describe spouses, children or unmarried sons or unmarried daughters over the age of 21, in order to establish a separate provision (discussed below) to permit eligible dependents to adjust their status based on a grant of suspension of deportation or cancellation of removal to the principal applicant.

Section 2 also amends section 309(c)(5) by inserting a new subsection (ii), relating to eligibility for relief to persons in exclusion proceedings and persons who have received advanced authorization to depart the United States. Under the Act, as in effect prior to April 1, 1997, only persons in deportation proceedings, that is, persons who were charged as deportable from the United States, are entitled to apply for suspension of deportation. In contrast, cancellation of removal, the successor to suspension of deportation, is available to persons in removal proceedings regardless of whether they are inadmissible or deportable. Consequently, those persons described in section 309(c)(5)(C)(i) of IIRIRA who were in proceedings prior to April 1, 1997 may only take advantage of Section 203 NACARA relief if they were in deportation proceedings, while persons who were not in proceedings prior to April 1 may apply for relief under NACARA regardless of whether they are found to be inadmissible or deportable from the United States. Proposed Section 309(c)(5)(C)(ii)(I) would eliminate this distinction by ensuring that anyone described in section 309(c)(5)(C)(i) could take advantage of the relief authorized by Section 203 of NACARA.

In addition, proposed Section 309(c)(5)(C)(ii)(II) would address a second implementation problem arising from the inadmissibility/deportability distinction. This problem relates to aliens unlawfully present in the United States who are pursuing immigration benefits and who desire to briefly depart the United States for urgent humanitarian reasons, such as the serious illness or death of a family member. Under Section 212(d)(5), of the Act, the Attorney General has the authority to grant "advance parole"—essentially a guarantee that the individual will be permitted to return to the country, although he or she will not be considered to have been admitted to the United States. Consequently, an individual who receives advance parole would be permitted to temporarily enter the United States (generally, to continue to pursue a benefit), but his or her status would be that of an inadmissible alien. For aliens seeking special rule cancellation of removal, the question of status—whether one is considered deportable or inadmissible—is irrelevant to their application, as one may be either inadmissible or deportable when applying for cancellation relief. As noted in the preceding paragraph, however, persons applying for suspension of deportation must be deportable and thus, if they exit the United States under advance parole, they would no longer be eligible to apply for suspension of deportation upon return. Proposed section 309(c)(5)(C)(ii)(II) would correct that disparity by making such persons eligible for relief as long as they were not charged as inadmissible on the basis of criminal activities or security grounds. This requirement parallels that found in Section 244(a)(1), which limits eligibility for relief to persons who are not deportable on the basis of criminal or security grounds. Because advance parole is itself a discretionary benefit limited to urgent humanitarian purposes, the proposed amendment does not include persons seeking suspension of deportation under section 244(a)(2).

Section 3

DRAFT

Section 203(c) of NACARA permits certain aliens with final orders to submit one motion to reopen in order to apply for NACARA suspension of deportation or special rule cancellation of removal. Section 3 amends this paragraph in two ways. First, with respect to who may file a motion to reopen, the amendment deletes the phrase "any alien who has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by section 203 of the Nicaraguan Adjustment and Central American Relief Act" and inserts "any alien who is described in subsection 309(c)(5)(C)(i)." This amendment would clarify that any person who meets the criteria set forth by Congress in Section 309(c)(5)(C) (1) is entitled to file a motion to reopen, thus reducing significant confusion within the immigrant community regarding the meaning of the language "made eligible by." This provision would also ensure that determinations regarding eligibility were based on the merits of the alien's application rather than on litigation surrounding the ability of the alien to reopen.

Next, because the designated filing period for submission of NACARA motions to reopen has lapsed, this section amends the designated filing period to permit Hondurans and persons in exclusion proceedings an opportunity to submit such motions.

Section 3 also creates subparagraph (2) of paragraph (g) which would clarify that discretionary bars to relief which ordinarily preclude an alien from applying for suspension of deportation or cancellation of removal do not apply to persons described in section 309(c)(5)(C)(i). This clarification is necessary to address certain gaps in eligibility requirements not accounted for in the initial legislation. Although the inclusion of a special provision for reopening demonstrates that Congress intended to extend NACARA benefits to aliens with final orders, many of these aliens are statutorily ineligible to apply for special rule cancellation of removal or suspension of deportation because they are subject to the bars to discretionary relief contained in section 240B(d) of the Act (overstay of voluntary departure) or section 242B(e)(2),(3), or (4) as in effect prior to April 1, 1997 (overstay of voluntary departure, failure to appear for a deportation order, or failure to appear for an asylum hearing).

Absent an amendment exempting eligible NACARA beneficiaries from these bars, the Department of Justice has determined that such individuals are not entitled to reopen their cases. As it appears that Congress intended to provide certain aliens under final orders of deportation or removal the opportunity to apply for suspension of deportation or cancellation of removal, the proposed amendment clarifies that an otherwise eligible alien will not be prevented from moving to reopen his or her case and will not be barred from applying for relief under Section 203 of NACARA solely on the basis of one of the discretionary bars to relief described above. This amendment will not, however, affect the requirement that an alien establish prima facie eligibility for the relief sought.

Section 4

DRAFT

Generally, eligibility to apply for suspension of deportation or special rule cancellation of removal under Section 203 of NACARA is predicated both on nationality requirements and on filing an asylum application within a certain period of time. Congress exempted spouses, children and unmarried sons and unmarried daughters of Section 203-eligible aliens from these requirements, basing initial eligibility to apply for NACARA relief on the grant of relief to the alien parent or spouse. Thus, if the parent or spouse is granted relief under Section 203, the dependent spouse or offspring becomes eligible to apply for suspension of deportation or special rule cancellation of removal. The dependent must establish independent eligibility, including proof of seven years of continuous physical presence. Reports from the INS field offices, the Executive Office for Immigration Review, and advocacy groups representing the affected communities have established that the independent eligibility requirement is causing great hardship within the communities, as many NACARA eligible applicants have spouses or children who have not continuously resided in the United States for seven years or more. Many individuals who have the opportunity to seek relief face the prospect of separation from their spouses or children who will not be eligible for NACARA relief. Given the ameliorative purpose of NACARA and the administration's commitment to family unity, eliminating the independent eligibility requirement for the dependents of aliens granted relief under Section 203 better reflects the intent of NACARA legislation.

Consequently, Section 4 of this proposed legislation amends section 309(c)(5) of IIRIRA by adding paragraph (h), relating to the adjustment of dependents. Much like the adjustment provision of Section 202, Section 203 dependents would be permitted to adjust their status following a grant of relief to the principal applicant, provided that they were able to establish good moral character, met certain admissibility requirements and had not been convicted of an aggravated felony.

e-mail to Maria
re: parity for Sal/Guat (amnesty)
⊕ Hondurans (?)

Native Amer
Race Transition Mktg.

10/6/98

NACARA implementation

Want NACARA amended

support leg. to end disparate treatment
built in to be fixed.

4/97 - ABC cases started to be heard

11/97 - NACARA signed

12/97 or 1/98 - some cases were heard during this period
(Stopped in January)

Ct. is not staying procedures for NACARA-eligible cases.

Denied

Newark judges are not waiting for the reg. to hear these cases under NACARA standard
"Depends which judge you speak to" — how generous a given BIA decision is.

Dispute re: grant rate
for Salvadorans and Guatemalans

Fundamental problem — that NACARA @ discretion of immigration judges.

DoJ: no general finding of extreme hardship
so, we get individual discretion.

Fear in the community.

⊕ general finding of extreme hardship for ABC class members (?)

Amend NACARA → amnesty for Sal/Guat

Rep. members: no one is engaging them on making these changes. (amnesty for Sal/Guat).

Gutierrez / Durbin bill

Salvadorans will have the largest # (but not higher than Nicaraguans)

Large #s really speak to the magnitude of the injustice that took place during the 1980s.

Want a strong statement from Pres. that Central Am. should get the same treatment as Nicaraguans / Cubans / Eastern Europeans.

Julie, —

The NACARA rule.

I don't know when INS needs
comments but it is probably
relatively soon.

Stuart.

REGULATORY REVIEW WORKSHEET

OMB NUMBER: 1115-A500
 RIN NUMBER: 1115-AF14
 CHRONOLOGY: No previous reference

RECEIVED : 09/22/1998
 E.O. DUE DATE: 12/21/1998
 EXTENDED : (Y/N)
 APPEALED : __/__/__

AGENCY : Department of Justice
 SUBAGENCY : Immigration and Naturalization Service

TITLE: Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador and Former Soviet Bloc Countries

STAGE: Proposed Rule
 LEGAL DEADLINE: No

ECONOMICALLY SIGNIFICANT: No
 UNFUNDED MANDATE : No

DESK OFFICER: Stuart Shapiro
 ANALYST : Richard Theroux

ACTION:

- ☐ (1) Consistent Without Change
- ☐ (2) Consistent With Change
- ☐ (3) Withdrawn by Agency
- ☐ (7) Returned - Sent Improperly
- ☐ (9) Returned for Reconsideration
- ☐ (11) Emergency
- ☐ (12) Statutory or Judicial Deadline

ECONOMICALLY SIGNIFICANT: ☐ Yes ☐ No
 MAJOR : ☐ Yes ☐ No
 UNFUNDED MANDATE : ☐ Yes ☐ No
 (If yes, check all that apply)
☐ State, local, tribal governments
☐ Private Sector

REGULATORY IMPACT:

- ☐ (D) Deregulatory
- ☐ (R) Regulatory
- ☐ (N) Nonregulatory

SIGNATURES AND DATES:

RMO	Desk Officer	Economist	OIRA
-----	-----	-----	-----
Date: _____	Date: _____	Date: _____	Date: _____

AGENCY NOTIFIED: __/__/__

TITLE:

+ Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries

RIN: 1115-AF14 (FINAL)

REGULATORY PLAN: No

PRIORITY: Other Significant

REINVENTING GOVERNMENT:

This rulemaking is not part of the Reinventing Government effort.

LEGAL AUTHORITY:

5 USC 552; 5 USC 552a; 8 USC 1101; 8 USC 1103; 8 USC 1158;
8 USC 1201; 8 USC 1252; 8 USC 1252b; 8 USC 1282; 8 USC 1304;
8 USC 1356; 31 USC 9701

CFR CITATION:

8 CFR 103; 8 CFR 204; 8 CFR 208; 8 CFR 299

LEGAL DEADLINE: None

ABSTRACT:

On November 19, 1997, President Clinton signed the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title 2 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-139, Stat. 2644, (1997)). Section 203 of NACARA provides that certain Guatemalans, Salvadorans, and nationals of former soviet Bloc countries are eligible to apply for cancellation of removal under the standards for suspension of deportation that existed prior to enactment of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA).

To implement the new cancellation of removal provisions efficiently and expeditiously, the Attorney General has decided to integrate adjudication of cancellation of removal requests into the affirmative asylum process. Traditionally, only immigration judges have had authority to grant suspension of deportation and, after implementation of IIRIRA, cancellation or removal, to eligible aliens in the context of deportation or removal proceedings. The proposed rule authorizes asylum officers to grant cancellation of removal under section 203 of NACARA to certain qualified aliens who have asylum applications pending with the Service, and to their qualified dependents. The rule also sets forth the process for the new adjudication program.

RIN: 1115-AF14

DATE 9/22/98

TITLE:

PAGE 2

Suspension of Deportation and Special Rule Cancellation of
Removal for Certain Nationals of Guatemala, El Salvador, and
Former Soviet Bloc Countries

TIMETABLE:

ACTION	DATE	FR CITE
Interim Final Rule (INS No. 1915-98).....	10/00/98	
Final Rule.....	02/00/99	

REGULATORY FLEXIBILITY ANALYSIS REQUIRED: No

SMALL ENTITIES AFFECTED: No

GOVERNMENT LEVELS AFFECTED: Federal

ADDITIONAL INFORMATION:

INS No. 1915-98

AGENCY CONTACT:

Joanna Ruppel,
Asylum Officer,
International Affairs,
Department of Justice,
Immigration and Naturalization Service,
425 I Street NW.,
ULLICO 3rd Floor,
Washington, DC 20536,
202 305-2741

EXECUTIVE ORDER 12866 SUBMISSION**Important**

Please read the instructions on the reverse side before completing this form.

For additional forms or assistance in completing this form, contact the OIRA Docket Library, (202) 395-8880, or your OIRA Desk Officer.

Send three copies of both this form and supporting material (four copies if Economically Significant or an Unfunded Mandate) to:

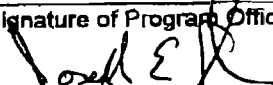
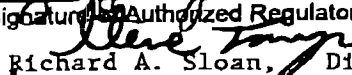
Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 10102
725 17th Street, N.W.
Washington, D. C. 20503

RECEIVED
SEP 22 1998
OIRA DOCKET LIBRARY

1. Agency/Subagency originating request Department of Justice Immigration and Naturalization Service	2. Regulation Identifier Number (RIN) 1115 - AF14 1115-AS07
3. Title Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries	
4. Stage of Development ☐ Prerule ☒ Proposed Rule ☐ Interim Final Rule ☐ Final Rule ☐ Final Rule - No material change ☐ Notice ☐ Other Description of Other _____	5. Legal Deadline for this submission a) ☐ Yes ☒ No b) Date ____ / ____ / ____ DD MM YYY c) ☐ Statutory ☐ Judicial 6. Designations a) Economically Significant (E.O. 12866) ☐ Yes ☒ No b) Unfunded Mandate (2 U.S.C. 1532) ☐ Yes ☒ No If either of the above is "Yes," submit four (4) complete packages to OIRA
7. Agency Contact (person who can best answer questions regarding the content of this submission) Joanna Ruppel Phone (520) 327-5886	

Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E. O. 12866 and any applicable policy directives.

Signature of Program Official  Acting Director, Asylum Division	Date 7-24-98
Signature of Authorized Regulatory Contact  Richard A. Sloan, Director, Policy Directives and Instructions	Date 7-27-98

BILLING CODE: 4410-10

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 208, 240, 274a, 299

INS No. 1915-98; AG Order No.

RIN 1115-AF14

**Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals
of Guatemala, El Salvador, and Former Soviet Bloc Countries**

AGENCY: Immigration and Naturalization Service, and Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Department of Justice (Department) regulations by offering certain beneficiaries of the Nicaraguan Adjustment and Central American Relief Act (NACARA) who currently have asylum applications pending with the Immigration and Naturalization Service (Service), and their qualified dependents, the option of applying with the Service for suspension of deportation or cancellation of removal under the statutory requirements set forth in NACARA ("special rule cancellation of removal").

Described in very general terms, both suspension of deportation and special rule cancellation of removal are forms of discretionary relief which, if granted, permit an individual subject to deportation or removal to remain in the United States. Integrating the processing of certain applications under NACARA into the Service's Asylum Program will provide an efficient

~~certain applications under NACARA into the Service's Asylum Program~~ will provide an efficient mechanism for processing the suspension of deportation and special rule cancellation of removal applications of most of the approximately 240,000 registered class members of American Baptist Churches vs. Thornburgh 760 F. Supp. 796 (N.D. Cal. 1991) (ABC), and certain other beneficiaries of NACARA who have asylum applications pending with the Service, as well as their qualified family members. The Immigration Court will retain exclusive jurisdiction over most suspension of deportation and special rule cancellation of removal applications submitted by NACARA beneficiaries who have been placed in deportation or removal proceedings.

In addition, this rule proposes to compile and codify the relevant factors and standards for extreme hardship identified within existing case law in order to provide a more uniform and focused mechanism for evaluating this aspect of a person's eligibility for suspension of deportation or special rule cancellation of removal.

DATES: Written comments must be submitted on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: Please submit written comments in triplicate to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1915-98 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: For matters relating to the Immigration and Naturalization Service: John Lafferty or Wenona Paul, International Affairs, Department of Justice, Immigration and Naturalization Service, 425 I Street NW., ULLICO Bldg., third floor,

Washington, DC 20536, telephone number (202) 305-2663. For matters relating to the Executive Office for Immigration Review: Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia, 22041, telephone number (703) 305-0470.

SUPPLEMENTARY INFORMATION:

I. Background

What is the Nicaraguan Adjustment and Central American Relief Act?

On November 19, 1997, President Clinton signed the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Pub. L. No. 105-100 (111 Stat. 2160, 2193) (as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139 (111 Stat. 2644)). This new law amends the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Immigration and Nationality Act (Act) by providing several distinct forms of relief to certain aliens who are presently residing unlawfully in the United States. Section 202 of NACARA permits certain Nicaraguan and Cuban nationals who meet the standards set forth in that section to apply for adjustment of status to that of lawful permanent resident. The interim rule governing applications for adjustment under section 202 was published in the **Federal Register** on May 21, 1998, at 63 FR 27823.

This proposed rule implements section 203 of NACARA, which permits certain Guatemalans, Salvadorans, and nationals of the former Soviet bloc to apply for suspension of deportation or cancellation of removal under special provisions set forth in that section. Unlike those applying under section 202, NACARA beneficiaries under section 203 may not become

lawful permanent residents unless they meet the statutory requirements for suspension of deportation or cancellation of removal and are found to merit such relief as a matter of discretion.

Throughout the discussion of this proposed rule, the term “NACARA beneficiaries” refers to those persons listed in section 309(c)(5)(C)(i) of IIRIRA, as amended by NACARA, who may be eligible to apply for suspension of deportation or cancellation of removal pursuant to the NACARA amendments to IIRIRA.

How does NACARA affect applications for suspension of deportation and cancellation of removal?

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), enacted by Congress on September 30, 1996, consolidated the dual system of exclusion and deportation proceedings into removal proceedings, for persons placed in proceedings on or after April 1, 1997. Individuals placed in deportation proceedings prior to April 1, 1997, can apply for suspension of deportation under former section 244 of the Act, as in effect prior to April 1, 1997. Suspension of deportation is a discretionary form of relief available to individuals who can establish continuous physical presence in the United States for 7 years prior to the date of application, good moral character during that period, and that deportation would result in extreme hardship to the applicant or to the applicant’s parent, spouse or child who is a lawful permanent resident or United States citizen. Different standards apply to individuals who are deportable on certain criminal, document fraud, or security grounds. Other special exceptions apply to battered spouses and children, and to individuals who have served in the United States military.

Under the new framework created by IIRIRA, the discretionary relief of suspension of deportation was replaced by section 240A, cancellation of removal. Congress limited the availability of this type of relief in three fundamental ways. First, Congress amended the rules relating to time counted toward physical presence in the United States. For persons seeking cancellation of removal, section 240A(d)(1) of the Act provides that time counted towards continuous physical presence ceases when a person is served with a charging document and placed in removal proceedings or when a person commits an offense referred to in section 212(a)(2) of the Act that renders the person inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4) of the Act, whichever is earlier (the “stop-time” rule). The Board of Immigration Appeals (Board) held that, under the transitional rules at section 309(c)(5) of IIRIRA governing persons in deportation proceedings, this “stop-time” rule applied equally to individuals placed in proceedings prior to April 1, 1997, who had applied for or who may apply for suspension of deportation. In addition, section 240A(d)(2) addresses certain breaks in presence in the United States, for purposes of cancellation of removal eligibility, by providing that an alien shall be considered to have failed to maintain continuous physical presence in the United States, if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

Second, IIRIRA heightened the eligibility standards for both the required period of continuous physical presence in the United States and the degree and type of hardship that must result from removal. Generally, to be eligible for cancellation of removal under the Act as amended by IIRIRA, the applicant must establish 10 years of continuous physical presence in the

United States, good moral character during that period, and that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent, or child who is a lawful permanent resident or United States citizen.

Third, Congress provided that no more than 4,000 aliens may have their deportation suspended or removal canceled, and their status adjusted pursuant thereto, in any fiscal year.

With certain exceptions, section 203 of NACARA permits certain Guatemalans, Salvadorans, and nationals of former Soviet bloc countries to apply for suspension of deportation or cancellation of removal under the standards that existed prior to enactment of IIRIRA. Specifically, NACARA exempts qualified Guatemalans, Salvadorans, and nationals of former Soviet bloc countries from the "stop-time" rule. In addition, section 203(b) of NACARA created a special rule for cancellation of removal for NACARA beneficiaries who have not been placed in deportation proceedings. Special rule cancellation of removal permits these individuals to apply for cancellation of removal under standards that are generally the same as those for suspension of deportation.

Section 204 of NACARA also amended the Act to exempt qualified NACARA beneficiaries from the limit on the number of individuals who may be granted suspension of deportation and cancellation of removal, and adjustments of status pursuant thereto, each year.

What is suspension of deportation and special rule cancellation of removal?

Both suspension of deportation and special rule cancellation of removal are forms of discretionary relief which, if granted, permit an individual subject to deportation or removal to remain in the United States. The criteria for granting such relief, in the exercise of discretion, are described in Part IV of this Supplementary Information.

If an individual is granted suspension of deportation or special rule cancellation of removal, his or her immigration status will then be adjusted to that of lawful permanent resident. Suspension of deportation is only available to eligible persons who were placed in deportation proceedings prior to April 1, 1997. Special rule cancellation of removal is available to eligible aliens who are placed in removal proceedings on or after April 1, 1997, or who have not been placed in deportation proceedings and are eligible to apply with the Service under the standards set forth in this proposed rule.

Who can apply under this new law?

Unless convicted of an aggravated felony, the following individuals may be eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA:

- (1) any registered class member of the ABC settlement agreement who has not been apprehended at time of entry after December 19, 1990;
- (2) any Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990; and
- (3) any alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and at the time of filing was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia.

In addition and regardless of nationality, the spouse, child (unmarried and under 21 years of age), unmarried son, and unmarried daughter of an individual described in any of the above three categories who is granted cancellation of removal or suspension of deportation may apply

for suspension of deportation or special rule cancellation of removal under the provisions of NACARA, unless he or she has been convicted of an aggravated felony. The relationship between the spouse, child, unmarried son, or unmarried daughter and the individual granted suspension of deportation or cancellation of removal must exist at the time that the parent or spouse is granted cancellation of removal or suspension of deportation. If the alien is an unmarried son or unmarried daughter 21 years of age or older at the time the parent is granted cancellation of removal or suspension of deportation, he or she must have entered the United States on or before October 1, 1990, in order to be eligible to apply for suspension of deportation or special rule cancellation of removal under NACARA. Although a spouse, child, unmarried son or unmarried daughter is not statutorily eligible to apply for such relief unless the "principal" spouse or parent has been granted, applications for relief may be submitted at the same time as the "principal" spouse or parent, or while the "principal" spouse or parent's application is pending. The spouse, child, unmarried son or unmarried daughter will be required to independently establish each of the applicable statutory criteria for suspension of deportation or special rule cancellation of removal and that he or she merits relief in the exercise of discretion.

Would withdrawal of an asylum application make someone ineligible to apply under section 203 of NACARA?

No. Although certain individuals are eligible to apply for relief under section 203 of NACARA based on nationality, entry date to the United States, and the filing of an asylum application by a requisite date, the statute does not require that the asylum application still be pending in order to apply for relief under NACARA.

Will there be a new procedure to apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA?

Yes. To implement section 203 of NACARA efficiently and expeditiously, the Attorney General has decided to integrate the adjudication of suspension of deportation and special rule cancellation of removal applications into the affirmative asylum process. Under this proposed rule, the Attorney General will delegate to asylum officers the authority to grant suspension of deportation or special rule cancellation of removal to certain beneficiaries of NACARA who have asylum applications pending with the Service and to their qualified dependents. Under present regulations, only immigration judges, subject to review by the Board and the Attorney General, are permitted to adjudicate suspension of deportation or cancellation of removal applications within the context of deportation or removal proceedings. Given the large number of NACARA beneficiaries who presently have asylum applications pending before the Service, the Attorney General determined that delegation of authority to the Service in this limited circumstance is the most efficient method for implementing section 203 of NACARA.

Streamlining the process by permitting eligible applicants to raise their suspension of deportation or special rule cancellation of removal claims simultaneously with their asylum claims offers an efficient method for resolving many of these claims at an earlier stage in the administrative process. The great majority of section 203 beneficiaries are class members of the ABC settlement agreement who currently have asylum applications pending with the Service and are awaiting a de novo adjudication of their applications pursuant to the terms of the settlement agreement. Although the ABC class members previously placed in deportation proceedings could seek to recalendar their cases in order to apply for suspension of deportation before the Immigration Court, most class members were never placed in proceedings. Absent the proposed

rule, these individuals, as well as other NACARA beneficiaries who have asylum applications pending before the Service, would be required to wait until their asylum claims had been adjudicated and, if ineligible for asylum, placed in removal proceedings before they would have an opportunity to file their suspension of deportation or cancellation of removal applications before the Immigration Court.

Under the proposed rule, an asylum officer will have the authority to consider and grant suspension of deportation or special rule cancellation of removal to an applicant who is clearly eligible for the relief from deportation or removal, thus reducing both the time and expense incurred by the Government and the applicant in resolving the claim. Consequently, the proposed rule will implement NACARA in a manner consistent with the humanitarian concerns expressed by Congress in passing this legislation.

II. Process for applying with the Service

Who will be able to apply with the Service for suspension of deportation or special rule cancellation of removal?

The great majority of individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under NACARA will be eligible to apply for such discretionary relief with the Service. However, not all aliens covered by NACARA will be able to apply with the Service. Asylum officers' jurisdiction to consider applications for suspension of deportation or special rule cancellation of removal will be limited to certain eligible NACARA beneficiaries who have an asylum application pending with the Asylum Program and to their eligible spouses, children, unmarried sons, and unmarried daughters.

The following individuals will be permitted to apply for suspension of deportation or special rule cancellation of removal with the Service:

(1) a Guatemalan or Salvadoran national who applied for asylum with the Service on or before April 1, 1990, and whose asylum application is pending with the Service;

(2) an ABC class member who is eligible for benefits of the ABC settlement agreement and who has not yet had a de novo asylum adjudication with the Service, under the terms of the settlement agreement;

(3) a national of a former Soviet bloc country who meets the application eligibility criteria in section 203 of NACARA and who has an asylum application pending with the Service; and

(4) the spouse, child, unmarried son, and unmarried daughter of an individual described in any of the preceding three categories, as long as the qualified spouse or parent has pending with the Service an application for suspension of deportation or special rule cancellation of removal or has been granted suspension of deportation or special rule cancellation of removal by the Service and, with certain exceptions, the spouse, child, unmarried son or unmarried daughter has not been placed in immigration proceedings. To be eligible to apply for suspension of deportation or special rule cancellation of removal under NACARA, an unmarried son or unmarried daughter 21 years of age or older must have first entered the United States on or before October 1, 1990, or have been less than 21 years of age when his or her parent was granted suspension of deportation or cancellation of removal.

With respect to aliens who have been placed in deportation or removal proceedings, this proposed rule gives authority to asylum officers to consider applications for suspension of deportation or special rule cancellation of removal submitted by qualified applicants only if an

immigration judge has administratively closed those proceedings or the Board has continued those proceedings because:

(1) the applicant is entitled to a de novo asylum adjudication pursuant to the ABC settlement agreement (see next section for discussion of class membership and ABC eligibility requirements);

(2) the applicant is an ABC class member with a final order of deportation who is entitled to a de novo asylum adjudication pursuant to the ABC settlement agreement, has filed and been granted a motion to reopen under section 203(c) of NACARA, pursuant to the notice published in the **Federal Register** by the Attorney General on January 21, 1998, at 63 FR 3154, or under 8 CFR 3.43 (published in the **Federal Register** on June 11, 1998, at 63 FR 31890-01), and has requested that the reopened proceedings be closed in order to file for suspension of deportation before the Service; or

(3) the applicant is the spouse, child, unmarried son or unmarried daughter of a NACARA beneficiary who is eligible to apply for, and has applied for, suspension of deportation or special rule cancellation of removal with the Service, and the immigration judge has administratively closed the proceedings to permit the applicant to submit an application for suspension of deportation or special rule cancellation of removal with the Service.

All other persons in deportation or removal proceedings who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA must apply for this relief before the Immigration Court.

Who is eligible for benefits of the ABC settlement agreement?

A class member of the ABC settlement agreement is eligible for benefits of the agreement only if he or she registered for ABC benefits, applied for asylum by a specified cutoff date, has not been convicted of an aggravated felony, and has not been apprehended at time of entry after December 19, 1990. All Guatemalan nationals who first entered the United States on or before October 1, 1990, and all Salvadoran nationals who first entered the United States on or before September 19, 1990, are class members under the ABC settlement agreement. Guatemalan class members were required to register for ABC benefits on or before December 31, 1991, and to apply for asylum on or before January 3, 1995. Salvadoran class members were required to register for ABC benefits on or before October 31, 1991, and to apply for asylum on or before January 31, 1996. (The Service permitted a two-week administrative grace period, extending to February 16, 1996). A class member was not required to file a new asylum application under the settlement agreement if the applicant had already filed an asylum application with the Service or the Immigration Court prior to the applicable filing deadline.

Can an ABC class member who registered for ABC benefits, but failed to apply for asylum by the applicable filing deadline, apply for suspension of deportation or special rule cancellation of removal with the Service?

No. Although NACARA allows a registered ABC class member to apply for suspension of deportation or special rule cancellation of removal, even if he or she failed to apply for asylum by the applicable date necessary to retain ABC benefits, the proposed rule requires that such an individual apply for relief under section 203 of NACARA in deportation or removal proceedings before the Immigration Court. If a registered ABC class member applied for asylum after the applicable ABC filing deadline, the Service will process the asylum application pursuant to

current asylum regulations, but will not accept from the class member an application for special rule cancellation of removal. If such a class member is not granted asylum and appears to be deportable or inadmissible, the Service will initiate removal proceedings. The class member may then be eligible to apply for special rule cancellation of removal before the Immigration Court. The Service does not have jurisdiction over an asylum application filed by an ABC class member who was in proceedings that were previously administratively closed or continued by the Executive Office for Immigration Review (EOIR) and who missed the applicable asylum filing deadline for ABC benefits. In such cases, the Service will move to recalendar proceedings before EOIR, and the class member may apply for suspension of deportation in the context of the recalendared proceedings.

This restriction permits the Service to focus its resources on the adjudication of the applications filed by the registered ABC class members who met the filing deadlines; other Guatemalans, Salvadorans, and nationals of former Soviet bloc countries who are qualified to apply under section 203 of NACARA and whose asylum applications are pending with the Service; and the dependents of these groups. Limiting the program to registered ABC class members who met the requisite filing deadlines will also serve to protect the integrity of the program by reducing the possibility of fraudulent claims of ABC class membership and registration. Because an applicant for suspension of deportation or special rule cancellation of removal will be entitled to immediately apply for and be granted employment authorization, the Service is concerned that there would be an influx of fraudulent applications submitted solely for the purpose of obtaining employment authorization, if no restrictions are placed on the submission of applications. Consequently, to avoid creating such a problem and to avoid

diverting resources from the adjudication process in order to verify the status of each new applicant claiming to be a registered ABC class member, the Service has chosen to limit the group of persons eligible to apply with the Service for relief from deportation or removal under section 203 NACARA to those persons who can more readily be identified by their previously filed asylum applications.

Must a spouse, child, unmarried son, or unmarried daughter of a beneficiary of section 203 of NACARA have applied for asylum with the Service in order to be eligible to apply for suspension of deportation or special rule cancellation of removal with the Service?

No. In the interest of preserving family unity and fostering administrative efficiency, this rule proposes to give the Service jurisdiction to grant or refer an application for suspension of deportation or special rule cancellation of removal filed by a spouse, child, unmarried son or unmarried daughter of certain NACARA beneficiaries. The spouse, child, unmarried son or unmarried daughter will not be required to apply for asylum with the Service in order to submit an application for discretionary relief under section 203 of NACARA, so long as the applicant's spouse or parent either has an application for relief under section 203 of NACARA pending with the Service or has been granted suspension of deportation or special rule cancellation of removal by the Service.

If the spouse, child, unmarried son or unmarried daughter is in deportation or removal proceedings, he or she appears otherwise eligible for discretionary relief under section 203 of NACARA, and the qualified parent or spouse has submitted an application for such relief with the Service, the Immigration Court may administratively close the dependent's case to permit the dependent to submit an application for suspension of deportation or special rule cancellation of removal with the Service. A dependent's case that has been administratively closed to allow the

dependent to apply with the Service for relief under section 203 of NACARA may be recalendared by the Service if the dependent fails to file his or her application within a required period of time or if the dependent becomes clearly ineligible for relief under section 203 of NACARA prior to submitting his or her application with the Service. A dependent whose case has been administratively closed by EOIR to permit the dependent to file an application for suspension of deportation or special rule cancellation of removal with the Service will not be permitted to file an asylum application with the Service, as jurisdiction remains with EOIR for all matters other than the initial adjudication of the application for suspension of deportation or special rule cancellation of removal.

Although the Service will attempt to interview the dependent and make an eligibility determination at the same time the Service considers the applications of other family members, the application will generally be considered a separate application for purposes of the filing fee, because it will not have been filed at the same time as the parent's or spouse's application.

When can an application be filed?

Anyone who is eligible to apply for suspension of deportation or special rule cancellation of removal and who is in deportation or removal proceedings may apply for such discretionary relief before the Immigration Court in the course of those proceedings. Those who are eligible to apply with the Service will be able to apply when interim or final regulations delegating authority to the Service become effective. The Department expects to publish interim or final regulations after the notice and comment period for this proposed rule has been completed. There is no deadline for filing the application with the Service, as long as the applicant still meets the criteria for eligibility to apply with the Service.

How does one submit an application to the Service?

To apply with the Service for suspension of deportation or special rule cancellation of removal under section 203 of NACARA, the applicant must submit a Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100), with all attachments and supporting documents, in accordance with the instructions on that form. The Service is currently in the process of preparing the final version of proposed Form I-881. The Service will not accept applications submitted on a Form EOIR-40 or EOIR-42.

Each applicant, including all qualified dependents, must submit a separate application.

Will there be a fee?

Yes. The proposed rule establishes a \$215 fee for a single applicant, with a maximum family cap of \$430 for a family of two or more qualified relatives who submit applications to the Service at the same time. Qualified relatives are limited to the spouse, child, unmarried son and unmarried daughter of an applicant. A dependent who does not submit an application at the same time as his or her parent or spouse will be required to pay the \$215 fee. As with other applications for immigration benefits, applicants may request a fee waiver pursuant to 8 CFR 103.7(c).

The fee for applying directly with the Immigration Court in the course of deportation or removal proceedings will continue to be \$100, with a single fee of \$100 whenever applications are filed by two or more individuals in the same proceedings. If the application filed with the Service is referred to the Immigration Court, the applicant will not be required to pay an additional fee.

In addition to the fee required to submit an application for suspension of deportation or special rule cancellation of removal, each applicant who is required to be fingerprinted will also be required to include a fingerprinting fee (now \$25), or request for fee waiver, when submitting the application to the Service, pursuant to current regulations.

Why is the fee for individuals applying with the Service higher than the fee for individuals applying with the Immigration Court?

The proposed fee for individuals applying with the Service is higher, because the cost to the Service to adjudicate applications must be funded from the Immigration Examinations Fee Account (IEFA). The IEFA was established by Congress in 1989, and the revenue deposited in the account is the sole source of funding for the processing of immigration and naturalization applications and petitions, and for other purposes designated by Congress, such as the processing of asylum applications for which no fee is required. No appropriations are provided by Congress from tax dollars. In contrast, the Immigration Court receives funds appropriated by Congress to cover the costs of court functions. The \$100 fee to apply for suspension of deportation or cancellation of removal in Immigration Court partially covers the Service's costs associated with adjudicating such applications in deportation or removal proceedings.

How was the fee determined?

The Service is authorized to charge fees for the adjudication and processing of applications and petitions for a wide variety of immigration and naturalization benefits. The fees are required to recover the cost to the Service of providing specific immigration service. All fees must be reviewed regularly and adjusted as costs change, as more precise cost determination processes become available, or as directed by legislation. This rule proposes to establish a fee

Integrating the applicable activity costs from the IEFA fee study, the Service calculated a fee of \$215 for a single applicant. The maximum amount being proposed for families (as a family cap) is \$430.

Must the applicant be fingerprinted?

Yes. Each applicant 14 years or older must be fingerprinted. Under current regulations, a fingerprinting fee (now \$25), or request for fee waiver, must be submitted to the Service for each person who requires fingerprinting in order to apply for a benefit. An applicant who has previously submitted fingerprints for an asylum application must be fingerprinted again to fulfill current requirements for suspension of deportation or special rule cancellation of removal. The fingerprints will ordinarily be taken at an Application Support Center or a designated Law Enforcement Agency. For cases before the Service, after an application has been submitted, the applicant will be notified in writing of the appointment date and the location of the Application Support Center or designated Law Enforcement Agency where the applicant must go to be fingerprinted. The Service may not conduct an interview until the applicant has been fingerprinted and the Service has received a definitive response from the Federal Bureau of Investigation (FBI) that a full criminal background check has been completed. An applicant's unexcused failure to appear for fingerprinting may result in dismissal of the application for suspension of deportation or special rule cancellation of removal or referral of the application to the Immigration Court. For applications submitted to the Immigration Court, the applicant should proceed as directed by the immigration judge.

How will the interview process before the Service work and what should the applicant bring to the interview?

Each applicant will be notified by the Asylum Office of the date, time and place (address) of a scheduled interview. The Service recommends that each applicant bring a copy of the application and originals of any supporting documents to the interview. Any documents submitted that are written in a foreign language must be accompanied by a certified translation pursuant to 8 CFR 103.2. The applicant should also bring some form of identification, if available, including any passport(s), other travel or identification documents, or Form I-94, Arrival-Departure Record.

An asylum officer will conduct a nonadversarial interview to elicit information relating to eligibility for both asylum and for suspension of deportation or special rule cancellation of removal, if the applicant has applied for both forms of relief.

The applicant has the right to legal representation at the interview, at no cost to the United States Government. Any attorney or representative of record who is representing an applicant must file a G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the applicant.

If the applicant is unable to proceed with the interview in fluent English, he or she must provide, at no expense to the Service, a competent interpreter fluent in both English and a language that the applicant speaks fluently. The interpreter must be at least 18 years of age. The following persons cannot serve as interpreter: the attorney or representative of record or a witness testifying on the applicant's behalf at the interview. If the applicant also has an asylum application pending with the Service, a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence, may not serve as an interpreter. Failure without good cause to bring a competent interpreter to the interview may be considered

an unexcused failure to appear for the interview, which may result in dismissal of the application or referral of the application to the Immigration Court.

In most cases, the applicant will be given a notice to return to the Asylum Office for service of the decision and, where appropriate, charging documents placing the person in removal proceedings (the “pick-up”). Each applicant will also be advised of the requirement to bring an interpreter to the pick-up if the applicant is not fluent in English. An applicant who is not fluent in English must bring an interpreter to the “pick-up,” because the applicant may be asked at that time to admit inadmissibility or deportability, and may also be asked whether he or she intends to continue to pursue a pending application for asylum before the Service, if suspension of deportation or special rule cancellation of removal is granted. Although a grant of suspension of deportation or cancellation of removal will confer lawful permanent resident status, statute provides that an alien who is physically present in the United States, or who arrives in the United States, may apply for asylum irrespective of the alien’s status.

Must the applicant concede inadmissibility or deportability in order to be granted suspension of deportation or special rule cancellation of removal by the Service?

Yes. NACARA provides that the Attorney General may grant suspension of deportation to a qualified individual who is deportable from the United States or special rule cancellation of removal to a qualified alien who is inadmissible or deportable from the United States. The Department has determined that, before suspension of deportation or cancellation of removal may be granted, there must be a finding of inadmissibility or deportability. Because asylum officers are not authorized to make determinations regarding inadmissibility or deportability in most contexts, applicants for suspension of deportation or special rule cancellation of removal

before the Service will be required to concede inadmissibility or deportability before the Service may grant the relief from deportation or removal to the applicant. The instructions for the application will advise the applicant of this requirement. If an asylum officer determines that the applicant is eligible for suspension of deportation or special rule cancellation of removal, the applicant will be informed of the preliminary decision and asked to sign a written concession of inadmissibility or deportability before the final decision is issued. If the applicant declines to admit inadmissibility or deportability and is not granted asylum, the applicant will be placed in immigration proceedings and the application for suspension of deportation or special rule cancellation of removal will be referred to the Immigration Court.

What if an applicant does not appear for the scheduled interview with an asylum officer ?

An applicant who cannot appear for the scheduled interview should submit prior to the interview a written request to reschedule the interview, explaining the reasons he or she cannot attend the interview. An unexcused failure to appear for the interview may result in dismissal of the application for suspension of deportation or special rule cancellation of removal or referral of that application to the Immigration Court.

III. Process for applying with EOIR

How does one apply for suspension of deportation or special rule cancellation of removal before the Immigration Court?

A person eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA who is presently in deportation or removal proceedings should follow the procedures for submitting an application under the regulations and as directed by the immigration judge. The Immigration Court is already adjudicating applications under

section 203 of NACARA; there is no need for those who are in proceedings to wait for publication of an interim or final version of this proposed rule to make an application before the Immigration Court. However, persons who apply for suspension of deportation or special rule cancellation of removal under section 203 of NACARA, after this proposed rule is issued as an interim or final rule, will be required to submit their applications on Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100), with all attachments and supporting documents, in accordance with the instructions for that form. Each applicant must submit a separate application.

What if a person who is eligible to apply for special rule cancellation of removal is not in proceedings and either does not have an asylum application pending or filed for asylum after the applicable filing deadline?

Under this proposed rule, a person who is not in proceedings and who is ineligible to apply with the Service for discretionary relief under section 203 of NACARA will not be permitted to submit an application unless and until he or she is placed in removal proceedings. Under section 203 of NACARA, there is no deadline for filing an application for special rule cancellation of removal. The decision to place an alien in proceedings lies solely within the discretion of the Service.

IV. Eligibility for Suspension of Deportation and Special Rule Cancellation of Removal

What are the applicable statutory provisions?

Statutory eligibility for suspension of deportation will be determined based on the criteria governing continuous physical presence, good moral character, and extreme hardship set forth in paragraphs (a) and (b) of former section 244 of the Act, as in effect prior to April 1, 1997, and, as

discussed below, subject to applicable bars to discretionary relief as provided in the Act, as in effect prior to April 1, 1997. However, persons eligible to apply for suspension of deportation under section 203 of NACARA are exempted from the transitional rule governing continuous physical presence contained in section 309(c)(5) of IIRIRA. This means that such applicants are exempt from 240A(d)(1) of the Act, as amended by IIRIRA, which affects the determination of when times toward physical presence in the United States stops accruing (the “stop-time” rule). Specifically, section 240A(d)(1) of the Act, as amended by IIRIRA, provides that time counted toward physical presence in the United States stops accruing when a person is placed in deportation proceedings or commits an offense referred to in section 212(a)(2) of the Act that renders the person inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4) of the Act, whichever is earlier. Such persons are also exempt from section 240A(d)(2), which addresses breaks in presence in the United States.

Applications for special rule cancellation of removal under section 203 of NACARA are governed by statutory eligibility requirements contained in section 309(f)(1) of IIRIRA, as amended by NACARA. These requirements correspond, with certain exceptions, to the requirements contained in former sections 244(a)(1) and (a)(2) of the Act, as in effect prior to April 1, 1997. Applications under section 203 of NACARA are otherwise subject to the provisions of section 240A of the Act, with the exception of sections 240A(b)(1) (the heightened standards relating to eligibility), (d)(1) (the “stop-time rule”), and (e) (limitations on the annual number of individuals granted relief).

Additionally, to be eligible for suspension of deportation or special rule cancellation of removal, the alien must not be subject to any of the statutory bars to seeking such relief. Section 244(f) of the Act, as it existed prior to April 1, 1997, and section 240A(c) of the Act provide that certain categories of aliens (crewmen and certain non-immigrant exchange aliens) are ineligible for suspension of deportation or cancellation of removal. Pursuant to former section 242B(e)(2) of the Act, as in effect prior to April 1, 1997, and section 240B(d) of the Act, an alien who was previously granted voluntary departure and received oral and written notice of the consequences of failing to depart, but did not depart the United States within the time specified, is barred for a specific period of time from various forms of discretionary relief, including suspension of deportation and cancellation of removal. Similarly, former sections 242B(e)(1), (3) and (4) of the Act, as in effect prior to April 1, 1997, preclude the Attorney General from granting suspension of deportation to aliens who, under certain circumstances, fail to appear at a deportation or asylum hearing, or as ordered for deportation. Applicants for special rule cancellation of removal are subject, where applicable, to the bar to discretionary relief contained in section 240(b)(7) of the Act, relating to failure to appear at removal proceedings. The Attorney General has no authority to waive such bars in the cases in which they apply.

What are the requirements for establishing eligibility?

The burden is on the applicant to establish that he or she meets each of the statutory requirements for the relief sought and that he or she is entitled to relief from deportation or removal as a matter of discretion. As explained further below, the general requirements for eligibility relate to the amount of time the applicant has been continuously physically present in the United States, good moral character, and the degree of hardship to the applicant or qualified

relative resulting from removal. There are two basic standards both for eligibility for suspension of deportation and for special rule cancellation of removal, and the applicable standard is determined by the grounds of deportability or inadmissibility that apply. Aliens who are inadmissible or deportable on certain criminal or other grounds are subject to a higher standard that requires the applicant to establish a longer period of continuous physical presence and a higher degree of hardship resulting from removal. In addition, special eligibility provisions may apply to certain individuals who have been battered or subject to extreme cruelty, or whose children have been subject to such abuse, and to certain individuals who have served in the United States Armed Forces.

To be eligible for suspension of deportation under the general standard set forth in former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, an applicant must not have been convicted of an aggravated felony, must not be deportable for having participated in Nazi persecution or in genocide, and must be deportable under any law of the United States other than paragraph (a)(2) (criminal grounds), paragraph (3) (failure to register and falsification of documents), or paragraph (4) (security and related grounds) of the former section 241(a) of the Act, as in effect prior to April 1, 1997. To be eligible for special rule cancellation of removal under the general standard set forth in section 309(f)(1)(A) of IIRIRA, as amended by NACARA, an applicant must not be inadmissible to the United States under paragraph (2) (criminal and related grounds) or paragraph (3) (security and related grounds) of section 212(a) of the Act, or deportable under paragraph (2) (criminal grounds), paragraph (3) (failure to register and falsification of documents), or paragraph (4) (security and related grounds) of section 237(a) of Act, and may not be an alien who is an aggravated felon or has been found to be a persecutor.

An applicant for either form of relief who meets the foregoing eligibility requirements must also establish that:

(1) he or she has been physically present in the United States continuously for at least 7 years before applying for the relief;

(2) he or she has been a person of good moral character during those 7 years of physical presence; and

(3) removal from the United States would result in extreme hardship to the applicant, or to his or her spouse, parent, or child, who is a United States citizen or alien lawfully admitted for permanent residence.

The applicant must also establish that he or she merits relief as a matter of discretion.

Generally, persons who are inadmissible or deportable on the basis of the grounds previously described (other than those who have been convicted of an aggravated felony or involved in persecution of others) may still be eligible for suspension of deportation under former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, or for special rule cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by NACARA, under a higher standard. To be eligible under the higher standard, the applicant must establish that:

(1) he or she has been physically present in the United States continuously for not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation or removal;

(2) he or she has been a person of good moral character during that period; and

(3) deportation or removal would result in exceptional and extremely unusual hardship to the applicant or to his or her spouse, parent, or child, who is a citizen of the United States or an

alien lawfully admitted for permanent residence. The applicant must also establish that he or she merits relief as a matter of discretion.

What factors are considered in evaluating continuous physical presence?

For persons covered by section 203 of NACARA who are presently in deportation proceedings, the primary impact of NACARA is the elimination of the transitional rules contained in section 309(c)(5) of IIRIRA relating to the “stop-time” rule and certain breaks in presence. A person eligible to apply for suspension of deportation under NACARA must establish the required period of continuous physical presence by the date on which the application is filed. A person who is already subject to a final order of deportation and must reopen his or her proceedings under 8 CFR 3.43 must establish the required period of physical presence by no later than September 11, 1998, regardless of the date on which service of the charging document was completed.

The proposed rule repeats the statutory requirement that an applicant for suspension of deportation must establish that any break in continuous physical presence was brief, casual, and innocent, and did not meaningfully interrupt the applicant's period of continuous physical presence in the United States. The proposed rule also reflects conclusions set forth in case law that departures under an order of deportation, departures under an order of voluntary departure, or departures during which the applicant formed the intent to commit a crime meaningfully interrupt continuous physical presence.

Although applicants for special rule cancellation of removal are exempt from the “stop-time” provision of section 240A(d)(1) of the Act, they are not exempt from section 240A(d)(2) of the Act, relating to breaks in continuous physical presence. Under section 309(f)(2) of IIRIRA,

as amended by section 203(b) of NACARA, an applicant for special rule cancellation of removal will be considered to have failed to maintain continuous physical presence in the United States if he or she is absent from the United States for any period in excess of 90 days or for any periods that in the aggregate exceed 180 days. The proposed rule specifies that periods of shorter duration may be found to terminate continuous physical presence if the absence is a meaningful interruption.

What factors are considered in evaluating good moral character?

To be eligible for suspension of deportation or special rule cancellation of removal, the person will have to establish good moral character during the requisite period of continuous physical presence in the United States. Good moral character is decided on a case-by-case basis, taking into account the provisions of section 101(f) of the Act, which identify reasons a person cannot be found to be of good moral character, and precedent decisions by the Board and Federal courts.

What factors are considered in evaluating extreme hardship?

An applicant for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, or special rule cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, must establish that his or her deportation or removal would result in extreme hardship to himself or herself, or to a parent, child or spouse who is a United States citizen or lawful permanent resident alien. In adopting the same standards for special rule cancellation of removal as are required for suspension of deportation under former section 244(a)(1) of the Act, prior to amendments by IIRIRA, Congress appears to have intended the same standard for extreme hardship to apply to both forms of relief. The phrase "extreme hardship" is not defined in the Act, and NACARA provides no additional guidelines

for interpretation of this requirement. Instead, “extreme hardship” has acquired specific legal meaning through interpretation by the Board and Federal courts.

The Board has not set forth a bright line test for determining “extreme hardship,” finding that “extreme hardship” within the meaning of section 244(a)(1) of the Act is not a definable term of fixed and inflexible content or meaning; such a finding necessarily depends upon the facts and circumstances peculiar to each case. Matter of Hwang, 10 I&N Dec. 448 (BIA 1964). Over time, however, precedent decisions issued by the Board and federal courts have created a body of case law that has provided a framework for analyzing claims of extreme hardship. See Matter of Anderson, 16 I&N Dec. 596 (BIA 1978); Matter of Ige, 20 I&N Dec. 880 (BIA 1994); Matter of O-J-O, Int. Dec. #3280 (BIA 1996); Matter of L-O-G, Int. Dec. #3281 (BIA 1996); Matter of Pilch, Int. Dec. #3298 (BIA 1996). In these decisions and others, the Board has enumerated a series of factors that are relevant to a determination of extreme hardship. These precedent decisions are binding on the Service and EOIR.

Under this proposed rule, asylum officers will be required to consider suspension of deportation and special rule cancellation of removal applications under the same legal standards that govern adjudication by the Immigration Court. Because of the breadth of the case law governing the “extreme hardship” standard, the Department has concluded that a regulatory compilation of the relevant factors and standards identified within this body of law would provide a more uniform and focused source for evaluating extreme hardship claims. This proposed rule is not intended, however, to overturn or modify existing case law. Nor does it intend to limit the development through case law of other relevant factors. Instead, codification is intended to assist adjudicators, attorneys, and applicants to identify factors that may be

relevant to an extreme hardship determination in the context of an application for suspension of deportation or special rule cancellation of removal. This regulation, however, does not codify the higher standard of “exceptional and extremely unusual hardship” required under former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, or section 240A(b)(1) of the Act for persons seeking cancellation of removal.

This proposed rule maintains the flexibility of the existing standard by identifying broad factors that have been cited in existing precedent decisions as relevant to the evaluation of whether removal would result in extreme hardship to the alien or to his or her qualified relative. These factors are (1) the age of the person, both at the time he or she entered the United States and at the time he or she applied for suspension of deportation; (2) the age, number, and immigration status of the person’s children and their ability to speak the native language and adjust to life in another country; (3) the health condition of the alien or his or her child, spouse, or parent and the availability of any required medical treatment in the country to which the alien would be returned; (4) the person’s ability to obtain employment in the country to which the person would be removed; (5) the person’s length of residence in the United States; (6) the existence of other family members who will be legally residing in the United States; (7) the financial impact of departure; (8) the impact of a disruption of educational opportunities; (9) the psychological impact of removal; (10) the current political and economic conditions in the country to which the person would be deported; (11) family and other ties to the country to which the person would be returned; (12) contributions to and ties to a community in the United States, including the degree of integration into society; (13) immigration history, including authorized residence in the United States; and (14) the availability of other means of adjusting to permanent resident status.

Ultimately, “extreme hardship” must be evaluated on a case-by-case basis after a review of all the circumstances in the case, and none of the listed factors alone, or taken together, automatically establishes a claim of extreme hardship. Nor is the list exhaustive, as there may be other factors relevant to the issue of extreme hardship in a particular case. The listed factors should not preclude consideration of other factors raised by an applicant, nor is an applicant required to show that each of the listed factors applies in his or her case, in order to establish extreme hardship. Conversely, an adjudicator is not required to consider factors that have not been raised in making an extreme hardship determination.

Generally, no single factor will be dispositive in making an extreme hardship determination. Matter of Anderson, *supra*. To establish extreme hardship, an applicant must demonstrate that deportation or removal would result in a degree of hardship beyond that typically associated with deportation or removal. For example, extreme hardship requires more than the mere economic deprivation that might result from an alien’s deportation from the United States. Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); and Matter of Sipus, 14 I&N Dec. 229 (BIA 1972). Loss of a job and the concomitant financial loss is not synonymous with extreme hardship. Matter of Pilch, *supra*. Similarly, readjustment to life in the native country after having spent a number of years in the United States is not the type of hardship that has been characterized as extreme, since most aliens who have spent time abroad suffer this kind of hardship. Matter of Uy, 11 I&N Dec. 159 (BIA 1965). The birth of a United States citizen child does not in itself provide a basis for a finding of extreme hardship. Davidson v. INS, *supra*; Matter of Kiri, 15 I&N Dec. 88 (BIA 1974). Nor does a significant reduction in one’s standard

of living or inability to pursue one's profession, in itself, compel a finding of extreme hardship.

Matter of Pilch, supra.

The Board has also found that a claim of persecution may not generally be presented as a means of demonstrating extreme hardship. Matter of L-O-G, supra. In those cases in which a claim of persecution is raised, however, it must be examined from the perspective of extreme hardship, rather than on the basis of the criteria used to identify a refugee under asylum law. Ordonez v. INS, 137 F.3d 1120 (9th Cir., 1998). Consequently, issues such as the circumstances under which an individual left his or her country or the political consequences of such a return may be relevant to the discussion of listed factors such as the psychological impact of deportation or removal, current country conditions, immigration history, or remaining ties to the country of deportation or removal. See Matter of O-J-O, supra (family's history of conflict with Sandinistas factored into evaluation of effect of current country conditions).

Thus, a factor that may not in itself be determinative may become significant, or even critical, when weighed with all the other circumstances and factors presented. Matter of L-O-G, supra. Relevant factors that may not be considered extreme in themselves must be considered in the aggregate to determine whether extreme hardship exists. Matter of Ige, supra. In all cases, the particular degree of personal hardship resulting from each of the factors must be taken into account. Matter of L-O-G, supra. Similarly, an adjudicator should not discount the effect of a factor simply because it is not unique to the individual. The Board has noted that the "word 'extreme' should not be equated with 'unique' and hardship for suspension purposes need not be unique to be extreme." Id.

V. Adjudication by the Service

How will a decision be made if a person has applied for both asylum and suspension of deportation or special rule cancellation of removal?

An asylum officer will determine eligibility for suspension of deportation or special rule cancellation of removal concurrently with the determination of eligibility for asylum, if an applicant who is eligible to apply with the Service under NACARA has applied for both forms of relief. After considering the information and documents submitted by the applicant, the testimony of the applicant and any witnesses presented at the interview, relevant country conditions information, and other information available to the asylum officer, the asylum officer will determine whether the applicant is eligible for suspension of deportation or special rule cancellation of removal or asylum. The Service will grant suspension of deportation or special rule cancellation of removal if the applicant is clearly eligible for the relief sought. If the Service finds that the applicant is not clearly eligible for suspension of deportation or special rule cancellation of removal and is ineligible for asylum, the asylum officer will refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court (or dismiss the application without prejudice, if the applicant is in valid non-immigrant or immigrant status). The Service will also process the asylum application under the terms of the settlement agreement for eligible ABC class members or under 8 CFR 208.14 for all other NACARA beneficiaries.

When will the Service refer an application to the Immigration Court?

Under the proposed rule, asylum officers will not have the authority to deny an application for suspension of deportation or special rule cancellation of removal. Instead, an

asylum officer will refer an application to the Immigration Court, if the applicant appears to be inadmissible or deportable and any of the following circumstances apply:

- (1) The applicant appears to be statutorily ineligible for the relief sought;
- (2) It appears that relief should be denied as a matter of discretion;
- (3) The applicant appears to be eligible for relief only under the higher standards set forth in former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, or section 309(f)(1)(B) of IIRIRA, as amended by NACARA (requiring, among other things, 10 years continuous physical presence and a showing of exceptional and extremely unusual hardship resulting from removal);
- (4) The applicant appears eligible for relief only under the provisions that apply to battered spouses and children in former section 244(a)(3) of the Act, as in effect prior to April 1, 1997, or section 240A(b)(2) of the Act;
- (5) The applicant declines to concede inadmissibility or deportability; or
- (6) The applicant fails to appear for an interview or for a fingerprint appointment, and such failure to appear is unexcused. In the case of an unexcused failure to appear for an interview or for fingerprinting, the Service may refer the application to Immigration Court without conducting an interview, or the Service may dismiss the application.

Generally, referrals to the Immigration Court will occur after the Service has evaluated the application and determined that the applicant is not clearly eligible for suspension of deportation or special rule cancellation of removal. In the case of applicants who are only eligible under the higher standard for either form of relief, referral is necessary to avoid complex determinations regarding admissibility or deportability that are more appropriately made by an

immigration judge. Other grounds for referral are related to administrative efficiency and parallel provisions in 8 CFR part 208 with respect to the referral of asylum applications.

What happens if the Service finds that the applicant is eligible for suspension of deportation or special rule cancellation of removal, but is not eligible for asylum?

If the Service determines that the applicant is eligible for a grant of suspension of deportation or special rule cancellation of removal by the Service and makes a preliminary determination that the applicant is not eligible for asylum, the Service will grant the applicant suspension of deportation or special rule cancellation of removal and adjust his or her status to that of lawful permanent resident. When the Service notifies the applicant of the decision to grant suspension of deportation or special rule cancellation of removal, the Service will notify the applicant of his or her right to continue to pursue the request for asylum. At the same time, the Service will give the applicant the opportunity to request to pursue the asylum application or to request in writing to withdraw the asylum application. If the applicant requests in writing to withdraw the asylum application, the application will be dismissed without prejudice. If the applicant wishes to pursue the asylum application and the applicant is eligible for ABC benefits, the Service will send the applicant a Notice of Intent to Deny and provide an opportunity to rebut the Notice of Intent to Deny pursuant to the terms of the settlement agreement. If the applicant is not eligible for ABC benefits and wishes to pursue the asylum application, the Service will send the applicant a Notice of Intent to Deny in accordance with current asylum procedures for applicants who are in valid immigration status.

What happens if the Service determines that the applicant is eligible for both suspension of deportation or special rule cancellation of removal and for asylum?

If the asylum officer determines that the applicant is eligible for both asylum and a grant of suspension of deportation or special rule cancellation of removal by the Service, the Service will grant the applicant suspension of deportation or special rule cancellation of removal and adjust his or her status to that of lawful permanent resident. When the Service notifies the applicant of the decision to grant suspension of deportation or special rule cancellation of removal, the Service will notify the applicant of his or her right to continue to pursue the request for asylum. At the same time, the Service will give the applicant the opportunity to request to pursue the asylum application or to request in writing to withdraw the asylum application. If the applicant requests in writing to withdraw the asylum application, the application will be dismissed without prejudice. If the applicant requests to pursue the asylum application, the Service will grant the applicant asylum.

What happens if the Service finds that the applicant is eligible for asylum, but not suspension of deportation or special rule cancellation of removal?

If the Service determines that the applicant is eligible for asylum, but appears ineligible for suspension of deportation or special rule cancellation of removal, then the Service will grant the application for asylum and dismiss the application for suspension of deportation or special rule cancellation of removal without prejudice.

What happens if the Service finds that the applicant is ineligible for asylum, suspension of deportation, or special rule cancellation of removal?

If the Service determines that the applicant is not eligible for a grant of asylum, suspension of deportation, or special rule cancellation of removal by the Service, and the applicant is not in valid immigrant or non-immigrant status, the Service will place the applicant

in removal proceedings (or reopen deportation or removal proceedings if such proceedings were administratively closed) and refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court. The application for asylum will be referred, if the application is governed by current asylum regulations. The application for asylum will be denied, if the application is governed by the ABC settlement agreement.

What happens to a pending asylum application if the Service adjusts the applicant's status to that of lawful permanent resident?

Some asylum applicants may be eligible to adjust their status to lawful permanent resident through means other than section 203 of NACARA. For example, Nicaraguans and Cubans who have adjusted status under section 202 of NACARA may no longer wish to seek asylum in the United States. To avoid unnecessary scheduling of such persons for asylum interviews, the Service will presume such asylum applications withdrawn and dismiss them without prejudice, unless the asylum applicant notifies the Service that he or she wishes to pursue the asylum request. The process for adjudicating eligible ABC class members' asylum applications is governed by the ABC settlement agreement and the 1990 asylum regulations. Accordingly, ABC class members will be asked to decide whether they wish to pursue their asylum applications if granted suspension of deportation or special rule cancellation of removal, and the Service will not presume their applications abandoned. Other section 203 NACARA beneficiaries who have received an interview regarding their asylum and suspension of deportation or special rule cancellation of removal applications will also be asked to decide whether they wish to pursue their asylum applications if granted suspension of deportation or special rule cancellation of removal.

How will an application be processed if the applicant was in proceedings in Immigration Court that were administratively closed under the ABC settlement agreement?

Pursuant to the ABC settlement agreement, EOIR already has administratively closed proceedings for ABC class members who were in proceedings before the Immigration Court. This action was taken to afford the class members the opportunity to pursue a de novo asylum adjudication with the Service. Because these class members were in deportation proceedings prior to April 1, 1997, they may be eligible to apply for suspension of deportation. If the Service grants either asylum or suspension of deportation to a registered ABC class member whose proceedings with the Immigration Court were administratively closed, such grant of asylum or suspension of deportation will terminate those proceedings under this regulation. (The Department currently is engaged in efforts to clarify language in the ABC settlement agreement in accordance with this proposal for automatic termination of proceedings before EOIR upon a grant of asylum.) If the Service denies asylum to a registered ABC class member whose previous proceedings were administratively closed and the asylum officer determines that the applicant is not clearly eligible for suspension of deportation, the Service will move to recalendar proceedings before the Immigration Court, pursuant to the settlement agreement. At the same time, the Service will refer to the Immigration Court the application for suspension of deportation.

How will applications be processed for applicants who have an appeal pending with the Board of Immigration Appeals, which was continued under the ABC settlement?

Pursuant to the ABC settlement agreement, the Board stayed or continued indefinitely appeals that had been filed by ABC class members in order to give them the opportunity to pursue the benefits of the settlement agreement. If the Service grants either asylum or

suspension of deportation to a registered ABC class member whose proceedings with the Board were administratively closed or continued, such grant of asylum or suspension of deportation will terminate those proceedings under this regulation. (As noted above, the Department currently is engaged in efforts to clarify language in the ABC settlement agreement in accordance with this proposal for automatic termination of proceedings before EOIR upon a grant of asylum.) If the Service denies asylum to an eligible ABC class member and does not grant suspension of deportation, the Board shall resume proceedings upon notice from the Service, under the terms of the ABC settlement agreement. The Service will refer the application for suspension of deportation to the Board. The Board will remand proceedings to the immigration judge solely for adjudication of the application for suspension of deportation unless the eligible ABC class member also moves for, and is granted, a remand of the asylum application pursuant to the terms of the ABC settlement agreement.

How will applications be processed for class members eligible for ABC benefits who have been issued a final order of deportation?

Section 203(c) of NACARA permits eligible NACARA beneficiaries with final orders to file a motion to reopen in order to pursue suspension of deportation or special rule cancellation of removal under NACARA. Section 203(c) requires that all NACARA beneficiaries who are under final orders of deportation, including ABC class members, must file a motion to reopen no later than September 11, 1998, in order to obtain relief under section 203 of NACARA. (The applicable rule, 8 CFR 3.43, was published in the **Federal Register** on June 11, 1998, at 63 FR 31890-01.)

An ABC class member who has been issued a final order, but currently has an asylum application pending before the Service, may file an application for suspension of deportation

with the Service only if he or she first moves to reopen his or her case with EOIR, and the motion is granted. Unless the case is reopened, the alien will remain subject to the order of deportation, which will be enforceable if the alien is denied asylum under the terms of the ABC settlement agreement. If the motion is granted, the ABC class member may move to have his or her deportation proceedings administratively closed in order to apply for suspension of deportation with the Service. As is the case for all NACARA beneficiaries with final orders, eligible ABC class members who have challenged their immigration proceedings in Federal court must file and be granted a motion to reopen by EOIR in order to seek relief under section 203 of NACARA. If the applicant has pending in Federal court a case that was stayed so that the applicant could pursue ABC benefits, the Government will wait until the application for suspension of deportation is adjudicated before requesting that court proceedings be resumed or dismissed.

Employment authorization

Are applicants for suspension of deportation or special rule cancellation of removal eligible for employment authorization?

Yes. Under current regulations, applicants for suspension of deportation or cancellation of removal are eligible to apply for and be granted employment authorization. 8 CFR 274a.12(c)(10). Applicants for suspension of deportation or special rule cancellation of removal under section 203 of NACARA will also be eligible to apply for and be granted employment authorization under this provision at the time of filing an application with the Service or EOIR.

Travel outside the United States

Is an applicant permitted to travel outside the United States while an application for suspension of deportation or special rule cancellation of removal is pending?

Applicants for suspension of deportation or special rule cancellation of removal under NACARA are subject to present rules and procedures governing advance parole. Nothing in NACARA authorizes travel outside the United States for beneficiaries. Those NACARA beneficiaries who leave the country without first obtaining advance parole and who do not have any other lawful status may be subject on their return to expedited removal under section 235(b) of the Act.

NACARA beneficiaries who leave the country and are paroled back in will no longer be eligible for suspension of deportation since they would be inadmissible to the United States, rather than deportable from the United States.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant impact on a substantial number of small entities because of the following reason: This rule would provide new administrative procedures for the Service to consider applications from certain Guatemalans, Salvadorans, nationals of former Soviet Bloc countries, and their dependents who are applying for suspension of deportation or special rule cancellation of removal and, if granted, to adjust their status to that of lawful permanent resident. It will have no effect on small entities, as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a “significant regulatory action” under Executive order 12866, section 3(f) Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibility among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 – Civil Justice Reform

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

Paperwork Reduction Act

The information collection requirement contained in this rule (Form I-881) will be submitted for review to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act. The Service issued a 60-day notice in the **Federal Register** on May 8, 1998, at 63 FR 25523, requesting comments on this new information collection.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 240

Administrative practice and procedure, Immigration.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 103 – POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552a; 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. In § 103.1, the last sentence in paragraph (g)(3)(ii) is revised to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(g) * * *

(3) * * *

(ii) Asylum officers. * * * Asylum officers are delegated the authority to hear and adjudicate credible fear of persecution determinations under section 235(b)(1)(B) of the Act, applications for asylum and for withholding of removal, as provided under 8 CFR part 208, and applications for suspension of deportation and special rule cancellation of removal, as provided under 8 CFR part 240, subpart H.

* * * * *

3. In § 103.7, paragraph (b)(1) is amended by adding the entry for “Form I-881” to the listing of fees, in proper numerical sequence, to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

* * * * *

Form I-881. For filing an application for suspension of deportation or special rule cancellation of removal (pursuant to section 203 of Public Law 105-100):

-- \$215 for adjudication by the Service, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time shall be \$430.

-- \$100 for adjudication by the Immigration Court (A single fee of \$100 will be charged whenever applications are filed by two or more aliens in the same proceedings). The \$100 fee is not required if the Form I-881 is referred to the Immigration Court by the Service.

* * * * *

PART 208 -- PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

4. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 8 CFR part 2.

5. Section 208.14 is amended by revising the section heading and by adding a new paragraph (f), to read as follows:

§ 208.14 Approval, denial, referral or dismissal of application.

* * * * *

(f) If an asylum applicant is granted adjustment of status to lawful permanent resident, any pending asylum application filed by the applicant with the Service will be presumed

abandoned and dismissed without prejudice, unless the applicant requests in writing within 30 days of the grant of adjustment of status, or otherwise before the application has been dismissed, that the asylum application be adjudicated.

PART 240 – PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

6. The authority citation for part 240 is revised to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202, 203, and 204 of Pub. L. 105-100 (111 Stat. 2160, 2193); 8 CFR part 2.

7. In subpart F, a new § 240.58 is added to read as follows:

§ 240.58 Extreme hardship.

(a) To be eligible for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, the alien must meet the requirements set forth in the Act, which include a showing that deportation would result in extreme hardship to the alien or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. Applicants are encouraged to cite in their applications and to document all applicable factors, as the presence or absence of any one factor is not determinative in evaluating extreme hardship. Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision.

To establish extreme hardship, an applicant must demonstrate that deportation or removal would result in a degree of hardship beyond that typically associated with deportation or removal. Factors which may be considered in evaluating whether deportation would result in extreme hardship to the alien or to the alien's qualified relative include, but are not limited to, the following:

(1) The age of the alien, both at the time he or she entered the United States and at the time he or she applied for suspension of deportation;

(2) The age, number, and immigration status of the alien's children and their ability to speak the native language and to adjust to life in another country;

(3) The health condition of the alien or his or her child, spouse, or parent and the availability of any required medical treatment in the country to which the alien would be returned;

(4) The alien's ability to obtain employment in the country to which the alien would be deported;

(5) The alien's length of residence in the United States;

(6) The existence of other family members who will be legally residing in the United States;

(7) The financial impact of departure;

(8) The impact of disruption of educational opportunities;

(9) The psychological impact of removal;

(10) The current political and economic conditions in the country to which the alien would be returned;

- (11) Family and other ties to the country to which the alien would be returned;
 - (12) Contributions to and ties to a community in the United States, including the degree of integration into society;
 - (13) Immigration history, including authorized residence in the United States; and
 - (14) The availability of other means of adjusting to permanent resident status.
- (b) Nothing in paragraph (a) of this section shall be construed as creating any right, interest, or entitlement that is legally enforceable by or on behalf of any party against the United States or its agencies, officers, or any other person.

8. Part 240 is amended by adding Subpart H to read as follows:

Subpart H: Applications for Suspension of Deportation or Special Rule Cancellation of Removal under section 203 of Public Law 105-100.

Sec.

- 240.60 Definitions.
- 240.61 Applicability.
- 240.62 Jurisdiction.
- 240.63 Application process.
- 240.64 Eligibility -- general.
- 240.65 Eligibility for suspension of deportation.
- 240.66 Eligibility for special rule cancellation of removal.
- 240.67 Procedure for interview before an asylum officer.
- 240.68 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprinting.
- 240.69 Reliance on information compiled by other sources.

240.70 Decision by the Service.

§ 240.60 Definitions.

As used in this subpart the term:

ABC refers to American Baptist Churches v. Thornburgh 760 F. Supp. 796 (N.D. Cal. 1991).

ABC class member refers to:

(1) Any Guatemalan national who first entered the United States on or before October 1, 1990; and

(2) Any Salvadoran national who first entered the United States on or before September 19, 1990.

IIRIRA refers to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Public Law 104-208 (110 Stat. 3009-625).

NACARA refers to the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Public Law 105-100 (111 Stat. 2160, 2193), as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Public Law 105-139 (111 Stat. 2644).

Registered ABC class member refers to an ABC class member who:

(1) In the case of an ABC class member who is a national of Guatemala, properly submitted an ABC registration form to the Service on or before December 31, 1991; or

(2) In the case of an ABC class member who is a national of El Salvador, properly submitted an ABC registration form to the Service on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991.

§ 240.61 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart H applies to the following aliens:

(1) A registered ABC class member who has not been apprehended at the time of entry after December 19, 1990;

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990;

(3) An alien who entered the United States on or before December 31, 1990, filed an asylum application on or before December 31, 1991, and, at the time of filing the application was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia;

(4) An alien who is the spouse or child of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section, at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section;

(5) An alien who is:

(i) 21 years of age or older and the unmarried son or unmarried daughter of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (a)(1), (a)(2), or (a)(3) of this section; and

(ii) Entered the United States on or before October 1, 1990.

(b) This subpart H does not apply to any alien who has been convicted at any time of an aggravated felony, as defined in section 101(a)(43) of the Act.

§ 240.62 Jurisdiction.

(a) Office of International Affairs. Except as provided in paragraph (b) of this section, the Office of International Affairs shall have initial jurisdiction to grant or refer to the Immigration Court an application for suspension of deportation or special rule cancellation of removal filed by an alien described in § 240.61, provided:

(1) In the case of a national of El Salvador described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 31, 1996 (with an administrative grace period extending to February 16, 1996), or otherwise met the asylum application filing deadline pursuant to the ABC settlement agreement, and the application is still pending adjudication by the Service;

(2) In the case of a national of Guatemala described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 3, 1995, or otherwise met the asylum application filing deadline pursuant to the ABC settlement agreement, and the application is still pending adjudication by the Service;

(3) In the case of an individual described in § 240.61(a)(2) or (3), the individual's asylum application is pending adjudication by the Service;

(4) In the case of an individual described in § 240.61(a)(4) or (5), the individual's parent or spouse has an application pending with the Service under this subpart H or has been granted relief by the Service under this subpart.

(b) Immigration Court. The Immigration Court shall have exclusive jurisdiction over an application for suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA, by an alien who has been served Form I-221, Order to Show Cause, or Form I-862, Notice to Appear, after a copy of the charging document has been filed with the Immigration Court, unless the alien is within one of the following exceptions:

(1) Certain ABC class members. (i) The alien is a registered ABC class member for whom proceedings before the immigration judge or the Board were administratively closed or continued (including those who had final orders of deportation or removal who have filed and been granted a Motion to Reopen as required under 8 CFR 3.43);

(ii) The alien is eligible for benefits of the ABC settlement agreement and has not had the de novo asylum adjudication under the settlement agreement; and

(iii) The alien has not moved for and been granted a motion to recalendar proceedings before the Immigration Court or the Board to request suspension of deportation.

(2) Spouses, children, unmarried sons and unmarried daughters. (i) The alien is described in § 240.61(a) (4) or (5);

(ii) The alien's spouse or parent is described in § 240.61(a)(1), (a)(2), or (a)(3) and has a Form I-881 pending with the Service; and

(iii) The alien's proceedings before the Immigration Court have been administratively closed to permit the alien to file an application for suspension of deportation or special rule cancellation of removal with the Service.

§ 240.63 Application process.

Except as provided in paragraph (a) of this section, the application must be made on a Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100 (NACARA)), and filed in accordance with the instructions for that form. Each application must be filed with the filing and fingerprint fees as provided in § 103.7(b) of this chapter, or request for fee waiver, as provided in § 103.7(c) of this chapter. The fact that an applicant has also applied for asylum does not exempt him or her from the fingerprinting fees associated with the Form I-881.

(a) Applications filed with EOIR. If jurisdiction rests with the Immigration Court under § 260.62(b), the application must be made on the Form I-881, if filed subsequent to the effective date of the interim or final rule. The application form, along with any supporting documents, must be filed with the Immigration Court and served on the Service's district counsel in accordance with the instructions for the form. Applications for suspension of deportation filed prior to the effective date of the interim or final rule shall be filed on Form EOIR-40, Application for Suspension of Deportation. Applications filed for special rule cancellation of removal prior to the effective date of the interim or final rule must be filed on Form EOIR-40A, Application for Suspension of Deportation.

(b) Applications filed with the Service. If jurisdiction rests with the Service under §240.62(a), the Form I-881 and supporting documents must be filed at the appropriate Service Center in accordance with the instructions for the form.

§ 240.64 Eligibility – general.

(a) Burden and standard of proof. The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief.

(b) Calculation of continuous physical presence and certain breaks in presence. For purposes of calculating continuous physical presence under this section, section 309(c)(5) of IIRIRA, as in effect prior to November 19, 1997, and section 240A(d)(1) of the Act shall not apply to persons described in § 240.61.

(1) For applications for suspension of deportation made under former section 244 of the Act, as in effect prior to April 1, 1997, the burden of proof is on the applicant to establish that any breaks in continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States.

(2) For applications for special rule cancellation of removal made under section 309(f)(1) of IIRIRA, as amended by NACARA, the applicant shall be considered to have failed to maintain continuous physical presence in the United States, if he or she has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. The burden is on the applicant to establish that any period of absence less than 90 days was brief, casual and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States.

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

(c) Factors relevant to extreme hardship. Extreme hardship is decided on a case-by-case basis, taking into account the particular facts and circumstances of the claim and considering the factors enumerated in § 240.58.

§ 240.65 Eligibility for suspension of deportation.

To establish eligibility for suspension of deportation under this section, the applicant must be described in § 240.61, must establish that he or she is eligible under former section 244 of the Act, as in effect prior to April 1, 1997, must not be subject to any bars to eligibility in former section 242B of the Act, as in effect prior to April 1, 1997, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997 (relating to Nazi persecution and genocide).

(a) General rule. To establish eligibility for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except the provisions specified in paragraph (b)(2) of this section, and must establish:

- (1) He or she has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date the application was filed;
- (2) During all of such period he or she was and is a person of good moral character; and
- (3) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) Aliens deportable on criminal or certain other grounds. To establish eligibility for suspension of deportation under former section 244(a)(2) of the Act, as in effect prior to

April 1, 1997, an alien who is deportable under paragraph (2), (3), or (4) of former section 241(a) of the Act, as in effect prior to April 1, 1997 (relating to criminal activity, document fraud, failure to register, and security threats), must establish:

(1) He or she has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation;

(2) During all of such period he or she has been and is a person of good moral character;
and

(3) The alien's deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) Battered spouses and children. To establish eligibility for suspension of deportation under former section 244(a)(3) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except former section 241(a)(1)(G) of the Act, as in effect prior to April 1, 1997) (relating to marriage fraud), and except the provisions specified in paragraph (b)(2) of this section, and must establish:

(1) He or she has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date the application was filed;

(2) Has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and

(3) During all of such time in the United States the alien was and is a person of good moral character; and

(4) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

§ 240.66 Eligibility for special rule cancellation of removal.

To establish eligibility for special rule cancellation of removal, the applicant must show he or she is eligible under section 309(f)(1) of IIRIRA, as amended by section 203 of NACARA. The applicant must be described in § 240.61, must be inadmissible or deportable, must not be subject to any bars to eligibility in sections 240(b)(7), 240B(d), or 240A(c) of the Act, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in section 241(b)(3)(B)(i) of the Act (relating to persecution of others).

(a) General rule. To establish eligibility for special rule cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, the alien must establish:

(1) He or she is not inadmissible under paragraph (2) or (3) of section 212(a) or deportable under paragraph (2), (3) or (4) of section 237(a) of the Act (relating to criminal activity, document fraud, failure to register, and security threats);

(2) He or she has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed;

(3) He or she has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in extreme hardship to himself or herself, or to the alien's spouse, parent or child who is a United States citizen or alien lawfully admitted for permanent residence.

(b) Aliens inadmissible or deportable on criminal or certain other grounds. To establish eligibility for cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by section 203 of NACARA, the alien must be described in § 240.61 and establish:

(1) He or she is inadmissible under section 212(a)(2) of the Act (relating to criminal activity), or deportable under section 237(a)(2) (other than section 237(a)(2)(A)(iii), relating to aggravated felony convictions), or 237(a)(3) of the Act (relating to criminal activity, document fraud, and failure to register);

(2) He or she has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of status, constituting a ground for removal;

(3) He or she has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in exceptional and extremely unusual hardship to himself or herself or to the alien's spouse, parent, or child, who is a United States citizen or alien lawfully admitted for permanent residence.

§ 240.67 Procedure for interview before an asylum officer.

(a) Fingerprinting requirements. The Service will notify each applicant 14 years of age or older to appear for an interview only after the applicant has complied with fingerprinting requirements pursuant to §103.2(e) of this chapter, and the Service has received a definitive

response from the Federal Bureau of Investigation (FBI) that a full criminal background check has been completed. A definitive response that a full criminal background check on an applicant has been completed includes:

(1) Confirmation from the FBI that an applicant does not have an administrative or criminal record;

(2) Confirmation from the FBI that an applicant has an administrative or a criminal record;

(3) Confirmation from the FBI that two properly prepared fingerprint cards (Form FD-258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

(b) Interview. (1) The asylum officer shall conduct the interview in a non-adversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for suspension of deportation or special rule cancellation of removal. If the applicant has an asylum application pending with the Service, the asylum officer shall also elicit information relating to the application for asylum in accordance with § 208.9 of this chapter. At the time of the interview, the applicant must provide complete information regarding his or her identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General.

(2) The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(3) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and a language in which

the applicant is fluent. The interpreter must be at least 18 years of age. The following individuals may not serve as the applicant's interpreter: the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, or if the applicant also has an asylum application pending with the Service, a representative or employee of the applicant's country of nationality, or if stateless, country of last habitual residence. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 240.68.

(4) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(5) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, the applicant shall be informed that he or she must appear in person to receive and to acknowledge receipt of the decision and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer.

(6) The asylum officer shall consider evidence submitted by the applicant with his or her application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence.

§ 240.68 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprinting.

Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an interview. Failure to comply with fingerprint processing requirements without good cause may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section 265 of the Act and regulations promulgated thereunder, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment. Failure to appear at the interview or fingerprint appointment will be excused if the applicant demonstrates that such failure was the result of exceptional circumstances.

§ 240.69 Reliance on information compiled by other sources.

In determining whether an applicant is eligible for suspension of deportation or special rule cancellation of removal, the asylum officer may rely on material described in § 208.12 of this chapter. Nothing in this subpart shall be construed to entitle the applicant to conduct discovery directed toward records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State.

§ 240.70 Decision by the Service.

(a) Service of decision. Unless otherwise provided by an Asylum Office, the applicant will be required to return to the Asylum Office to receive service of the decision on his or her application. If the applicant does not speak English fluently, the applicant must bring an interpreter when he or she returns to the office to receive service of the decision.

(b) Grant of suspension of deportation. An asylum officer may grant suspension of deportation to an applicant eligible to apply for this relief with the Service who qualifies for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, who is not an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997, and who admits deportability under any law of the United States, excluding paragraph (2), (3), or (4) of former section 241(a) of the Act, as in effect prior to April 1, 1997. If the Service has made a preliminary decision to grant the applicant suspension of deportation or special rule cancellation of removal under this subpart, the applicant will be required to sign an admission of deportability or inadmissibility before the Service may grant the relief sought. If suspension of deportation is granted, the Service will adjust the status of the alien to lawful permanent resident, effective as of the date that suspension of deportation is granted.

(c) Grant of cancellation of removal. An asylum officer may grant cancellation of removal to an applicant who is eligible to apply for this relief with the Service, and who qualifies for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, and who admits deportability under section 237(a), excluding paragraphs (2), (3), and (4), of the Act, or inadmissibility under section 212(a), excluding paragraphs (2) or (3), of the Act. If cancellation of removal is granted, the Service will adjust the status of the alien to lawful permanent resident, effective as of the date that cancellation of removal is granted.

(d) Referral of the application. Except as provided in paragraphs (e) and (f) of this section, and unless the applicant is granted asylum or is in lawful immigrant or non-immigrant status, an asylum officer shall refer the application for suspension of deportation or special rule

cancellation of removal to the Immigration Court for adjudication in deportation or removal proceedings, if:

(1) The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA;

(2) The applicant does not appear to merit relief as a matter of discretion;

(3) The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal under this subpart, but does not admit deportability or inadmissibility; or

(4) The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure(s) was not excused by the Service, unless the application is dismissed.

(e) Dismissal of the application. An asylum officer shall dismiss without prejudice an application for suspension of deportation or special rule cancellation of removal submitted by an applicant who is granted asylum, or who is in lawful immigrant or non-immigrant status. An asylum officer may also dismiss an application for failure to appear, pursuant to § 240.68.

(f) Special provisions for certain ABC class members whose proceedings before EOIR were administratively closed or continued. The following provisions shall apply with respect to an ABC class member who was in proceedings before the Immigration Court or the Board, and those proceedings were closed or continued pursuant to the ABC settlement agreement or in order to allow the alien to apply under this subpart with the Service:

(1) Suspension of deportation or asylum granted. If an asylum officer grants asylum or suspension of deportation, the previous proceedings before the Immigration Court or Board shall be terminated as a matter of law on the date relief is granted.

(2) Asylum denied and application for suspension of deportation not approved. If an asylum officer denies asylum and does not grant the applicant suspension of deportation, the Service shall move to recalendar proceedings before the Immigration Court or renew the appeal before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation. In the case where jurisdiction rests with the Board, an application for suspension of deportation that is referred to the Board will be remanded to the immigration judge for adjudication.

(g) Special provisions for dependents whose proceedings before EOIR were administratively closed. If an asylum officer grants suspension of deportation or special rule cancellation of removal to an applicant described in § 240.61(a)(4) or (a)(5), whose proceedings before EOIR were administratively closed, those proceedings shall terminate as of the date the relief is granted. If suspension of deportation or special rule cancellation of removal is not granted, the Service shall move to recalendar the proceedings and shall refer the application to the Immigration Court, unless the applicant has been granted asylum.

PART 274a – CONTROL OF EMPLOYMENT OF ALIENS

9. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; and 8 CFR part 2.

10. Section 274a.12 is amended by revising the first sentence in paragraph (c)(10), to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(10) An alien who has filed an application for suspension of deportation under section 244 of the Act (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the Act, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Public Law 104-208 (110 Stat. 3009-625) (as amended by the Nicaraguan Adjustment and Central American Relief Act (NACARA), title II of Pubic Law 105-100 (111 Stat. 2160, 2193), and whose application has been accepted by the Service or EOIR. * * *

* * * * *

PART 299 – IMMIGRATION FORMS

11. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

12. Section 299.1 is amended in the table by adding the entry for Form “I-881” in proper numerical sequence, to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
----------	--------------	-------

* * * * *

I-881.....	10-01-98.....	Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100).
------------	---------------	--

* * * * *

13. Section 299.5 is amended in the table by adding the entry for Form "I-881" in proper numerical sequence, to read as follows:

§ 299.5 Display of control numbers.

* * * * *

INS form No.	INS form title	Currently assigned OMB control No.
--------------	----------------	---------------------------------------

* * * * *

I-881...	Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105-100).	1115 - xxxx
----------	--	-------------

* * * * *

Janet Reno

Dated:

Attorney General