



**IMMIGRATION AND NATURALIZATION SERVICE
OFFICE OF THE GENERAL COUNSEL**

To: Julie Fernandez White House
456-6558

Phone: _____

Fax: 456-5581

From: Kelly Ryan
Associate General Counsel
Chief, Refugee and Asylum Division

Phone: 202.514.3211

Fax: 202.514.0455

Date: 17 July 1997 Page Number (inc. coversheet): 117

Comments: _____

Here are the 2 regulations which DOJ has
published for NACARAs.

- 1) The § 202 adjustment regulations & press announcement,
- 2) § 203 motion to reopen regulations,
- 3) The INS Q + A's.

IMPORT ASSESSMENT TABLE—
Continued
(Raw cotton fiber)

HTS No.	Conv. fact.	Cents/ kg.
6302910035	1.052	1.2466
6302910045	1.052	1.2466
6302910050	1.052	1.2466
6302910060	1.052	1.2466
6303110000	0.9448	1.1196
6303910000	0.6429	0.7618
6304111000	1.0629	1.2595
6304190500	1.052	1.2466
6304191000	1.1689	1.3851
6304191500	0.4091	0.4848
6304192000	0.4091	0.4848
6304910020	0.9351	1.1081
6304920000	0.9351	1.1081
6505901540	1.181	1.3995
6505902060	0.9935	1.1773
6505902545	0.5844	0.6925

Dated: May 15, 1998.

Mary E. Atienza,

Deputy Administrator, Cotton Programs.

[FR Doc. 98-13525 Filed 5-20-98; 8:45 am]

BILING CODE 3410-02-P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3, 240, 245, 274a and 299

[INS NO. 1893-97; AG Order No. 2154-98]

RIN 1115-AF04

Adjustment of Status for Certain Nationals of Nicaragua and Cuba

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

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule implements section 202 of the Nicaragua Adjustment and Central American Relief Act (NACARA) by establishing procedures for certain nationals of Nicaragua and Cuba who have been residing in the United States to become lawful permanent residents of this country. This rule allows them to obtain lawful permanent resident status without applying for an immigrant visa at a United States consulate abroad and waives many of the usual requirements for this benefit.

DATES: *Effective date:* This interim rule is effective June 22, 1998.

Comment date: Comments must be submitted on or before July 20, 1998.

ADDRESSES: Please submit written comments, original and two copies, 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. 1893-97 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—*Suzy Nguyen, Adjudications Officer, Office of Adjudications, Immigration and Naturalization Service, 425 I Street NW, Room 3214, Washington, DC 20536, telephone (202) 514-5014; *For matters relating to the Executive Office for Immigration Review—*Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, 5107 Leesbury Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION:

How Does Section 202 of NACARA Affect Nicaraguan and Cuban Nationals?

The Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of the District of Columbia Appropriations Act, 1998, Pub. L. 105-100 (111 Stat. 2180, 2193), was signed into law on November 19, 1997. As amended, section 202 of NACARA allows certain Nicaragua and Cuban nationals who are physically present in the United States to adjust status to that of lawful permanent resident. In order to be eligible for benefits under NACARA, an applicant must be a national of Nicaragua or Cuba; must be admissible to the United States under all provisions of section 212(a) of the Immigration and Nationality Act (the Act), other than those provisions specifically excepted by NACARA; must have been physically present in the United States for a continuous period beginning not later than December 1, 1995, and ending not earlier than the date the application for adjustment is filed (not counting absences totaling 180 days or less); and must properly file an application before April 1, 2000. In addition, certain family members of NACARA beneficiaries are also eligible for adjustment of status under NACARA.

What Are the Benefits of NACARA?

An alien seeking adjustment of status under NACARA is not subject to a number of the requirements to which aliens seeking adjustment under section 245 of the Act may be subject.

First, a NACARA applicant is not required to have been inspected and

admitted or paroled into the United States.

Second, a NACARA applicant is not subject to any of the barriers to adjustment contained in section 245(c) of the Act (e.g., the bars against aliens who have accepted or continued in unauthorized employment, aliens who remained in the United States longer than authorized, and aliens admitted as crewmen, in transit without visa, or under the visa waiver pilot program). Consequently, an alien who would otherwise be ineligible under section 245(c) may apply for adjustment under NACARA.

Third, NACARA applicants are not subject to the immigrant visa preference system requirements contained in sections 201 and 202 of the Act. Hence, neither the worldwide quota restrictions nor the per-country quota restrictions apply.

Fourth, applicants need not demonstrate that they are not inadmissible under paragraphs (4), (5), (6)(A), (7)(A), and (9)(B) of section 212(a) of the Act in order to adjust status under section 202 of Public Law 105-100. Accordingly, NACARA allows an otherwise qualified applicant to adjust status under NACARA notwithstanding inadmissibility for likelihood of becoming a public charge, for failure to obtain a labor certification, for failure to meet certain requirements applicable to foreign-trained physicians, for failure to meet certain standards for foreign health-care workers, for entering or remaining in the country illegally, for violating documentary requirements relating to entry as an immigrant, or for accruing more than 180 days of unlawful presence prior to the alien's last departure or removal.

Fifth, unlike those seeking to adjust status under other provisions of law, a NACARA applicant who has been paroled into the United States and is now in exclusion or removal proceedings before an immigration judge is not barred from filing an application for adjustment of status under the provisions of NACARA while in such proceedings.

What Are the NACARA Requirements Regarding Continuous Physical Presence in the United States

Under the terms of NACARA, eligible applicants must have been physically present in the United States continuously since December 1, 1995. However, they may have been outside of the United States for periods not to exceed 180 days in the aggregate between December 1, 1995, and the date of adjustment of status. A NACARA applicant shall not be considered to

have failed to maintain continuous physical presence in the United States by reason of any absences for periods that do not exceed 180 days in the aggregate. Furthermore, the 180-day cumulative period shall be tolled during an absence authorized pursuant to issuance of an Authorization for Parole of an alien into the United States (Form I-512).

How Can a NACARA Applicant Prove Continuous Physical Presence in the United States?

A NACARA applicant must establish two aspects of physical presence in the United States: commencement on or prior to December 1, 1995, and continuity since that date.

Under section 202(b)(2)(A) of Pub. L. 105-100, as amended, an applicant may prove commencement of continuous physical presence in the United States by demonstrating that on or before December 1, 1995, he or she:

- (i) Applied to the Attorney General for asylum;
- (ii) was issued an order to show cause under section 242 or 242B of the Immigration and Nationality Act (as in effect prior to April 1, 1997);
- (iii) was placed in exclusion proceedings under section 236 of such Act (as in effect prior to April 1, 1997);
- (iv) Applied for adjustment of status under section 245 of such Act;
- (v) Applied to the Attorney General for employment authorization;
- (vi) Performed service, or engaged in a trade or business, within the United States which is evidenced by records maintained by the Commissioner of Social Security; or
- (vii) Applied for any other benefit under the Immigration and Nationality Act by means of an application establishing the alien's presence in the United States prior to December 1, 1995.

Normally, such demonstration will be made through submission of a photocopy of a Government-issued document. In some cases, the alien may submit other evidence demonstrating one or more of the above actions, which may be verified through Government records.

Section 202(b)(2)(B) of NACARA also permits, but does not require, the Attorney General to provide by regulation for additional methods by which an applicant could prove commencement of continuous physical presence in the United States. The Department of Justice (Department) is availing itself of this authority to allow a NACARA applicant to submit, as evidence of commencement of physical presence in the United States, other documentation issued by state and local

authorities (such as school, hospital, police, and public assistance records). The Department believes that these evidentiary options may well provide sufficient opportunities for qualified applicants to establish commencement of physical presence in the United States without encouraging fraudulent applications. However, in order to ensure that no significant group of eligible aliens is precluded from establishing eligibility for NACARA benefits, the Department is soliciting public comments on the need for any additional methods of establishing commencement of physical presence in the United States and suggestions as to what those additional methods should be, including whether the documentary standards listed in 8 CFR 245.13(e)(3) for demonstrating continuity of physical presence should also be applied to the requirement for demonstrating commencement of physical presence. Commenters are encouraged to explain which classes of aliens would benefit from the proposal, and how the proposal could be implemented without severely compromising the integrity of the adjudicative process.

The NACARA statute is silent as to the methods by which an applicant may demonstrate the continuity of his or her physical presence in the United States. By regulation, the Department is hereby providing that a NACARA applicant may demonstrate continuity of physical presence in the United States through the submission of one or more documents issued by any governmental or non-governmental authority. Such documentation must bear the name of the applicant, have been dated at the time it was issued, and bear the signature of the issuing authority. In some cases, a single document may suffice to establish continuity for the entire post-December 1, 1995, period, while in other cases the alien may need to submit a number of documents. For example, a college transcript or an employment record may show that an applicant attended school or worked in the United States throughout the entire post-December 1, 1995, period. On the other hand, an applicant would need to submit a number of monthly rent receipts or electric bills to establish the same continuity of presence. While the Department neither requires nor wants the applicant to submit documentation to show presence on every single day since December 1, 1995, there should be no significant chronological gaps in the documentation, either. Generally, a gap of 3 months or less in documentation is not considered significant. Furthermore, if the applicant is aware of documents

already contained in this or her Immigration and Naturalization Service (Service) file that establish physical presence, he or she may merely list those documents, giving the type and date of the document. Examples of such documents might include a written copy of a sworn statement given to a Service officer, the transcript of a formal hearing, and a Record of Deportable/Inadmissible Alien (Form I-213).

How Does an Applicant Establish Admissibility?

The grounds of inadmissibility specified in paragraphs (4) (public charge), (5) (lack of labor certification), (6)(A) (illegal entry), (7)(A) (immigrant not in possession of an immigrant visa or other valid entry document), and (9)(B) (unlawful presence) of section 212(a) of the Act do not apply to NACARA applicants. Additionally, a Nicaraguan or Cuban national present in the United States who has been ordered excluded, deported, or removed from, or who has agreed to depart voluntarily from, the United States may apply for adjustment of status under NACARA.

If a NACARA applicant is inadmissible to the United States under one of the grounds of inadmissibility contained in section 212(a) of the Act other than those specifically excepted by NACARA, but is eligible for an individual waiver of that ground of inadmissibility, he or she may file an application for the waiver concurrently with his or her application for adjustment of status. Adjustment of status may not be granted unless the waiver has first been approved.

How Do the Provisions of NACARA Affect Dependents of Nicaraguan and Cuban Nationals?

The provisions of NACARA also apply to certain dependents. To receive NACARA benefits as a dependent of a NACARA beneficiary, an alien would have to be a national of either Nicaragua or Cuba (but need not necessarily be of the same nationality as the principal beneficiary—a Cuban dependent could qualify through a Nicaraguan principal beneficiary and vice versa); would have to be the spouse, child (i.e., under 21 years of age and unmarried), or unmarried son or daughter (i.e., 21 years of age or older) of a NACARA principal beneficiary at the time of the principal beneficiary's adjustment of status to that of permanent resident; and would have to be admissible to the United States under section 212(a) of the Act (other than those provisions specifically excepted by NACARA). NACARA dependents must be physically present in the United States in order to apply

and must properly file an application before April 1, 2000.

Additionally, an unmarried son or daughter, other than a child as defined in section 101(b)(1) of the Act, would have to have been physically present in the United States continuously since December 1, 1995 (not counting absences totaling 180 days or fewer). Although many qualifying dependents of NACARA principal beneficiaries would be able to receive NACARA benefits in their own right, some would only be able to qualify under the dependent provisions. Examples of otherwise eligible persons who could only qualify as dependents would include a spouse or child who arrived in the United States between December 1, 1995, and the principal beneficiary's filing date, and a spouse or child who had been absent for an aggregate of more than 180 days.

How Are Dependents Who Do Not Meet NACARA Requirements Affected?

A family member who is unable to qualify for NACARA adjustment of status on his or her own, or as a dependent under the provisions of NACARA, may eventually become eligible for lawful permanent resident status under other provisions of the Act. Examples of such individuals would include a dependent who is not a national of Nicaragua or Cuba, a spouse or child whose relationship to the principal applicant is not established until after the principal applicant is granted permanent resident status, and an unmarried son or daughter over the age of 21 who entered the United States after December 1, 1995. Upon becoming a permanent resident, a NACARA beneficiary could file a visa petition to accord such a dependent immigrant classification under section 203(a)(2) of the Act, thereby enabling the dependent who is not eligible for NACARA benefits to seek immigration to the United States through the normal family-based immigration process.

What Happens if an Applicant Is Already in Exclusion, Deportation, or Removal Proceedings, or Has a Motion To Reopen or Motion To Reconsider Pending Before the Immigration Court or the Board of Immigration Appeals (Board)?

Proceedings Pending Before the Executive Office for Immigration Review (EOIR)

Persons who have proceedings pending before an Immigration Court or the Board, or persons who have a pending motion to reopen or reconsider filed on or before May 21, 1998, shall

remain within the jurisdiction of EOIR for the purpose of consideration of applications for adjustment of status under section 202 of NACARA.

Proceedings Pending Before an Immigration Judge

If an alien (other than an arriving alien who has not been paroled into the United States) is in exclusion, deportation, or removal proceedings before an immigration judge, or if an alien has a motion to reopen or motion to reconsider filed on or before May 21, 1998 pending before an immigration judge, jurisdiction over an application for adjustment of status under section 202 of NACARA shall lie with the Immigration Court. The procedure for filing an application for adjustment under NACARA is described below. If an alien who is not clearly ineligible for adjustment of status under section 202 of NACARA and who has a pending motion to reopen or motion to reconsider files an application for adjustment of status under section 202 of NACARA, the Immigration judge shall reopen the alien's proceedings for consideration of the adjustment application. Applications shall be subject to the filing requirements of 8 CFR 3.11 and 3.31.

Proceedings Pending Before the Board

If an alien who is not clearly ineligible for adjustment of status under section 202 of NACARA has a pending appeal with the Board, the Board shall remand the proceedings to the immigration judge for the sole purpose of adjudicating the application for adjustment. The Board shall so remand the case regardless of whether the alien has already filed an application for adjustment of status under NACARA. Further, if an alien has a pending motion to reopen or motion to reconsider filed with the Board on or before May 21, 1998, the Board shall reopen and remand the proceedings to the immigration judge for the sole purpose of adjudicating an application for adjustment of status under section 202 of NACARA.

If upon remand the immigration judge denies the application, or the alien fails to file an application for adjustment under section 202 of NACARA, the immigration judge shall return the case to the Board by certification. This will allow the Board to consider the denial of the NACARA application as well as all other outstanding issues from the previously pending appeal or motion. The alien shall not be required to file another Notice of Appeal to the Board of Immigration Appeals or Decision of Immigration Judge (Form EOIR-26), or

to pay an appeal filing fee because the immigration judge's certification of the denial to the Board will automatically transfer the immigration judge's decision to the Board.

May an Alien Who Is in Proceedings Before an Immigration Court or the Board of Immigration Appeals Apply for Adjustment of Status Before the Service?

Yes, under certain circumstances. An alien who is in exclusion, deportation, or removal proceedings before an Immigration Court or the Board may move to have the proceeding administratively closed for the purpose of filing an application for adjustment under NACARA. If the Service concurs in such motion, the Immigration Court or the Board, as appropriate, will administratively close the proceedings. Such closure would permit recalendar of the closed proceedings if, for example, the alien fails to file an application for adjustment of status under NACARA before April 1, 2000, or the Service denies any application for adjustment of status filed by the alien under NACARA. Should the Service deny the application of status filed by the alien under NACARA. Should the Service deny the application, or the alien fail to file the application before April 1, 2000, the Service will move to recalendar the proceedings and the proceedings will be recalendar by the Immigration Court or the Board, as appropriate. In the case of an application denied by the Service, the alien could seek reconsideration of the denied adjustment application in such recalendar proceedings.

What Happens if an Applicant Is the Subject of a Final Order of Removal?

An alien who is the subject of a final order of removal, and who has never filed an application for adjustment of status under section 202 of NACARA with the Immigration Court, must file such application with the Service. However, if such alien has a motion to reopen or a motion to reconsider filed on or before May 2, 1998 pending before an Immigration Court or the Board, then the application for adjustment must be filed with the Immigration Court or with the Board, as appropriate. The mere filing of an application for adjustment of status under section 202 of NACARA with the Service or the referral of a denied application to an immigration judge does not stay the execution of the final order of removal. To request that execution of the final order be stayed by the Service, the alien must file an Application for Stay of Removal (Form I-246), following the procedures set

forth in 8 CFR 241.6. If the application is referred to the immigration judge, and the Service does not grant a stay of execution of the final order, the alien must request that the immigration judge or Board specifically grant a stay of execution of the final order of removal pursuant to 8 CFR 245.13(d)(5)(ii).

When Can an Application Be Filed?

The application period for NACARA benefits begins June 22, 1998 and ends on March 31, 2000.

What Forms and Other Documents Should Be Filed?

Each applicant for NACARA adjustment of status benefits must file a separate Application to Registrar Permanent Residence or Adjust Status (Form I-485), accompanied by the required application fee and supporting documents described below. NACARA applicants should complete Part 2 (Application Type) of that form by checking box "h—other" and writing "NACARA—Principal" or "NACARA—Dependent" next to that block. Each application filed must be accompanied by the required initial evidence: (1) a birth certificate or other record of birth; (2) two photographs as described in the Form I-485 instructions; (3) a completed Biographic Information Sheet (Form G-325A) if the applicant is between 14 and 79 years of age; (4) a report of medical examination; (5) if the applicant is at least 14 years of age, a local police clearance from each jurisdiction where the alien has resided for six months or longer since arriving in the United States; (6) a copy of the applicant's Arrival-Departure Record (Form I-94) or other evidence of inspection and admission or parole into the United States, if applicable; (7) one or more of the documents described in section 202(b)(2) of NACARA and 8 CFR 245.13(e)(2) to establish commencement of physical presence in the United States; and (8) one or more of the documents described in 8 CFR 245.13(e)(3) to establish continuity of physical presence in the United States. In addition, the applicant must submit a statement showing all departures from and arrivals in the United States since December 1, 1995. Finally, if the alien is applying as the spouse, child, or unmarried son or daughter of another NACARA beneficiary, the applicant must submit evidence of the relationship (for example, a marriage certificate).

Must the Applicant Be Fingerprinted?

Yes. Upon receipt of the application, the Service will instruct the applicant regarding procedures for obtaining

fingerprints through one of the Service's Application Support Centers (ASCs) or authorized Designated Law Enforcement Agencies (DLEAs) chosen specifically for that purpose. Those instructions will direct the applicant to the ASC or DLEA nearest the applicant's home, and advise the applicant of the date(s) and time(s) fingerprinting services may be obtained. Applicants should not submit fingerprint cards as part of the initial filing.

Is There a Fee for Filing This Application?

NACARA adjustment of status applications must be submitted with the fee required by 8 CFR 103.7(b)(1) for Form I-485 (currently \$130 for applicants 14 years of age or older, and \$100 for applicants under age 14). If the application is submitted to the INS Texas Service Center, the fee must also be submitted to that center. If the application is submitted to an Immigration Court or the Board of Immigration Appeals, the fee must be submitted to the appropriate local office of the Service in accordance with 8 CFR 3.31. An applicant who is deserving of the benefits of section 202 of NACARA and is unable to pay the filing fee may request a fee waiver in accordance with 8 CFR 103.7(c).

How and Where Should the Application Be Filed?

If the applicant is not in exclusion, deportation, or removal proceedings before an Immigration Court or the Board of Immigration Appeals, the application and attachments must be submitted by mail to: USINS Texas Service Center, P.O. Box 851804, Mesquite, TX 75185-1804. If the applicant is in proceedings pending before an Immigration Court or the Board of Immigration Appeals, or if the applicant has a motion to reopen or motion to reconsider filed on or before May 21, 1998 pending before an Immigration Court or the Board, the application and attachments must be submitted to the Immigration Court with jurisdiction over the case or to the Board if the Board has jurisdiction. In such cases, the fee should be submitted to the Service pursuant to 8 CFR 3.31, as provided above. It should be noted that if the motion to reopen or motion to reconsider is filed after May 21, 1998, jurisdiction over any application for adjustment of status under NACARA lies with the Service, not with EOIR.

Applications for adjustment of status under NACARA may not be submitted to any other Service locations or to any consular posts.

Will an Applicant Filing an Application for Adjustment of Status Under NACARA With the Service Be Required to Appear Before the Service for an Interview?

The decision whether to require an interview is solely within the discretion of the Service. The Service may elect to waive the interview of the applicant. If the application is adjudicated without interview, a notice of the decision will be mailed to the applicant. If an interview is required, the application will be forwarded to the local Service office having jurisdiction over the applicant's place of residence. The applicant will be notified of the date and time to appear for the interview. If an applicant fails to appear for an interview, the application may be denied in accordance with existing regulations.

Can an Applicant Be Authorized To Work While the Application Is Pending?

An unexpired authorization to accept employment under another provision of the Act will not be invalidated by the filing of an application for adjustment of status under NACARA or by the administrative closure of the exclusion, deportation, or removal proceeding to pursue relief pursuant to NACARA. Furthermore, an applicant for adjustment under NACARA is not precluded from applying for, and being granted, an extension of any such employment authorization for which he or she remains eligible. Any applicant for adjustment of status under NACARA who wishes to obtain initial employment authorization, or continued employment authorization when his or her prior authorization expires, during the pendency of the adjustment of status application may file an Application for Employment Authorization (Form I-765), in accordance with the instructions on the form. With limited exceptions, the interim rule provides that employment authorization will not be granted until the application for adjustment has been pending for 180 days. This approach is in keeping with section 202(c)(3) of NACARA, which mandates approval of employment authorization if the adjustment application "is pending for a period exceeding 180 days," and has not been denied, and which authorizes, but does not mandate, approval of employment authorization if the application has been pending for fewer than 180 days. Under the interim rule, the Department will authorize employment for applicants whose cases have been pending for fewer than 180 days only if the

applicant applies for work authorization and adjustment at the same time. In addition, the Service record must contain evidence that the applicant is a national of Nicaragua or Cuba who had applied to the Service for an immigration benefit, or had been placed in deportation or exclusion proceedings, not later than December 1, 1995, as provided in paragraphs (1)(A)(i) through (v) and (vii) of section 202(b) of NACARA, unless the record also shows that the applicant is clearly ineligible for adjustment of status under NACARA (e.g., the applicant has been convicted of an aggravated felony). The potential benefits of filing for adjustment of status and employment authorization concurrently will be emphasized during public information sessions that the Service will hold with local community groups. The Department believes that limited employment authorization to these circumstances and to circumstances in which 180 days have elapsed since the filing of the application will both: (1) discourage fraudulent applications filed simply as a way to gain work authorization, and (2) permit employment more promptly for those whose applications appear likely to be granted. However, in publishing this interim rule the Department solicits the views of interested parties on this topic.

Can an Application for Adjustment of Status Be Submitted if the Alien Is Outside the United States?

No. The statute and regulations require that an alien be physically present in the United States in order to properly file an application. However, the regulation does contain a special provision allowing an otherwise eligible alien who is outside the United States to submit a request for parole authorization. Such request would have to be accompanied by photocopies of the documents the alien intends to file in support of his or her claim for eligibility for adjustment of status under NACARA if the parole authorization is granted. Parole authorization may be granted, as a matter of discretion, if upon review of the application for parole authorization and related documents it is determined that the application for adjustment of status is likely to be approved once it has been properly filed. The alien would be allowed to file the application after being paroled into the country. Accordingly, the alien must remain outside the United States until the request for parole authorization is approved. Any attempt to enter the United States without the parole authorization could result in the alien's

being found inadmissible to, and removed from, the United States.

Can an Applicant Travel Outside the United States While the Application Is Pending?

Nothing in NACARA authorizes the Service to allow an applicant to re-enter the United States without proper documents. If an applicant plans to leave the United States to go to any other country, including Canada or Mexico, before a decision is made on his or her NACARA adjustment application, the applicant should contact the Service to request advance authorization for parole. If an applicant leaves the United States without such advance authorization, action on his or her NACARA adjustment application may be terminated and the application may be denied. An applicant may also experience difficulty when returning to the United States if he or she does not have such advance authorization. Furthermore, any absence from the United States without an advance parole authorization issued prior to departure counts toward the 180-day aggregate time period that the applicant is allowed to be outside the United States.

If an Alien Who Is Under a Final Order of Exclusion, Deportation, or Removal Departs From the United States, Will the Alien Be Effecting His or Her own Exclusion, Deportation, or Removal?

Yes. Such alien would be a "self-deport" and would be subject to the inadmissibility provisions of section 212(a)(9) of the Act, regardless of whether the alien obtained an Authorization for Parole of an Alien Into the United States (Form I-512) prior to departure. While being inadmissible would not preclude the alien from being paroled into the United States, it would preclude the alien from being admitted to the United States or being granted an adjustment of status, unless the alien first applied for and was granted permission to reapply for admission into the United States.

How Can an Alien Apply for Such Permission?

An Alien needing such permission may file an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), in accordance with the instructions on that form. Form I-212 may be filed prior to the alien's departure.

Can an Alien Who Has Not Filed the Application for Adjustment Obtain a Form I-512?

Once this regulation becomes effective on June 22, 1998, and except as discussed above, only the NACARA-eligible aliens who have filed an application for adjustment of status will be able to obtain a Form I-512. However, because some individuals may need to travel prior to that date, on December 24, 1997, the Service issued instructions to all local Service offices allowing district directors to issue Form I-512 to aliens who appear to be eligible for adjustment of status under NACARA and need to travel. The interim rules provides that for aliens who departed the United States with a Form I-512 issued pursuant to those December 24, 1997, instructions, the 180-day cumulative period during which an alien may be absent without breaking continuous physical presence in the United States is tolled while the alien is outside the United States in accordance with the conditions of the advance parole authorization. In this fashion, the Department precludes undue hardships for the affected individuals.

Furthermore, for those aliens who were not issued a Form I-512 because they departed before the Service could implement the December 24, 1997, instructions, the interim rule provides for the tolling of the 180-day cumulative period from November 19, 1997, until July 20, 1998, provided the alien departed from the United States prior to December 31, 1997. This provision extends until July 20, 1998, in order to provide interested aliens 30 days from the effective date of the interim regulation to file the application for parole authorization with the Texas Service Center. As discussed above, once the application for parole authorization has been filed the 180-day cumulative period during which an alien is not required to be physically present in the United States is tolled, provided the application for parole authorization is granted. Such tolling would remain in effect until the alien arrives in the United States with the Form I-512 issued by the director of the Texas Service Center.

What Documentation Will Be Issued if the Adjustment Application Is Approved?

After processing is completed, a notice of the decision will be mailed to the NACARA applicant. Applicants should keep this notice for their records. If the application has been approved, an alien registration receipt card will be

mailed separately to the applicant. To obtain temporary evidence of lawful permanent resident status, the applicant may present the original approval notice and his or her passport or other photo identification at his or her local Service office. The local Service office will issue temporary evidence of lawful permanent resident status after verifying the approval of the NACARA adjustment of status application. If the applicant is not in possession of a passport in which such temporary evidence may be endorsed, he or she should also submit two photographs meeting Alien Documentation, Identification, and Telecommunication System (ADIT) specifications so that the Service may prepare and issue temporary evidence of lawful permanent residence status. If the alien previously had been issued a final order of exclusion, deportation, or removal, such order shall be deemed canceled as of the date of the approval of the application for adjustment of status. If the alien had been in exclusion, deportation, or removal proceedings that were administratively closed, such proceedings shall be deemed terminated as of the date of approval of the application for adjustment of status.

What Happens if an Application Is Denied by the Service?

If the Service finds that an applicant is ineligible for adjustment of status under NACARA, the Service will advise him or her of its determination and of the applicant's right to seek, and the procedures for seeking, consideration of the application by an immigration judge. Depending on the individual case circumstances, those procedures could take one of three different routes as follows:

(1) If exclusion, deportation, or removal proceedings had never been commenced, the Service will issue a Notice to Appear, thereby initiating removal proceedings during which the applicant may renew his or her application for adjustment under NACARA before an Immigration Court. In such proceedings, the immigration judge shall adjudicate the renewed application.

(2) If exclusion, deportation, or removal proceedings had been initiated and administratively closed under the procedure set forth in 8 CFR 245.13(d)(3), the Service will advise the alien of the Service's denial of the NACARA adjustment application and will move the Immigration Court, or the Board if at the time of administrative closure the Board had jurisdiction over the case, to recalendar the proceeding. The previously closed removal

proceedings will then be recalendarred by the Immigration Court or the Board, as appropriate.

(3) If a final order of exclusion, deportation, or removal had been issued, the Service, using Form I-290C, Notice of Certification, will refer its decision to deny the NACARA adjustment application to an immigration judge, who will adjudicate the application in proceedings designed solely for the purpose of such adjudication.

What Happens if an Application Is Denied by the Immigration Court?

If the Immigration Court denies the NACARA adjustment application of an alien in exclusion, deporting, or removing proceedings before the Immigration Court, the decision to appeal to the Board along with and under the same procedures as all other issues before the Immigration Court in those proceedings. If the Immigration Court denies the NACARA adjustment application of an alien whose case was remanded to the Immigration Court by the Board, the Immigration Court shall certify the decision to the Board for review. If the Immigration Court denies the NACARA adjustment application of an alien whose case was referred by the Service for a NACARA-only inquiry, the alien shall have the right to appeal the decision of the Board, subject to the requests for 8 CFR parts 3 and 240 governing appeals from immigration judges to the Board, including the requirements of filing a Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) and paying the filing fee.

What Happens if an Alien Fails To Appear for a Hearing Before the Immigration Judge on a NACARA Adjustment as Applicable?

An alien must appear for all scheduled hearings before an immigration judge, unless his or her appearance is waived by the immigration judge. An alien who is in exclusion, deportation, or removal proceedings before the immigration judge and who fails to appear for a hearing regarding a NACARA adjustment application will be subject to the applicable statutory and regulatory *in absentia* procedures (i.e., section 242B of the Act as it existed prior to the amendments of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on September 30, 1996, for deportation proceedings, and section 240 of the Act as amended IIRIRA for removal proceedings).

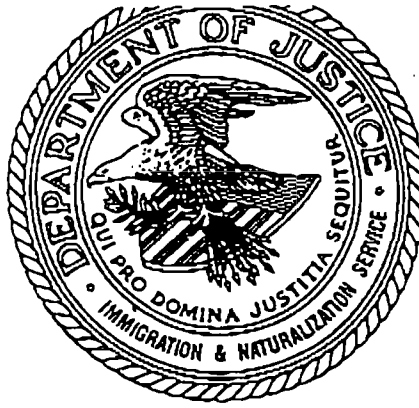
What Rules of Procedure Apply in NACARA-only Hearings Conducted on Cases Referred by the Service to the Immigration Court?

Although an alien who is placed before the immigration judge for a NACARA-only hearing after referral on a Notice of Certification (Form I-290) to the Immigration Court by the Service is not specifically subject to the statutory and regulatory provisions governing exclusion, deportation, and removal proceedings, the Department has inserted language in this interim rule reflecting the standards in section 240 of the Act for removal proceedings, including the *in absentia* procedures. Absent specific statutory direction in this area, the procedures of section 240 of the Act were chosen because such procedures are similar to those from the pre-IIRIRA section 242B of the Act and indicate Congress's most recent preference for procedures dealing with failures to appear for immigration proceedings. Use of the language from section 240 of the Act also assures that the *in absentia* procedures used for those in NACARA-only proceedings are consistent with the *in absentia* procedures applicable to aliens who file NACARA adjustment applications in ongoing removal and deportation proceedings.

As for those aliens who, upon reopening and remanding by the Board to the Immigration Court, fail to file a NACARA adjustment application with the Immigration Court, the immigration judge will certify the case back to the Board for consideration of the previously pending appeal or motion. If, prior to receiving a final order from the Board, the alien subsequently requests as remand to file a NACARA adjustment application, the Board shall remand the case to the Immigration Court, unless the alien is clearly ineligible for such relief.

Good Cause Exception

The Department's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based upon the "good cause" exceptions found at 5 U.S.C. 553(b)(B). Section 202 of NACARA became effective immediately upon enactment on November 19, 1997. Publication of this rule, as an interim rule will expedite implementation of that section and allow Nicaraguan and Cuban nationals and their spouses and children to apply for and obtain the benefits available to applicants for adjustment of status under NACARA as soon as possible before the statutory application deadline of April 1, 2000.



**IMMIGRATION AND NATURALIZATION SERVICE
OFFICE OF THE GENERAL COUNSEL**

To: Julie Fernandez Whitehouse
456-6558

Phone: _____

Fax: 456-5581

From: Kelly Ryan
Associate General Counsel
Chief, Refugee and Asylum Division

Phone: 202.514.3211

Fax: 202.514.0455

Date: 17 July 1997 Page Number (inc. coversheet): ~~17~~

Comments: _____

Here are the 2 regulations which DOJ has
published for NACARAAs.

- 1) The § 202 adjustment regulations & press announcement,
- 2) § 203 motion to Reopen regulations,
- 3) The INS Q + A's.

NACARA Q&As for Nicaraguans, CubansPage 3

Q. May someone who is outside the United States apply for adjustment under NACARA?

A. No. Section 202 only provides benefits for those who are present in the United States at the time of filing. However, the regulation contains a special provision that allows an otherwise eligible alien who is outside the United States to submit a request for parole authorization. The request must be accompanied by photocopies of the documents the alien intends to file in support of the claim for eligibility for adjustment of status under NACARA if the parole authorization is granted. Parole may be authorized, as a matter of discretion, if upon review of the application for parole and related documents INS determines that the application for adjustment of status is likely to be approved once it has been properly filed. The alien would be allowed to file the application after being paroled into the country. Accordingly, the alien must remain outside the United States until the request for parole authorization is approved. Any attempt to enter the United States without the parole authorization could result in the alien's being found inadmissible to, and removed from, the United States.

Q: Can a person eligible under NACARA who has been ordered deported still apply for adjustment to LPR status?

A: Yes, if they are otherwise eligible. An alien who is the subject of a final order, and has never filed an application for adjustment of status under NACARA with the Immigration Court, must file such application with INS. However, if such alien has a motion to reopen or a motion to reconsider pending at the Court or the Board which was filed on or before May 21, 1998, then the application for adjustment must be filed with the proper Court or the Board, as appropriate. **The mere filing of an application for adjustment of status under section 202 of NACARA with INS or the referral of a denied application to an immigration judge does not stay the execution of that final order.** In order to request that INS stay execution of the final order, the alien must file a Form I-246, Application for Stay of Removal. If the application is referred to the immigration judge, and INS does not grant a stay of execution of the final order, the alien must request that the immigration judge or Board specifically grant a stay of execution of the final order.

Q: What about people who have already been deported?

A: An alien who has been deported from the United States cannot apply for adjustment under NACARA because one must be present in the United States to receive such a benefit. An alien who is outside the United States may, under certain circumstances, request parole authorization to return to the United States in order to apply for adjustment under NACARA. Furthermore, aliens who have previously been deported are ineligible for adjustment of status unless and until INS has approved their application for permission to reapply for admission (Form I-212) into the United States after exclusion, deportation or removal.

(more)

NACARA Q&As for Nicaraguans, CubansPage 4

Q: Do all grounds of inadmissibility apply to applicants for adjustment under NACARA?

A: Not all of them. The law states that the grounds of inadmissibility dealing with public charge, lack of labor certification, illegal entry, lack of a required visa, and unlawful presence do not apply to applicants for adjustment under NACARA. An applicant who is inadmissible under any other grounds may not be granted adjustment, unless an individual waiver is available and granted.

Q. Can a person eligible for NACARA and convicted of a crime in the United States still apply for LPR status?

A: NACARA does not waive any criminal grounds of inadmissibility for Nicaraguans and Cubans seeking adjustment of status. However, such aliens may be eligible for an individual waiver of such inadmissibility under certain circumstances.

Q: How many Cubans and Nicaraguans are currently detained who may be eligible for NACARA adjustment? Are you going to release them ?

A: As of May 11, 1998, there were approximately 2,500 Cubans and 180 Nicaraguans in detention. We have sent instructions to the field not to remove any person who may be eligible for this relief. People who appear eligible will be considered for release.

Q: Are applicants for adjustment under NACARA eligible for work authorization?

A: Applicants with an unexpired work authorization may continue to use it during the application process. Applicants who wish to obtain initial employment authorization, or continued authorization when theirs expires, during the application process should file a Form I-765, Application for Employment Authorization, with INS. With limited exceptions, INS will not grant initial employment authorization until the application has been pending for 180 days.

In cases where the application has been pending for less than 180 days, INS will authorize employment only where the applicant applies for work authorization and adjustment at the same time, and the INS record contains evidence that the applicant is a Nicaraguan or Cuban national who had applied for one of the immigration benefits or had been placed in deportation or exclusion proceedings not later than December 1, 1995. INS will not authorize employment if the record shows the applicant is clearly ineligible for adjustment of status under NACARA.

Q: What constitutes a "break" in continuous presence for Nicaraguans and Cubans?

A. Absences from the United States totaling more than 180 days during the period that begins no later than December 1, 1995, and ends no earlier than the date the NACARA adjustment application is granted.

(more)

NACARA Q&As for Nicaraguans, CubansPage 5

Q: Are Nicaraguans and Cubans eligible for NACARA allowed to travel outside the United States.

A: Applicants who plan to leave the United States before a decision is made on their application must file a Form I-131 to obtain a Form I-512, Advance Authorization for Parole, from INS. Applicants who leave the United States without an I-512 may have their application terminated and denied, and may also experience difficulty when returning. In addition, any absence from the United States without an I-512 issued prior to departure counts toward the 180-day aggregate time period that the applicant is allowed to be outside the United States. Time spent outside the United States in accordance with an advance parole authorization does not count toward the 180-day maximum. Once the interim rule takes effect June 22, 1998, an I-512 will be issued only to those NACARA-eligible aliens who have filed an application for adjustment of status.

Aliens seeking a benefit under NACARA and who are under a final order of exclusion, deportation or removal leave the country at their own risk, even if they have obtained an advance parole (I-512) prior to departure. Aliens facing such an order cannot apply for adjustment of status unless they first apply for and are granted permission to reapply for admission into the United States. Aliens needing such permission must file a Form I-212, Application for Permission to Reapply for Admission Into the United States, and may do so before their departure.

Q: What happens if INS denies an application?

- A.** Applicants found ineligible for adjustment of status under NACARA will be advised of INS' determination and of their right to seek, and the procedures for seeking, consideration of the application by an immigration judge. Such procedures will follow one of three following routes:
1. Applicants who have never been in exclusion, deportation or removal proceedings will be placed in removal proceedings, during which they may renew their application before an Immigration Court.
 2. For applicants whose exclusion, deportation or removal proceeding before an Immigration Court or the Board of Immigration Appeals was administratively closed in order to apply to INS for NACARA adjustment, INS will move the Court or the Board, as appropriate, to recalendar (reschedule) the proceedings. Applicants may renew their applications before the Court or the Board as appropriate.
 3. For applicants subject to a final order of exclusion, deportation or removal, INS will refer its decisions to deny the application to an immigration judge, who will consider the application in proceedings held solely for the purpose of such adjudication.

(more)

NACARA Q&As for Nicaraguans, CubansPage 6

Q: What happens if an Immigration Court denies an application?

A: If the Court denies the NACARA adjustment application of an alien whose case was remanded by the Board, the Court shall certify the decision to the Board for review. If the Court denies the application of an alien whose case was referred by INS for a NACARA-adjustment-only inquiry, the alien shall have the right to appeal the decision to the Board, subject to the requirements governing appeals from immigration judges to the Board, including the requirements of a filing a Notice of Appeal (Form EOIR-26) and appeal filing fee.

Q: Why are the Nicaraguans and Cubans getting one form of relief and the Salvadorans, Guatemalans and former Soviet bloc nationals another?

A: It was Congress' decision to provide varying relief to varying groups. That question would best be directed to members of Congress.

Q: Does this interim rule apply to all NACARA-eligible beneficiaries?

A: No. This rule applies only to eligible Nicaraguans and Cubans. A separate rule will be published in the coming months for the other NACARA-eligible beneficiaries.

- INS -

PAGE 1

Citation	Rank(R)	Database	Mode
63 FR 31890-01	R 1 OF 1	FR	Page
1998 WL 302655 (F.R.)			
(CITE AS: 63 FR 31890)			

RULES and REGULATIONS

DEPARTMENT OF JUSTICE

8 CFR Part 3

[EOIR No. 121P; AG Order No. 2162-98]

RJN 1125-AA23

Executive Office for Immigration Review; Motion to Reopen: Suspension of
Deportation and Cancellation of Removal

Thursday, June 11, 1998

*31890 AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the regulations of the Executive Office for Immigration Review (EOIR) by establishing a special procedure for the filing and adjudication of motions to reopen to apply for suspension of deportation and cancellation of removal pursuant to section 203(c) of the NICARAGUAN ADJUSTMENT and Central American Relief Act.

DATES: Effective date: This interim rule is effective June 11, 1998.

Comment date: Written comments must be submitted on or before July 13, 1998.

ADDRESSES: Please submit written comments, in triplicate, to Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041.

FOR FURTHER INFORMATION CONTACT: Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION: This interim rule with request for comments amends 8 CFR part 3 by creating new s3.43.

Background

This regulation relates to a previous notice, signed by the Attorney General *31891 on January 15, 1998, and published at 63 FR 3154, on January 21, 1998, which designated the time period for filing motions to reopen pursuant to section 203(c) of the NICARAGUAN ADJUSTMENT and Central American Relief Act (Pub. L. 105-100; 111 Stat. 2160, 2193) (NACARA). Section 203 of NACARA, signed into law on November 19, 1997,

amended section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208; 110 Stat. 3009-625) (IIRIRA) to provide special rules regarding applications for suspension of deportation and cancellation of removal by certain aliens. These aliens include Guatemalan, Salvadoran, and certain former Soviet bloc nationals described in section 309(c)(5)(C)(i) of IIRIRA, as amended by section 203 of NACARA.

Section 203(c) of NACARA also amended section 309 of IIRIRA by creating a provision for motions to reopen under NACARA. Section 309(g) of IIRIRA, as amended, permits aliens with final orders of deportation or removal who have become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by section 203 of NACARA to file one motion to reopen removal or deportation proceedings to apply for such relief, without regard to the limitations imposed by law on motions to reopen. Section 309(g) of IIRIRA, as amended, further requires the Attorney General to designate a specific time period for filing motions to reopen for such relief beginning no later than 60 days after the date of enactment of NACARA and extending for a period not to exceed 240 days.

The Attorney General's notice in the Federal Register designated from January 16, 1998 to September 11, 1998 as the time period for filing NACARA motions to reopen. See 63 FR 3154. That notice waived the filing fee for motions to reopen filed pursuant to NACARA, but did not disturb any other regulatory provisions with respect to the filing or adjudication of motions to reopen.

The Interim Rule

The Attorney General is simplifying the filing process for NACARA motions to reopen in two ways. First, this rule clarifies who can file a motion to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, by defining who has become eligible for "special rule" cancellation of removal or suspension of deportation as a result of the amendments made by section 203 of NACARA. Second, the rule permits any alien who is moving to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, to file such motion initially without a suspension or cancellation application and supporting documents. The alien then will have until February 8, 1999 to file the application for suspension of deportation or cancellation of removal and to provide all other supporting evidence and arguments in favor of reopening. The alien should note at that time that he or she is filing such application to complete a NACARA motion to reopen filed earlier without an application and supporting documentation.

The Attorney General is clarifying who can file a motion to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, to ensure a fair and efficient administrative process. In addition, the Attorney General has decided to permit the initial filing of NACARA motions to reopen to pursue relief under NACARA without applications for relief and supporting documents because NACARA gives eligible aliens the opportunity to file only one NACARA-based motion to reopen and permits a 240-day time period during which the motion must be filed. Many potential NACARA beneficiaries may have been in proceedings years ago and it may take some time to accumulate the documents necessary to prepare an application for suspension of deportation.

Aliens Eligible To File a Motion To Reopen Pursuant to NACARA

Section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, permits an alien who has a final order of deportation or removal to file one motion to reopen only if he or she has become eligible for cancellation of removal or suspension of deportation as a result of the amendments made by section 203 of NACARA. Section 203(c) of NACARA provides: "[N]otwithstanding 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 may file one motion to reopen removal or deportation proceedings to apply for cancellation of removal or suspension of deportation." See Public Law 105-100, s203(c).

This rule clarifies who can file a motion to reopen pursuant to NACARA by defining "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." Several provisions of IIRIRA must be examined to determine "who has become eligible" for cancellation of removal or suspension of deportation as a result of the amendments made by NACARA.

IIRIRA consolidated deportation and exclusion proceedings into one unified removal proceeding and abolished the relief from deportation known as "suspension of deportation" contained in section 244(a) of the Immigration and Nationality Act (INA) (as it existed prior to April 1, 1997). Persons placed in removal proceedings after April 1, 1997 may, instead, apply for cancellation of removal pursuant to section 240A of the INA, as amended. While cancellation of removal resembles suspension of deportation, an applicant for cancellation must generally establish continuous physical presence for ten years instead of seven years, must establish "exceptional and extremely unusual hardship" instead of "extreme hardship," and must establish hardship to the applicant's United States citizen or lawful permanent resident spouse, parent, or child rather than hardship to the applicant or a United States citizen or lawful permanent resident spouse, parent, or child.

Special rules terminating continuous physical presence also apply to cancellation of removal relief. Section 240A(d) (1) and (2) provides three rules relating to the termination of continuous residence or physical presence. Any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is: (1) served a notice to appear under section 239(a); or (2) has committed an offense referred to in section 212(a)(2) that renders the alien 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), whichever is earlier. See section 240A(d)(1) of the INA, as amended. In addition, an alien shall be considered to have failed to maintain continuous physical presence in the United States if the alien has departed the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. See section 240A(d)(2) of the INA, as amended. These "stop-time rules" of IIRIRA apply to all aliens in removal proceedings under section 240A of the INA, as amended.

Section 309(c)(5) of IIRIRA as in effect prior to amendment by NACARA contained a transitional rule providing *31892 that paragraphs (1) and (2) of section 240A(d) of the INA (which established these "stop-time rules" relating to continuous physical presence) shall apply to notices to appear issued before, on, or after the date of enactment of IIRIRA. This transitional rule has been interpreted as applying the "stop-time rules" of IIRIRA also to orders to show cause issued against persons in deportation proceedings seeking suspension of deportation relief. Under this interpretation, an alien affected by any of the "stop-time rules" relating to continuous physical presence--for example, an alien who failed to accrue seven years of continuous physical presence before being served with an order to show cause--was made ineligible for suspension of deportation. Therefore, under IIRIRA an alien generally must establish seven years of continuous physical presence in the United States prior to service of a charging document, along with good moral character and extreme hardship, in order to qualify for suspension of deportation. (Aliens who cannot establish continuous physical presence because of commission of an offense, or because the continuity of their physical presence was interrupted by a departure from the United States exceeding 90 days (or 180 days in the aggregate), would also be ineligible for suspension of deportation.)

Section 203 of NACARA amends section 309(c)(5) of IIRIRA by eliminating this transitional restriction on suspension of deportation for six classes of aliens in deportation proceedings and similarly exempts persons in removal proceedings who are within those six categories from operation of the "stop-time rules" contained in section 240A(d)(1) of the INA. Section 203 also creates a "special rule" for cancellation of removal which generally restores pre-IIRIRA suspension rules for those who are applying for cancellation of removal and fall within the six classes of aliens.

Generally, an alien within one of the six classes who would have been ineligible for suspension of deportation at the time of adjudication as a result of section 309(c)(5) of IIRIRA may now be eligible for suspension under the NACARA amendments. Thus, an alien who was served with an order to show cause before being physically present in the United States for a continuous period of seven years may now be eligible for suspension of deportation as a result of the amendments made by section 203 of NACARA. Similarly, an alien within one of the six classes who was ineligible for cancellation of removal under the heightened standard of "exceptional and extremely unusual hardship" may now be eligible under the special rule for cancellation of removal. For example, an alien served with a notice to appear before being physically present in the United States for a continuous period of 10 years, or an alien who could not establish that his removal would result in exceptional and extremely unusual hardship to a United States citizen or lawful permanent resident spouse, parent, or child, may now be eligible for the special rule for cancellation of removal as a result of the amendments made by section 203 of NACARA.

This rule provides that a motion to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, must establish that the alien: (1) is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(f) of IIRIRA, as amended by section 203(b) of NACARA; and (2) was or would be ineligible (a) for suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to

November 19, 1997); or (b) for cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA; and (3) has not been convicted at any time of an aggravated felony; and (4) falls within one of the six classes of aliens described in section 203(a)(1) of NACARA.

Prima Facie Eligibility and Statutory Bars

As mentioned above, an alien reopening pursuant to NACARA must establish prima facie eligibility for suspension of deportation or cancellation of removal under the applicable standards governing such forms of discretionary relief pursuant to section 244 of the INA, as in effect prior to April 1, 1997. In general, the alien must have been physically present in the United States for a continuous period of at least seven years immediately preceding the date of such application; must be a person of good moral character during such period; and must establish that deportation or removal would result in extreme hardship to the alien or to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. Different standards apply to aliens who are deportable because of a criminal conviction or certain other grounds. See section 244(a)(2) of the INA, as in effect prior to April 1, 1997. The period of continuous physical presence must be established as of no later than September 11, 1998.

Further, to be prima facie eligible to apply for suspension of deportation or cancellation of removal, the alien must not be subject to any of the statutory bars to seeking such relief. Section 240A(c) of the INA, and section 244(f) of the INA as it existed prior to April 1, 1997, provide that certain categories of aliens are ineligible for cancellation of removal or suspension of deportation. Moreover, 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 voluntarily within the time specified, is barred for a specific period of time from various forms of discretionary relief, including cancellation of removal and suspension of deportation, pursuant to section 240B(d) of the INA and section 242B(e)(2) of the INA as it existed prior to April 1, 1997. Sections 242B(e)(1), (3) and (4) of the INA as it existed prior to April 1, 1997, also bar eligibility for such relief for certain aliens who, after receiving the required oral and written notices, failed to appear at their removal or deportation hearings, failed to appear as ordered for deportation, or failed to appear at an asylum hearing. These and any other statutory bars to eligibility for suspension of deportation or cancellation of removal are not waived by the provisions of NACARA. Although there may be only a limited number of aliens who are affected by these provisions, the Attorney General has no authority to waive these statutory bars in the cases where they do apply.

Motion To Reopen Without Application for Relief

The Attorney General is creating an exception to the regulatory requirements, found at 8 CFR ss3.2(c) and 3.23(b)(3), providing that "[a]ny motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents" for any alien eligible to reopen under section 309(g) of IIRIRA, as amended by section 203 of NACARA. Such aliens may elect to file a motion to reopen initially without an application for relief and supporting documents. The alien must allege in such motion that the alien: (1) is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(f) of IIRIRA, as amended by section 203(b) of NACARA; and (2) was or would be *31893 ineligible (a) for suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or (b) for cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA; and (3) has not been convicted at any time of an aggravated felony; and (4) falls within one of the six classes of aliens described in section 203(a)(1) of NACARA. The alien will then have until February 8, 1999 to file an application for suspension of deportation or cancellation of removal and all other supporting documents that would have been filed initially with a standard motion to reopen. A copy of both the motion to reopen and the subsequently filed application for suspension of deportation or cancellation of removal with all other supporting evidence must be served on the Immigration and Naturalization Service (INS or Service). The Service shall have 45 days from the date of service of the completed motion to respond to the motion.

The motion will be adjudicated only after it has been completed by the filing of the required application for suspension of deportation or cancellation of removal and the Service has submitted a response or the time for response has elapsed. The completed motion will be adjudicated under all applicable statutory and regulatory

provisions. Persons filing a motion to reopen under NACARA should follow standard motion practice, as set forth in the regulations, with the exception of the special provisions regarding the filing fee, the submission of the application for relief, and the provisions relating to Immigration Court jurisdiction as set forth in this rule.

If the alien fails to file the required application by February 8, 1999, the motion will be denied as abandoned. In that case, the alien will have lost the alien's one opportunity to move to reopen under section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, for suspension of deportation or cancellation of removal relief. However, an individual may still be eligible to reopen for other reasons as permitted by statute and regulation. The front page of a motion to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, and any envelope containing such motion should include the notation "Special NACARA Motion." The \$110 filing fee is waived for these motions to reopen pursuant to section 203(c) of NACARA. The requirements and procedures in 8 CFR ss3.31(b), 103.7(b)(1) and 240.11(f) for paying the application fee for suspension or cancellation after a motion to reopen is granted, however, are not waived. The alien should submit an Application for Suspension of Deportation (Form EOIR-40) whether or not he or she is in deportation or removal proceedings. The time period for filing the motion is from January 16, 1998 to September 11, 1998. See 63 FR 3154.

This special provision allowing for the filing of a motion to reopen without the application for relief and supporting documents applies only to motions to reopen under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA. An alien moving to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, may choose to file a complete motion to reopen accompanied by an application for suspension of deportation or cancellation of removal and all other supporting evidence within the designated time period of January 16, 1998 to September 11, 1998. The Service will then have 45 days to respond to the motion.

ABC Class Members

Any alien listed in section 309(c)(5)(C)(i) of IIRIRA with a final order of deportation or removal must file a motion to reopen pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, in order to apply for suspension of deportation or "special rule" cancellation of removal. This includes, but is not limited to, the defined class of Salvadorans and Guatemalans who are afforded de novo asylum adjudications pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (1991) (ABC class members) who were issued final orders by the Board or the Immigration Judge.

The Attorney General anticipates promulgating regulations this year to delegate to Service asylum officers the authority to adjudicate the applications of certain NACARA beneficiaries for suspension of deportation and "special rule" cancellation of removal. It is anticipated that ABC class members who are eligible for ABC benefits (that is, are registered for ABC benefits and have filed an asylum application by the requisite dates: for Guatemalans, by January 3, 1995; for Salvadorans, by February 16, 1996) and who have a final order of deportation will have the option to seek adjudication of suspension of deportation before an asylum officer at INS if the motion to reopen is granted. Thus, ABC class members may request administrative closure at the time they file their motion to reopen or after the motion is granted. Their cases may be administratively closed pending promulgation of regulations governing adjudication of suspension of deportation or "special rule" cancellation of removal before the INS. An ABC class member who is eligible for ABC benefits, as described above, and whose case previously had been administratively closed by the Immigration Court, is not required to file a motion to reopen under section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, however, as no final order has been issued in such a case.

Jurisdiction Over Motions To Reopen Under Section 203 of NACARA

All motions to reopen filed pursuant to the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, shall be filed with the Immigration Court, even if the Board of Immigration Appeals (Board) issued an order in the case. An alien should make all efforts to file such motion to reopen and the completed application for suspension of deportation or cancellation of removal with the Immigration Court that last had jurisdiction over the proceedings because that is the Immigration Court that will adjudicate the motion to reopen. Any motion to reopen under the special rules of section 309(g), as amended by section 203(c) of NACARA, filed with the Board or with an Immigration Court other than the one that last had jurisdiction over the

proceedings, will be forwarded to the appropriate Immigration Court for adjudication as a timely filed motion if filed on or before September 11, 1998.

The Department's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based upon the exception for rules of agency organization, procedures, or practice in 5 U.S.C. ss553(b)(3)(A) and upon the "good cause" exception found at 5 U.S.C. ss553(b)(3)(B), 553(d)(3). Immediate implementation is necessary because the time period has already been designated for filing motions to reopen under NACARA and will terminate on September 11, 1998.

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 economic impact on a substantial number of small entities because it affects individual aliens, not small entities. *31894

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 annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

The Attorney General has determined that this rule is a significant regulatory action under Executive Order 12866, and accordingly this rule has been reviewed by the Office of Management and Budget.

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

List of Subjects in 8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

Accordingly, part 3 of chapter 1 of Title 8 of the Code of Federal Regulations is amended as follows:

PART 3--EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 is revised to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100.

2. Section 3.43 is added to subpart C to read as follows:

s3.43 Motion to Reopen for Suspension of Deportation and Cancellation of Removal pursuant to Section 203(c) of the NICARAGUAN ADJUSTMENT and Central American Relief Act (NACARA).

(a) Standard for Adjudication. Except as provided in this section, a motion to reopen proceedings under section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) Aliens eligible to reopen proceedings under section 203 of NACARA. A motion to reopen proceedings to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, must establish that the alien:

(1) Is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(2) Was or would be ineligible:

(i) For suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or

(ii) For cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(3) Has not been convicted at any time of an aggravated felony; and

(4) Is within one of the following six classes:

(i) A national of El Salvador who:

(A) First entered the United States on or before September 19, 1990;

(B) Registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al. v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) (ABC) on or before October 31, 1991, or applied for Temporary Protected Status (TPS) on or before October 31, 1991; and

(C) Was not apprehended after December 19, 1990, at time of entry; or

(ii) A national of Guatemala who:

(A) First entered the United States on or before October 1, 1990;

(B) Registered for ABC benefits on or before December 31, 1991; and

(C) Was not apprehended after December 19, 1990, at time of entry; or

(iii) A national of Guatemala or El Salvador who applied for asylum with INS on or before April 1, 1990;

or

(iv) An alien who:

(A) Entered the United States on or before December 31, 1990;

(B) Applied for asylum on or before December 31, 1991; and

(c) At the time of filing such application for asylum 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; or (v) The spouse or child of a person described under paragraphs (b)(4)(i) through (b)(4)(iv) of this section who was a spouse or child of such person at the time the person was granted suspension of deportation or cancellation of removal; or

(vi) An unmarried son or daughter of a parent, who is described under paragraphs (b)(4)(i) through (b)(4)(iv) of this section, at the time the parent is granted suspension of deportation or cancellation of removal, provided that, if the son or daughter is 21 years of age or older at the time the parent is granted suspension of deportation or cancellation of removal, the son or daughter must have entered the United States on or before October 1, 1990.

(c) Motion to reopen under section 203 of NACARA. (1) An alien filing a motion to reopen proceedings pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, may initially file a motion to reopen without an application for suspension of deportation or cancellation of removal and supporting documents, but the motion must be filed no later than September 11, 1998. The alien must allege in such motion to reopen that

the alien:

(i) Is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(g) of IIRIRA, as amended by section 203(b) of NACARA;

(ii) Was or would be ineligible:

(A) For suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or

(B) For cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(iii) Has not been convicted at any time of an aggravated felony; and

(iv) Falls within one of the six classes described in paragraph (b)(4) of this section.

(2) A motion to reopen filed without an application for suspension of deportation or cancellation of removal shall not be considered complete until it has been supplemented with the application for suspension of deportation or cancellation of removal and all other supporting documentation. An alien shall have until February 8, 1999 to complete that motion. A motion to reopen filed without an application and supporting documents will not be adjudicated until it is completed with the required application for suspension of deportation or cancellation of removal and supporting documents. The Service shall have 45 days from the date of service of the application for suspension of deportation or cancellation of removal to respond to that completed motion. If the alien fails to file the required application by 150 days after September 11, 1998 the motion will be denied as abandoned.

(c) Fee for motion to reopen waived. No filing fee is required for a motion to reopen to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA.

(d) Jurisdiction over motions to reopen under section 203 of NACARA and remand of appeals.

(1) Notwithstanding any other provisions, any motion to reopen filed pursuant to the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, shall be filed with the Immigration Court, even if the Board of Immigration Appeals issued an order in the case. The Immigration Court that last had jurisdiction over the proceedings will adjudicate a motion to reopen filed pursuant to the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA.

(2) The Board will remand to the Immigration Court any presently pending appeal in which the alien appears eligible to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203 of NACARA, and appears prima facie eligible for that relief. The alien will then have the opportunity to apply for suspension or cancellation under the special rules of NACARA before the Immigration Court.

Dated: June 5, 1998.

Janet Reno,

Attorney General.

[FR Doc. 98-15588 Filed 6-10-98; 8:45 am]

BILLING CODE 4410-30-M

63 FR 31890-01, 1998 WL 302655 (F.R.)

END OF DOCUMENT

U.S. Department of Justice
IMMIGRATION AND NATURALIZATION SERVICE

QUESTIONS AND ANSWERS

rev. 4/1/98

Nicaraguan Adjustment and Central American Relief Act of 1997

NACARA in Brief

The Nicaraguan Adjustment and Central American Relief Act (NACARA) was signed into law on November 19, 1997. It provides various immigration benefits and relief from deportation to certain Central Americans, Cubans and nationals of former Soviet bloc countries. Specifically, the law provides that eligible Nicaraguans or Cubans can be considered for adjustment of status to that of a permanent resident alien, and that certain Guatemalans, Salvadorans and nationals of former Soviet bloc countries are eligible to apply for suspension of deportation or special rule cancellation of removal under the standards that existed for suspension of deportation prior to the enactment of the September 1996 immigration law.

Adjustment for Cubans and Nicaraguans

Q: Which Nicaraguans and Cubans are eligible for adjustment to lawful permanent residence (LPR)?

A: Nicaraguans or Cubans who can establish they have been continuously physically present in the United States since December 1, 1995, and who are not inadmissible to the United States under all provisions of Section 212(a) of the Immigration and Nationality Act not waived by NACARA, can be considered for adjustment of status to permanent resident alien. Continuously present means not more than a total of 180 days outside the United States since December 1, 1995.

Q: Will an eligible person have to file and be approved for LPR status or is it just automatic?

A: It will be necessary for a person to file for adjustment of status.

Q: When may an eligible Nicaraguan or Cuban apply for adjustment?

A: We currently anticipate that the application period will commence 30 days after an interim regulation is published in the *Federal Register* and will expire March 31, 2000. The regulation implementing this provision is being circulated for approval within the government.

NACARA Q&AsPage 2

(more)

Q. May someone who is outside the United States apply for adjustment under NACARA?

No. Section 202 only provides benefits for those who are present in the United States at the time of filing. Although the procedures have not been finalized, INS anticipates that an alien who is outside the United States may, under certain circumstances, request parole authorization to return to the United States in order to apply for adjustment under NACARA.

Q: Can a person eligible under NACARA who has been ordered deported still apply for adjustment to LPR status?

A: Yes, if they are otherwise eligible.

Q: What about people who have already been deported?

A: An alien who has been deported from the United States cannot apply for adjustment under NACARA because one must be present in the United States to receive such a benefit. Although the procedures have not been finalized, INS anticipates that an alien who is outside the United States may, under certain circumstances, request parole authorization to return to the United States in order to apply for adjustment under NACARA. Furthermore, an alien who has previously been deported is ineligible for adjustment of status unless and until an application for permission to reapply for admission into the United States after exclusion, deportation or removal has been approved.

Q. Can a person eligible for NACARA and convicted of a crime in the United States still apply for LPR status?

A: NACARA does not waive any criminal grounds of inadmissibility for Nicaraguans and Cubans seeking adjustment of status. However, such aliens may be eligible for an individual waiver of such inadmissibility under certain circumstances.

Q: How many Cubans and Nicaraguans are currently detained who may be eligible for NACARA adjustment? Are you going to release them ?

A: INS is developing information on those numbers, but we do not yet have a final count. We have sent instructions to the field not to remove any person who may be eligible for this relief. People who appear eligible will be considered for release.

Q: Are applicants for adjustment under NACARA eligible for work authorization?

A: Nicaraguan and Cuban nationals who apply for adjustment under NACARA may be eligible for work authorization. However, procedures have not been finalized as of yet.

Q: What constitutes a "break" in continuous presence for Nicaraguans and Cubans?

NACARA Q&AsPage 3

A. Absences from the United States totaling more than 180 days during the period that begins no later than December 1, 1995, and ends no earlier than the date the NACARA adjustment application is filed.

(more)

Q: Are Nicaraguans and Cubans eligible for NACARA allowed to travel outside the United States.

A: Nicaraguans and Cubans who are eligible to seek relief under NACARA but are not currently in a lawful immigration status that allows travel must obtain written authorization from INS prior to leaving the United States. Failure to obtain such authorization could render the person ineligible under the legislation.

Q: If an applicant for adjustment under NACARA is denied, can he/she appeal to the federal courts?

A. The law passed by Congress says the decision of the Attorney General in these cases is not subject to judicial review by any court, but does provide for an administrative appeal.

Q: Is a dependent (spouse, minor child, unmarried son or daughter 21 or older) of a Nicaraguan or Cuban eligible for adjustment?

A. Only if the dependent is also a national of Nicaragua or Cuba. Nationals of other countries may not apply for adjustment of status under NACARA. A spouse or child may apply regardless of his/her date of entry into the United States, as long as he/she is physically present in the United States at the time of filing. An unmarried son or daughter age 21 or older must have resided in the United States continuously since December 1, 1995.

Q: Do all grounds of inadmissibility apply to applicants for adjustment under NACARA?

A: Not all of them. The law states that the grounds of inadmissibility dealing with public charge, lack of labor certification, illegal entry, lack of a required visa, and unlawful presence do not apply to applicants for adjustment under NACARA. An applicant who is inadmissible under any other grounds may not be granted adjustment, unless an individual waiver is available and granted.

Q. Why are the Nicaraguans and Cubans getting one form of relief and the Salvadorans and Guatemalans another?

A. It was Congress' decision to provide varying relief to varying groups. That question would best be directed to members of Congress.

NACARA Q&AsPage 4

Benefits for Guatemalans, Salvadorans, former Soviet bloc nationals**Q: What is cancellation of removal?**

A: Cancellation of removal is a form of discretionary relief available to a person who is
(more)

inadmissible or deportable from the United States. If an individual is granted special rule cancellation of removal under NACARA, his/her status will be adjusted to that of a lawful permanent resident.

Q: What is the difference between suspension of deportation and cancellation of removal?

A: Both suspension of deportation and 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. Suspension of deportation is only available to persons who are deportable from the United States who were placed in immigration proceedings prior to April 1, 1997. Cancellation of removal is available to persons who are inadmissible or deportable who were placed in immigration proceedings on or after April 1, 1997, or to NACARA beneficiaries who are eligible to apply for the benefit before the asylum program. If an individual is granted suspension of deportation or cancellation of removal, his or her immigration status will then be adjusted to that of a lawful permanent resident.

Q: Who benefits from the suspension/special rule cancellation provisions in NACARA?

A: **Guatemalans and Salvadorans** who have not been convicted of an aggravated felony who are inadmissible or deportable from the United States may be able to apply for suspension of deportation or special rule cancellation of removal under the following conditions:

1. You are a Salvadoran national who first entered the United States on or before September 19, 1990, **AND** you registered for benefits under the *American Baptist Churches v. Thornburgh (ABC)* settlement agreement on or before October 31, 1991, (either by submitting an ABC registration form or by applying for temporary protected status), unless apprehended at time of entry after December 19, 1990, **OR**
2. You are a Guatemalan national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991, unless you were apprehended at time of entry after December 19, 1990, **OR**
3. You are a Salvadoran or Guatemalan national who filed an application for asylum with the INS on or before April 1, 1990.
4. You are the spouse or an unmarried child under 21 years of age of a Salvadoran or Guatemalan described in sections 1, 2 or 3 who is granted suspension of deportation

NACARA Q&As**Page 5**

or special rule cancellation of removal. Your relationship to your spouse or parent must exist at the time your spouse or parent is granted the benefit.

5. You are the unmarried son or daughter aged 21 or older of a Salvadoran or Guatemalan described in sections 1, 2 or 3 who is granted suspension of deportation

(more)

or special rule cancellation of removal. You must have entered the United States on or before October 1, 1990. Your relationship to your parent must exist at the time the benefit is granted to your parent.

Former Soviet Bloc Nationals: If you entered the United States on or before December 31, 1990, applied for asylum on or before December 31, 1991, and at the time of application were 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, and have not been convicted of an aggravated felony, you may be able to apply for special rule cancellation of removal under the standards that existed for suspension of deportation prior to enactment of the September 1996 immigration law. Your spouse and unmarried children under 21 years of age may also be eligible to apply for suspension of deportation or special rule cancellation of removal if you are granted either of those benefits. Unmarried sons and daughters 21 years of age or older may be eligible to apply if they were in the United States on or before October 1, 1990.

Q: What makes a person eligible for this benefit?

A: If you are inadmissible or deportable from the United States, you may be eligible to qualify for special rule cancellation of removal (inadmissible or deportable) or suspension of deportation (only deportable) if:

1. You have been in the United States for seven years;
2. You are of good moral character;
3. Return to your country would result in extreme hardship to you or to your spouse, child or parent who is a U.S. citizen or lawful permanent resident; and
4. You merit a favorable exercise of discretion.

Different criteria may apply to you if you have been convicted of certain crimes. In addition, these provisions will not apply to you if you have been convicted of an aggravated felony.

Q: Who is eligible to apply with the INS Asylum Program for special rule cancellation of removal?

A: Certain NACARA beneficiaries who currently have asylum applications pending with the Asylum Program will be able to apply for special rule cancellation of removal

NACARA Q&As**Page 6**

with the asylum program. DOJ has not yet determined whether other individuals will be able to apply for special rule cancellation of removal directly with INS. Further announcements and details will be provided later.

(more)

Q: How and when can a person apply with the INS Asylum Office for special rule cancellation of removal?

A: Please do not attempt to apply with the INS at this time. There will be further announcements regarding these benefits. Persons covered by NACARA who are in removal or deportation proceedings can still apply to an immigration judge for cancellation of removal or suspension of deportation.

Q: Can a person apply for suspension of deportation or special rule cancellation even if he/she has left the United States and returned?

A: You may still be eligible to apply for suspension of deportation or special rule cancellation of removal under the NACARA provisions if you left the United States and returned. However, you will have to establish continual physical presence in the United States. For suspension eligibility, you will have to establish that your departure was brief, innocent and casual. For purposes of special rule cancellation, you cannot establish continuous physical presence if you have been outside the United States for 90 days or longer, or outside the United States for any period of time that totals 180 days or more. If you leave the United States, you may not be able to return unless you first receive advance parole before you leave the United States.

Q: What if a person is eligible for NACARA benefits and has been placed in deportation or removal proceedings?

A: If you have been placed in deportation or removal proceedings, you may apply for suspension of deportation or cancellation of removal in those proceedings, and an immigration judge will determine whether you are eligible.

If you have a final order of deportation or removal and you have become eligible for suspension of deportation or special rule cancellation of removal as a result of NACARA, you are entitled to file one motion to reopen proceedings to apply for the benefit under NACARA. As required in the law, the Attorney General has designated the period from January 16, 1998, until September 11, 1998, for eligible beneficiaries of NACARA to file a motion to reopen under NACARA. This means that you must file a motion to reopen, for purposes of NACARA, on or before September 11, 1998.

NACARA Q&As**Page 7**

However, you are not required to file a motion to reopen if you were in deportation proceedings before an immigration judge or the Board of Immigration Appeals that were administratively closed or stayed pursuant to the ABC settlement agreement.

Q: What if a person has an asylum application pending with INS?

A: INS has temporarily suspended processing asylum requests of certain applicants who may be eligible to apply for special rule cancellation of removal under NACARA. This is to maximize the efficiency and benefits of the new affirmative application process. As soon as the new application process for special rule cancellation of removal is implemented, INS will resume processing asylum requests of these applicants.

(more)

However, if you would like to proceed with your asylum request without waiting for implementation of the new affirmative process for special rule cancellation of removal, you may request an expedited adjudication of your asylum request. INS will honor the request to the extent that resources permit. If the asylum request is not granted and you are placed in removal proceedings, you may be eligible to apply for cancellation of removal with an immigration judge. If you have an unmarried child present in the United States who will turn 21 years of age in the next year, you may wish to discuss with legal counsel the benefits of requesting an expedited interview.

Q. Can a person eligible for NACARA and convicted of a crime in the United States still apply for suspension/cancellation?

A: People convicted of certain crimes may still be eligible to apply under a heightened standard, but NACARA-based suspension/special rule cancellation is unavailable to anyone convicted "at any time" of a crime defined as an aggravated felony under immigration law. NACARA's special provisions do not apply to aggravated felons.

Q: Can individuals eligible to apply for special rule cancellation of removal under NACARA apply for employment authorization?

A: INS believes that many people eligible for special rule cancellation of removal under NACARA may already have work authorization based on a pending asylum application. For those who do not, details regarding work authorization are still being discussed. INS will make announcements regarding this issue as the process is developed.

Q. How many people are eligible to apply for benefits under NACARA?

A. We do not yet have precise numbers. INS is looking at previous estimates on the ABC settlement groups and asylum groups in light of the language of the legislation, and should have revised information soon.

-INS-

VP —
Immigrant

MEMORANDUM FOR THE VICE PRESIDENT

FROM: Rick Gonzales

RE: Meeting (2/10/98) with Reps. Xavier Becerra (D-CA) and Luis Gutierrez (D-IL) on immigration issues.

DATE: February 9, 1998

PURPOSE

You are meeting with Reps. Xavier Becerra and Luis Gutierrez to discuss three immigration issues: (1) parity for Salvadorans and Guatemalans who received a less certain form of relief from deportation than Nicaraguans and Cubans as a result of last year's immigration law, (2) the naturalization backlog of 1.75 million applicants, and (3), persons who may become deportable in the near future because of Section 377 of the 1996 Immigration Act. Becerra and Gutierrez will spend most of the time discussing parity for Salvadorans and Guatemalans.

BACKGROUND**1. Parity for Guatemalans and Salvadorans**

The Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted during the last session of Congress, authorized amnesty (automatic "green cards") for Nicaraguans and Cubans, but provided a less certain form of relief from deportation for Guatemalans and Salvadorans. The Hispanic Caucus and many Central American advocates have urged the Administration to implement NACARA in a way that would achieve "parity" between all Central American groups affected by the legislation.

Specifically, NACARA permits Guatemalans and Salvadorans to be considered on a case by case basis for permanent relief under the more generous rules in effect prior to the 1996 immigration bill. To obtain this relief, an applicant must establish: (1) seven years of residence in the US, (2) good moral character, and (3) that the aliens deportation would cause "extreme hardship" to the alien or his or her immediate family members in the U.S.

The Hispanic Caucus and the advocacy groups have pushed the Attorney General to issue a regulation that would provide that those covered under the legislation would automatically meet the "extreme hardship" standard. This would have the effect of making it almost certain that Guatemalans and Salvadorans would receive

permanent status. In addition, the advocates strongly suggest that those covered by NACARA should be processed through an administrative adjudication rather than through a more adversarial process before the Immigration Judges at the Executive Office of Immigration Review (EOIR). The Hispanic Caucus and the Central American groups view this as an urgent matter because the Administration is currently in the process of drafting the NACARA regulations.

The President said in his signing statement that he was troubled that NACARA treats similarly situated individuals differently. He stated that the relief made available to these individuals could be minimized in the implementation process. You should let Becerra and Gutierrez know that we are taking steps to minimize differences between the various Central Americans groups. While DOJ opposes a blanket finding of "extreme hardship" for Guatemalans and Salvadorans, Attorney General Reno recently authorized a new adjudicative process that would greatly enhance these aliens' chances of obtaining permanent relief. (See talking points)

2. Naturalization backlog/Citizenship

The Hispanic Caucus has serious concerns over the naturalization backlog of 1.75 million applications, as well as INS fee increases for naturalization. The number of naturalization applications has increased from 540,000 in FY 1994 to almost 1.6 million in FY 1997. This dramatic increase, along with the dedication of substantial resources over the past nine months to implement quality procedures, has resulted in a increase in the number of pending applications from 720,000 at the end of FY 1996 to 1.75 million in November of 1997. Currently, most applicants are experiencing a wait time of 12 to 15 months.

In December, 1997 the firm of KPMG completed its review of INS's implementation of the new quality procedures. KPMG's findings were very positive and the report stated that INS has instituted "a quality mind set" in naturalization case processing. The result is that INS is now in a position to pursue a balanced approach to increasing productivity while maintaining integrity in the naturalization process.

Reducing the naturalization backlog is a top priority of the INS. A backlog reduction strategy has been devised based on the following: the creation of a separate Office of Naturalization Operations within the INS; the provision of \$200 million in new resources in FY 1998 to improve the naturalization process; and the development of specific backlog reduction plans within individual field offices, starting with the biggest offices such as Los Angeles and Chicago. In addition, the INS is implementing technological improvements to more quickly process and track naturalization applications and the associated fingerprint cards. (See talking points)

3. Section 377

The Immigration Control and Reform Act (IRCA) of 1986 legalized the immigration status of certain aliens who had been unlawfully present in the United States since January, 1982. IRCA provided for a one-year application period for this benefit, ending in May, 1988. After enactment of IRCA, the INS's implementation of the legalization program was challenged on the ground that INS dissuaded some individuals from applying within the required time period. The litigation ultimately reached the Supreme Court in 1993, where the Government's position prevailed. Despite the Supreme Court's decision, litigation continued.

Section 377 of the 1996 Immigration Act brought this litigation to an end. However, this provision continues to permit judicial review for legalization applicants who presented their application materials to INS within the one year filing deadline (May, 1998). This provision was supported by the Administration because DOJ believes that most individuals covered by the litigation do not have bona fide legalization claims.

The Hispanic Caucus is concerned that roughly 400,000 individuals will become deportable in the near future as a result of this provision. According to the Hispanic Caucus, all of these individuals claim to have been in the United States since at least January 1, 1982, and very few would be able to secure any other form of relief from deportation.

ATTACHMENTS

- Talking Points
- Congressional Hispanic Caucus Proposed Agenda
- 1/14/98 letter from Reps. Becerra and Gutierrez requesting the meeting

Talking Points

1. Parity for Salvadorans and Guatemalans

- We share your concern about disparities in treatment in NACARA, as the President and I have made very clear in several public statements relating to the bill.
- As the President indicated, we are seeking to minimize these disparities in the implementation process.
- In this regard, the Attorney General last week authorized a new administrative procedure for adjudicating the cases of Salvadorans, Guatemalans, and Eastern Europeans covered by NACARA. This procedure will empower INS asylum officers, in addition to immigration judges and the Board of Immigration Appeals, to decide the claims of these individuals.
- This modified procedure will be much less burdensome to these individuals because it lessens the need for representation by an attorney. It will also give them an additional opportunity to have their claims considered in a less adversarial setting than immigration court.
- We expect that these changes will significantly enhance the chances of these individuals to gain permanent relief and will result in a generous approval rate. We are confident they will address many of your concerns.
- I know that you and others have pushed for a blanket finding of "extreme hardship" for these individuals. However, the Department of Justice has determined that this is not legally or administratively appropriate.

2. Naturalization Backlog/Citizenship

- Reducing the backlog of naturalization applications is a top priority of the INS.
- A backlog reduction strategy has been devised based on the following:
 - (1) The INS has created as separate Office of Naturalization Operations to facilitate the naturalization process.
 - (2) **INS has obtained \$200 million in new resources** in FY 1998 to improve the naturalization process.
 - (3) INS has developed specific backlog reduction plans within individual field offices, starting with the biggest offices such as Los

Angeles and Chicago.

(4) The INS is implementing technological improvements to more quickly process and track naturalization applications and the associated fingerprint cards.

- INS Commissioner Doris Meissner has pledged not to raise fees until the case backlog begins to subside and the applicant waiting time is reduced (expected in late Spring).

Talking Points

3. Section 377

- First, I want to thank you for bringing this issue to my attention. This is an issue that I was unfamiliar with until recently.
- I am told that the Administration supported the enactment of Section 377 in an effort to bring an end to lengthy litigation covering individuals without bona fide claims to legalization. However, I am asking my staff to look into this issue further.

Central
America
(Immigration)

Immigration

NACARA
implementation

ORRIN G. HATCH, UTAH, CHAIRMAN

STROM THURMOND, SOUTH CAROLINA
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
FRED THOMPSON, TENNESSEE
JON KYL, ARIZONA
MIKE DEWINE, OHIO
JOHN ASHCROFT, MISSOURI
SPENCER ABRAHAM, MICHIGAN
JEFF SESSIONS, ALABAMA

PATRICK J. LEAHY, VERMONT
EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERBERT KOHL, WISCONSIN
DIANNE FEINGOLD, CALIFORNIA
RUSSELL D. FEINGOLD, WISCONSIN
RICHARD J. DURBIN, ILLINOIS
ROBERT G. TORRICELLI, NEW JERSEY

MANUS COONEY, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Minority Chief Counsel*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

December 15, 1997

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

Dear Attorney General Reno:

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

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

A number of questions have been raised since enactment of the legislation concerning how much flexibility the Administration has concerning the procedures to set up for implementation of the provisions relating to suspension of deportation and cancellation of removal. In particular, it has been suggested that since the language of the special transition rule for cancellation of removal established in section 309(f) of IIRIRA (as added by NACARA) is based on language contained in former section 244 of the Immigration and Nationality Act, the procedures for implementing the special rule therefore must in every respect track those currently in place to implement section 244. It has also been suggested that any failure to do so would of necessity create a discrepancy in the way NACARA itself is applied. This would inevitably result, it has

been suggested, because some of the beneficiaries of the new transition rules were in deportation proceedings as of April 1, 1997, and hence their applications for relief would be in the form of suspension of deportation under section 244 of the INA, whereas others were not, and hence would have their applications for relief adjudicated under the cancellation of removal special rule of section 309(f) of IIRIRA. The only alternative, it has been suggested, would be to have any special procedural rules for handling section 309(f) applications also govern applications under section 244 filed by NACARA beneficiaries, which in turn would create arbitrary distinctions between the handling of different applications under section 244.

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

This leaves only the question whether even if it creates no discrepancies among NACARA beneficiaries, there is nevertheless a problem with having one set of procedures for adjudicating applications of non-NACARA beneficiaries under former section 244 of the INA and a different set of procedures for adjudicating applications under IIRIRA section 309(f). We would respectfully suggest that there is nothing wrong with such an approach. To begin with, we agree that section 309(f)'s language draws heavily on the legal standards set out under former section 244. But as a general matter, neither section 244 of the INA nor new section 309(f) of IIRIRA details the procedural rules for adjudicating applications under either section. This is in contrast to former section 242(b)'s specification of the procedures for determining deportability, as well as in contrast to current section 240's specification of procedures for determining both admissibility and deportability, including the allocation of the burden of proof with respect to each determination. Accordingly, in our view, if you were to decide tomorrow that section 244

procedures should be changed, you would be free to change them, provided you did so in compliance with any other statutory or constitutional requirements. Accordingly, we see no reason why you are not equally free to set up different procedural rules for adjudicating applications under new section 309(f), such as, for example, creating a presumption of hardship if an applicant for relief meets certain prerequisites.¹

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

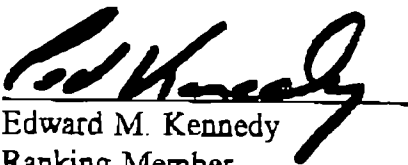
¹Section 244 does allocate the burden of proof on one issue. It states that an applicant for suspension of deportation must "prove[] that during all of [the] period [of required continuous presence] he was and is a person of good moral character." The very fact that 244 specifies the allocation of the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

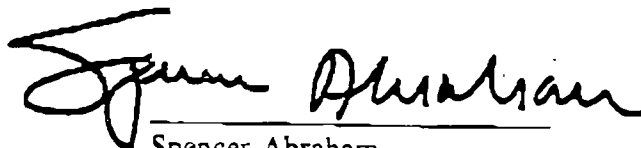
There is one other difference between the language of former section 244 of the INA and new section 309(f) of IIRIRA that is worth noting. Section 244 stated that the Attorney General might grant relief "in the case of an alien who ... is a person whose deportation would, in the opinion of the Attorney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

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

Thus, it seems to us that you are entirely free to adopt procedures for adjudicating the hardship issue under section 309(f) that differ from those used to adjudicate the issue under former section 244 of the INA, and that these can include a rule that in light of the length of time they have been here and the difficulties they have faced, NACARA beneficiaries are entitled to a presumption of extreme hardship.

Sincerely,


Edward M. Kennedy
Ranking Member
Subcommittee on Immigration


Spencer Abraham
Chairman
Subcommittee on Immigration


Bob Graham


Connie Mack



THE WHITE HOUSE

Domestic Policy Council

DATE: 12/16

FACSIMILE FOR: Elena Cagan

PHONE: () -

FAX: () 6-2878

FACSIMILE FROM: Julie Fernandes

PHONE: () -

FAX: () -

NUMBER OF PAGES (INCLUDING COVER): _____

- ☒ FOR YOUR REVIEW
☐ PER MY E-MAIL OR VOICE-MAIL MESSAGE TO YOU
☐ PER YOUR REQUEST

COMMENTS: Letter from Kennedy/Abraham to Perez
re: Central American implementation

Introduction

Many Salvadorans, Guatemalans, and Nicaraguans who fled their countries during the mid to late 1980s were afforded some type of temporary status in the United States for many years. In all cases the status was, by its terms, temporary and not intended to guarantee or lead to permanent residency, nor was it intended to guarantee that those covered would remain in the United States long enough to meet the seven-year residency requirement for suspension of deportation. However, as a practical matter many of these people established strong ties to the United States during their residency here and held the expectation that they might qualify to apply for suspension of deportation before their deportation was enforced.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter IIRIRA) severely restricts the availability of suspension of deportation by extending the length of time required in the United States, increasing the hardship requirement, and placing a limit on the number of cases that can be granted each year. These changes, as discussed below, render the option of suspension of deportation unavailable for most of the Guatemalans, Salvadorans, and Nicaraguans who came to the United States in the 1980s -- a matter which is of major concern to countries in the region. In his recent trip, the President pledged to consult with Congress on this issue. Below is a brief history of these cases and options for Congressional action.

Background

During the mid to late 1980s, in response to civil war and wide-spread political persecution in Central America, large numbers of civilians from Guatemala, El Salvador and Nicaragua fled to the United States, most entering illegally at the Southwest border. Many of these individuals were *bona fide* refugees, others fled general conditions of civil unrest or came for economic reasons. Some were apprehended by the Immigration and Naturalization Service (INS); some who were not apprehended came forward and affirmatively applied for asylum; and others have resided unidentified in the United States. The cases of those known to the INS were handled through a variety of means. In addition to the Salvadorans, Guatemalans, and Nicaraguans who have resided in the United States under a form of temporary status, there are many others from these countries residing in the United States who were never under such status. These include illegal residents who were not apprehended and never came forward to identify themselves, and many who entered the United States illegally during the 1990s.

Nicaraguans

The Nicaraguans' affirmative asylum claims were largely heard and resolved by the INS. Those denied asylum were placed in deportation proceedings before the Executive Office for Immigration Review (EOIR), where most renewed their claims for asylum. Those Nicaraguans apprehended by the INS were also placed in proceedings, and many of those also filed asylum claims with EOIR. In July 1987, the Nicaraguan Review Program was established under Attorney General Meese. Under this program, approximately 30,000 Nicaraguans in proceedings (or who already had a deportation order) were entitled to a special Department of Justice (DOJ) review of their asylum application, if it had been denied, prior to being deported. During this review period, which lasted until June 1995, most of the Nicaraguans in proceedings were

protected from deportation and were entitled to work authorization. When the program ended in June 1995, as a special transitional measure, Nicaraguans with a final order of deportation were informed that they could continue their work authorization if they filed with EOIR a *prima facie* valid motion to reopen their proceedings to apply for suspension of deportation. They would meet this test if they had seven years physical presence in the United States and had no serious criminal records.

As of April 1, 1997, approximately 38,000 Nicaraguans were in deportation or exclusion proceedings. This includes 16,400 Nicaraguans who had final orders of deportation as of July 1, 1996. It is not known how many of these Nicaraguans were those who fled their country in the mid to late 1980s.

Guatemalans and Salvadorans

There was considerable controversy regarding the treatment and status of Salvadorans and Guatemalans during the 1980s. A major class action law suit, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*), was filed against the United States government in 1985, alleging discriminatory treatment of Guatemalans and Salvadorans in asylum adjudication, both by the INS and by EOIR. The DOJ settled the case in 1991, entitling class members to special asylum adjudication procedures which were only fully put into place as of April 7, 1997, for the bulk of the class. Pursuant to the settlement, the vast majority of *ABC* class members have been protected from deportation until their asylum claims are decided, and have been entitled to apply for work authorization. The *ABC* class is specifically defined by nationality and date of entry to the United States: Guatemalans who entered on or before October 1, 1990, and Salvadorans who entered on or before September 19, 1990.

Estimated *ABC* class: 240,000, includes:

190,000 Salvadorans

50,000 Guatemalans

(The class includes 25,000 class members in proceedings prior to April 1, 1997; nationality unknown)

Another important note is that as an exceptional act of Congress, as part of the 1990 Immigration Act, Congress authorized Temporary Protected Status (TPS) for Salvadorans then in the United States (approximately 190,000 registered), temporarily suspending their return to their war torn country. TPS was in effect through June 30, 1992, and through the vehicle of Deferred Enforced Departure, protection was extended by both the Bush and Clinton administrations until December 31, 1994. Virtually all Salvadorans protected under TPS were also *ABC* class members.

ABC class members have had asylum applications pending in the asylum backlog for many years, pending the termination of TPS and DED for Salvadorans and while the Administration's priority was reforming the asylum program and handling recently filed cases first. It is expected that only a small percentage of the *ABC* class members will now be eligible for asylum because of changes in their countries. Until recent changes in the Immigration and Nationality Act, many expected that they might have the chance to apply for suspension of deportation under pre-

IIRIRA law. This was not part of the settlement agreement, but the expectation arose from the suspension provisions of the pre-IIRIRA Immigration and Nationality Act.

Changes in the New Law and Congressional Intent

The recent changes to the immigration law dramatically restricted the discretionary relief of suspension of deportation, now called cancellation of removal. The Conference Committee's report on the IIRIRA stated that these changes were made because suspension of deportation was being applied too widely and not as an extraordinary remedy in extreme cases, as it was originally intended. Immigration Judges had been granting suspension at a 50% rate, then the rate went to about 75% after the decision by the Board of Immigration Appeals (BIA) in *Matter of O-J-O*, Int. Dec. 3280 (BIA 1996).

However, it is likely that many in Congress may not have been aware of the consequences of some of the changes to the suspension provisions and the impact they would have on long-standing *de facto* residents. In particular, many may not have been aware of the provisions which severely limited any transitional measures for the ABC class and those already in proceedings before the April 1, 1997, effective date of the IIRIRA. For others in Congress, even the extreme changes were deliberate, specifically aimed at eliminating the possibility of an amnesty-like program for Central Americans who came illegally to the United States in the 1980s, and at further restricting relief for illegal immigrants. For these members of Congress, there will be strong resistance to any modification of the new laws.

1. Raised Standard for Hardship and Length of Time in the United States

The new cancellation of removal provisions, which apply only to people placed in proceedings after April 1, 1997, limit relief to individuals who have been physically present in the United States for a period of ten, as opposed to seven, years. The hardship standard was raised so that the individual must now demonstrate that removal would result in "exceptional and extremely unusual hardship," as opposed to extreme hardship. Further, this hardship must be to the individual's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; a showing of extreme hardship to the individual himself or herself no longer suffices.

2. Created a Cap on the Number who Can Be Granted Relief

Why isn't the cap a problem? → Congress also sought to limit the number of individuals who could be granted either suspension of deportation or cancellation of removal, by limiting to 4,000 the number of cases that may be approved per year. Previously, there was no limit on the number of individuals who could be granted suspension of deportation. The cap was adopted as a compromise to avoid eliminating suspension altogether. It was set considerably higher than available figures (2,500 grants in FY 1994), but the members trying to preserve suspension did not attend to the likely effect of the ABC caseload and other factors causing a steady upward trend (3,750 grants in FY 95, and 7,500 in FY 96).

By mid-February 1997, the 4,000 cap for fiscal year 1997 was nearly exhausted. In light of the need to address the transitional issues raised by the new cap, the Attorney General has decided not to deport before September 30, 1997, those who would qualify for suspension of deportation but for the cap, pending negotiations with Congress. In this context, the INS and the DOJ have initiated discussions on the Hill concerning possible legislation exempting from the cap transitional cases (those in proceedings prior to April 1, 1997). The DOJ will soon issue a regulation implementing the cap by means of a lottery among the pool of persons who would otherwise have received suspension. Winners will receive lawful permanent resident status; those not selected will receive a deportation order.

3. **Established Rule to Stop Time in the United States from Accruing after Initiation of Proceedings**

Formerly, individuals could continue to accrue time toward the seven years throughout the course of proceedings and appeals. To eliminate the incentive for prolonging immigration proceedings, Congress created a rule providing that the time necessary for purposes of cancellation of removal must have accrued before initiation of removal proceedings. The Administration supported this rule for prospective application, but the conference committee bill, in a poorly drafted provision, made the stop-time rule retroactive. The poor drafting has led to continuing litigation, but the BIA ruled that it is fully retroactive. *Matter of N-J-B*, Int. Dec. 3309 (BIA 1997). The retroactive application of the stop-time rule has significant consequences for the approximately 38,000 Nicaraguans who, prior to April 1, 1997, were placed in proceedings or had a final order of deportation issued and the 25,000 ABC class members who were placed in proceedings prior to April 1, 1997.

NJB:
retroactive applica-
of stop-time rule.

Effect of the New Law and Options for Congressional Action

Although suspension of deportation was always a discretionary form of relief, and by no means a guarantee for any individual, the new standards combined with the cap and the retroactive application of the stop-time rule dramatically limit this form of relief. As a result, approximately 280,000 Central Americans may eventually be subject to deportation -- of those only a small percentage will be eligible for asylum or cancellation of removal. The Central American governments are concerned that this threatens the stability and security of the region. Central American governments are very concerned about not only the loss of remittances, which comprise a significant percentage of their revenue, but also their ability to reintegrate this population into their developing economies and post-war societies.

During his recent trip, President Clinton pledged to consult with Congress regarding ways to soften the harsh consequences of the new law for this population. Set forth below are the major options for Congressional action.

1. Lift or Modify Cap for Cases in Proceedings prior to April 1, 1997

Did this happen?

The most modest option is to eliminate or modify the 4,000 cap for individuals who were placed in proceedings prior to April 1, 1997. The DOJ is already working with staff from the House and Senate immigration subcommittees towards a legislative modification of the cap. Our preferred modification would be to move the effective date of the cap from October 1, 1996, to April 1, 1997, and make the cap applicable only to removal cases filed *after* April 1, 1997. With such modification, the thousands of cases already in the pipeline before April 1 that meet the suspension criteria could be granted suspension without the number of grants being limited by the cap.

Staff for Rep. Lamar Smith, Chairman of the House Immigration Subcommittee, are interested in our proposal to modify the cap but only if we agree to: (1) offsetting legal immigration numbers to compensate for the increased number of suspension grants that would result and (2) codifying the BIA's *N-J-B* decision. However, staff for Senator Abraham, Chairman of the Senate Immigration Subcommittee, strongly oppose an offset to legal immigration. We are caught in the middle. In addition, there needs to be a decision on how such an offset should be structured, if we eventually have to make such a recommendation. Other offices on the Hill that support lifting the cap or making other adjustments for Salvadorans, Nicaraguans, and others prefer not to support an offset. However, they have not offered any realistic legislative alternative to smooth enactment of a lifting or delaying of the cap. We expect this may change once the Department publishes in the Federal Register the proposal to implement the cap.

Effect: Lifting the 4,000 yearly cap could affect a relatively small number of individuals; it is roughly estimated that from between 19,000 to 38,000 individuals who were placed in proceedings prior to April 1, 1997, would be granted suspension of deportation if there were no cap applicable to them. (We do not know how many of these are Central Americans, but we believe a strong majority consists of Central Americans and Mexicans.) This option alone would do nothing to help the approximately 215,000 *ABC* class members who have not been placed in proceedings, because they would still be required to meet the new ten-year and heightened hardship requirements and would be subject to the 4,000 yearly cap. Nor would it assist those Nicaraguans and *ABC* class members already in proceedings by April 1, 1997, who cannot meet the physical presence requirement due to retroactive application of the stop-time rule.

Pros: This affords important relief to at least 19,000 individuals, while avoiding a nationality-specific remedy. Also, because it is a modest proposal and keeps unchanged the substantive limits to suspension, it may be acceptable, as a transitional mechanism, to the harshest critics on the Hill.

Cons: Because this option, taken alone, would affect a relatively small number of individuals, it would not address the concerns of the Central American governments or most of the Guatemalans, Nicaraguans, and Salvadorans who have been living in the United States.

2. **Reverse the Retroactive Effect of the Stop-Time Provision and Lift or Modify Cap for Cases in Proceedings prior to April 1, 1997**

A legislative reversal of the BIA holding in *Matter of N-J-B* could enable a number of those who were placed in proceedings prior to April 1, 1997, to be eligible for suspension of deportation. Although the BIA decision could be overturned on appeal in federal court, we discuss here the possibility of legislation providing that the stop-time provision is not to be applied retroactively to cases already in proceedings prior to April 1, 1997.

Effect: It is estimated that the number of individuals already in proceedings by April 1, 1997, who would be granted suspension of deportation if *Matter of N-J-B* were overruled would be 38,000 to 76,000. This number includes all nationalities. With regard to Central Americans, this change would largely assist those Nicaraguans who were placed in proceedings prior to April 1, 1997. However, it would potentially affect only a small percentage of the ABC class (25,000), since the bulk of the class, approximately 215,000 individuals, has not yet been placed in removal proceedings.

Pros: This avoids a nationality-specific remedy. It would have a significant impact on the availability of suspension for Nicaraguans who came to the United States in the mid 1980s and were placed in proceedings prior to April 1, 1997.

Cons: This would have relatively little effect on availability of suspension of deportation to the ABC class, which is of great concern to the governments of Guatemala and El Salvador. This option is also likely to meet with strong opposition from the principal backers of the IIRIRA in Congress, and the proposal could undercut the chance to gain their support for a version of option one.

3. **Apply pre-April 1, 1997, Suspension Standards to ABC Class Members, Lift or Modify the 4,000 Cap for ABC Class Members and Individuals in Proceedings prior to April 1, 1997, and Reverse the Retroactive Application of the Stop-Time Rule for Individuals in Proceedings prior to April 1, 1997**

Individuals in proceedings prior to April 1, 1997, are already subject to the substantive requirements for suspension of deportation under the INA, before it was amended by the IIRIRA. This option would extend the application of the previous suspension requirements to the entire ABC class.

Effect: Unlike the options above, this option gives all 240,000 ABC class members a chance to apply for suspension under the old rules. This does not mean that all 240,000 will qualify; we expect about 50% to apply, allowing for no-shows and those who obtain other forms of relief, and 75% of those to succeed, yielding approximately 90,000 who will obtain lawful permanent resident status. Depending on how quickly the asylum office and EOIR caseload is handled, which we estimate would be from 3 to 5 years, this would amount to an average of 18,000 to 30,000 suspension grants to ABC class members per year. Taking into account those not in the ABC class who would also

benefit from this option, we estimate that this option could result in grants of suspension of deportation to roughly 119,000 individuals.

Pros: This option would significantly benefit members of the *ABC* class, whose expectation has been, until recently, that they might eventually be able to apply for suspension of deportation should asylum be denied. It would additionally benefit the Nicaraguans who have been residing in the United States since the mid to late 1980s and who were placed in deportation proceedings prior to April 1, 1997. As such, it would go far to foster stability and security in Central America and address the concerns of the governments of Guatemala and El Salvador regarding integration of this population into their developing economies and post-war societies.

It has been argued by *ABC* class counsel and special interest groups that special treatment for the *ABC* class is justified by these individuals' special legal status under the settlement agreement, which was viewed by them as a remedy for past mistreatment. Such treatment arguably also recognizes the exceptional circumstances faced by these individuals, as demonstrated by Congress in granting TPS, and their long standing status in the community.

Cons: Applying pre-April 1st suspension requirements to the *ABC* class singles out two nationalities for special treatment and cuts against Congress's intentions in granting TPS -- by definition a temporary form of protection. In addition, critics will argue that there is no basis to afford *ABC* class members special treatment in terms of suspension, because the settlement focused solely on class members' asylum adjudications. Class members' expectations about suspension were arguably no different from persons of other nationalities living for a long period in the United States illegally. There were also many non-*ABC* cases in the asylum backlog similarly affected by the new law. Other groups are likely to make the case that they are special in some way and ask for the same treatment as *ABC* class members. Finally, critics will portray this position as an amnesty and will use it to call into question the Administration's commitment to serious enforcement of immigration laws. Without the Administration's complete commitment to fighting for it, even proposing this option, would jeopardize the success of either option number one or two, as it could cause the principle supporters of the IIRIRA in Congress to harden their position on any potential changes to the law.

4. **No Change in Standard, but Eliminate or Modify the Cap for All Cases Regardless of Date Proceedings Initiated**

Effect: Assuming there is no change in the cancellation of removal rules, some proportion of *ABC* class members and Nicaraguans will meet the requirements for either suspension or cancellation. Either they will have been placed in proceedings prior to April 1, 1997, and meet the requirements of the old suspension of deportation law, or they will meet the requirements of the new cancellation law because they will have been in the United States continuously for ten years, show good moral character, and demonstrate the requisite hardship to relatives who are United States citizens or lawful permanent residents. Approximately 25% of the *ABC* class members entered in 1987 or

earlier, meeting the threshold qualification (ten-year physical presence) of the new cancellation rules. This number will increase over the course of processing the *ABC* cases, especially if we adjudicate cases on a first in, first out basis. However, this change would not benefit a significant number of *ABC* class members and Nicaraguans who cannot meet the cancellation standards or are precluded from meeting the suspension residency requirement because of the retroactive application of the stop-time provision.

Pros: Elimination or modification of the quantitative cap on what are qualitative decisions would be a positive step toward fairly providing relief and bringing the cap more in line with the numbers of individuals who may qualify for suspension of deportation or cancellation of removal. This option is more equitable than the lottery system described above.

Cons: This option would not significantly help *ABC* class members and Nicaraguans. In addition, Congress intentionally included the cap with the goal of restricting the number of people who will have this relief available to them. The Administration would face opposition to this proposal and would have to explain why the 4,000 number is too low, especially when stricter cancellation standards were designed to limit the number of grants. Like option number three, proposing this option could also jeopardize the success of either option number one or two, as it could cause the principal supporters of the IIRIRA in Congress to harden their position on any potential changes to the law. It will heighten suspicion that the DOJ will not enforce the new tighter rules as Congress intended.

Possible Offset against Legal Immigration

In preliminary discussions on the Hill regarding transitional approaches for implementing the new law, one proposal has been to have an enlarged cap offset by the legal immigration number. This approach could be seen to conflict with the Administration's often stated principle of favoring legal immigrants over those without legal status, including those who overstayed their legal status.

While the INS has not decided how it would want to see such an offset structured, if we eventually have to make such a recommendation, one method would be to reduce or eliminate the diversity visa program. Under this program, 55,000 immigration slots per year are awarded on a lottery basis to nationals of countries considered under-represented in the legal immigration stream. This provision, enacted in 1990, is largely used by Irish, Poles, other Europeans, Africans, and Japanese. In contrast to other legal immigration categories, beneficiaries of the diversity program need not have any family ties in the United States or an offer of employment. The diversity program lacks the domestic constituency of the family reunification and employer-sponsored visas. However it must be stressed that even if we could obtain an agreement with Immigration Subcommittee leadership on a particular offset, it is likely that other parts of the legal immigration could be re-opened by other Members and Senators. That is why Chairman Abraham and others are strongly opposed to starting down this road.

There are also problems if unused employment-based visas are used. Slots taken from this category would otherwise be made available to the preference category for spouses and unmarried children of lawful permanent residents, thereby slowing progress of those on the waiting list, already facing over three years' wait.

Based on current estimates, the options discussed above would require annual legal immigration offsets as follows:

- Option 1: 19,000 - 38,000; average over 5 years: 3,800 - 7,600 per year
- Option 2: 38,000 - 76,000; average over 5 years: 7,600 - 15,200 per year
- Option 3: 119,000; average over 5 years: 23,800 per year
- Option 4: Difficult to estimate

Resolving whether we enter into adjustments on legal immigration, even if limited to the diversity visa program, and presenting and passing whatever legislative changes are sought necessitate active White House involvement along the lines of the final days of the 1996 bill, if they are to be successful.



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Commissioner

425 I Street NW
Washington, DC 20536

JAN 16 1998

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL *WJ 1-28-98*
FROM: Doris Meissner
Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Implementation of cancellation of removal
provisions in the Nicaraguan Adjustment and
Central American Relief Act (NACARA)

PURPOSE: To obtain the Attorney General's approval for the
Immigration and Naturalization Service's (INS')
proposal to integrate cancellation of removal
adjudications for NACARA beneficiaries into the
affirmative asylum program.

TIMETABLE: Approval of INS' proposal at the earliest possible
date will facilitate sound program development and
opportunity for consultation.

SYNOPSIS: NACARA provides that certain Guatemalans,
Salvadorans and nationals of former Soviet Bloc
countries may apply for cancellation of removal
under standards that existed for suspension of
deportation prior to enactment of the Illegal
Immigration Reform and Immigrant Responsibility
Act of 1996. Most of the individuals covered by
the NACARA cancellation provisions are currently
in the Asylum Program's backlog. INS believes that
the most efficient method for processing these
cases is to integrate NACARA cancellation of
removal adjudications into the affirmative asylum
process. This would provide certain beneficiaries
of NACARA with the option of applying for
cancellation of removal in the context of the
affirmative asylum adjudication.

EXECUTIVE
SECRETARIAT

1998 JAN 20 A 10 03

RECEIVED
DEPT OF JUSTICE

Memorandum for the Attorney General

Page 2

Subject: Implementation of cancellation of removal provisions in the Nicaraguan Adjustment and Central American Relief Act (NACARA)

DISCUSSION: The INS proposal, which has been approved for legal sufficiency by the Office of Legal Counsel (OLC), is to integrate the adjudication of cancellation of removal requests under NACARA into the affirmative asylum process. Pursuant to your approval and promulgation of regulations, the Asylum Program would have jurisdiction to grant cancellation of removal to applicants who are eligible for the benefit under NACARA. If the applicant is denied asylum and appears ineligible for cancellation of removal, the Asylum Program would refer the request for cancellation of removal to the immigration court.

The Executive Office for Immigration Review opposed the adoption of the INS plan, arguing that its immigration judges already possess the expertise to adjudicate requests for cancellation and suspension in immigration court. Nonetheless, we believe that the proposal's advantages outweigh its drawbacks.

The benefits of adopting this process include efficiency, expediency, and substantial cost savings to both taxpayers and applicants. The great majority of the beneficiaries of the NACARA cancellation of removal provisions -- approximately 240,000 class members of American Baptist Churches vs. Thornburgh (ABC) -- are already in the Asylum Program's backlog and, according to the ABC settlement, are entitled to reconsideration of their asylum claims in the affirmative asylum process. If the Asylum Program also adjudicates the cancellation aspect of these cases, those individuals granted cancellation or asylum would not require further processing by the immigration courts, saving the Government and the applicant expenses associated with an adversarial proceeding before the immigration court.

The Executive Office of Immigration Review (EOIR) has questioned the legality of delegating to the INS the authority to adjudicate cancellation of

savings to both taxpayers and applicants. The

Memorandum for the Attorney General

Page 3

Subject: Implementation of cancellation of removal provisions in the Nicaraguan Adjustment and Central American Relief Act (NACARA)

removal requests. In addition, the Department of Justice has taken the position in Federal court litigation that the Immigration and Nationality Act requires that this type of relief be granted only in proceedings before an immigration judge. *AILA v Reno*, No. 97-0597 (D.D.C.); *Cervantes v. Perryman*, 954 F. Supp. 1257 (N.D. Ill. 1997); *Pincilloti v. Reno*, No. C95-2143 MFP (N.D. Cal 1996); *Espinoza v. Trominski*, No B-96-240 (S.D. Tex., filed December, 1996); *Alvidres-Reyes v. Reno*, No. EP-97-CA-122 (W.D. Texas 1997).

However, the OLC has determined that it is within your discretion to delegate authority to the INS to adjudicate cancellation of removal requests raised under NACARA. The OLC advised that the INS process should, 1) include a mechanism that requires applicants to concede inadmissibility or deportability before they are granted cancellation of removal, and 2) ensure that each grant is based on the proper factual predicates, consistent with the standards applied by EOIR. The INS is prepared to design a program that comports with OLC's recommendations.

While the INS will make every effort to implement the proposal in a fair and professional manner, there is a significant risk of litigation by nationalities not covered by NACARA's special cancellation provisions. These groups may bring equal protection claims, arguing that they should also be afforded the administratively created benefit of a non-adversarial adjudication of their cancellation or suspension application. The INS believes, after consultation with the Office of Immigration Litigation, that such claims can be defended, and that the risk of litigation should not deter adoption of this proposal.

The INS Office of International Affairs and the Office of Programs will chair an INS working group, including representatives from all relevant INS components and EOIR to promptly develop and implement the program. The INS will consult with ABC class counsel, Non-Governmental Organizations

Memorandum for the Attorney General

Page 4

Subject: Implementation of cancellation of removal provisions in
the Nicaraguan Adjustment and Central American Relief
Act (NACARA)

(NGOs), and advocates in designing the program, as
was successfully accomplished in development of
the 1995 reforms to the asylum process. To
~~maximize consistency in application of the NACARA~~
cancellation provisions, the INS intends to
suspend temporarily adjudication of affirmative
asylum requests filed by potential beneficiaries

02/05/98 10:18

202 514 6897

DAG

004

Our proposed timeline is as follows:

January:	Internal program development and Consultation with EOIR
February/March:	Formal Consultation with ABC class counsel, NGOs, and Congressional staff
April/May:	Draft regulations Publish notice of proposed rulemaking 60-day comment period
June:	Consider comments Develop training
July/August:	Publish final regulations Train asylum officers
September:	Begin implementation

RECOMMENDATION: The INS recommends that you approve the proposal
to integrate implementation of the NACARA
cancellation of removal provisions into the
affirmative asylum process.

APPROVE: 

DATE: February 2, 1998

Concurring Components:

OPD  1/22/98
OLC  1/27/98

DISAPPROVE: _____

Nonconcurring Components:

None

OTHER: _____

Where is the
argument in favor
of the admin. adjudicator?

Briefing Paper

Issue:

Should INS be given authority to handle suspension cases on a "grant or refer" basis for El Salvadorans, Guatemalans, and Eastern Europeans, or should these cases continue to be handled in Immigration Court, with those of all other nationalities?

Background:

Suspension of deportation is strictly a form of relief from deportation, unlike other forms of relief which Immigration Judges may grant such as asylum, voluntary departure, or adjustment of status. Therefore, jurisdiction over suspension of deportation has always vested solely in the Immigration Court and Board of Immigration Appeals.

Suspension of deportation is a complex and specialized area of immigration law. Determining eligibility for suspension of deportation involves weighing various factors with regard to whether the applicant has demonstrated 7 (or in some circumstances 10) years' continuous physical presence, extreme hardship (or in some circumstances exceptional and extremely unusual hardship), good moral character and a favorable exercise of discretion. The issue of demonstrating extreme hardship, in particular, requires an Immigration Judge to carefully weigh and evaluate a very wide variety of factors, such as family ties, job skills, ties to the alien's country of nationality, and health. In addition, Immigration Judges, as independent adjudicators, must ultimately determine, in their discretion, whether the alien ultimately merits a grant of suspension of deportation, based on numerous other factors such as service to the community, payment of income taxes, and other issues which go to the character of the alien.

Discussion:

With the passage of Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), El Salvadorans, Guatemalans, and Eastern Europeans were permitted to seek suspension under the pre-IIRIRA standards as set forth in the Matter of O-J-Q-, Interim Decision #3280 (BIA 1996). While this is a major benefit, which will probably permit many more of them to achieve suspension than would under the IIRIRA standard, the groups which represent them have sought additional concessions from the Administration in terms of even softer standards in applying the doctrine and quicker or different processing of individual claims.

Q: What is the
standard for
the equivalent
under
IIRIRA?
Do they have
suspension of
deportation?

Briefing Paper

Page 2

The Department has made it clear that there will be no softer standards. However, in an attempt to meet the concerns of the Administration, the INS has proposed a procedural change, the transfer of these suspension cases to its Asylum Office for processing on a "grant or refer" basis. It is INS' view that its Asylum Corps can, with some additional training, handle these cases quickly and that this proposal will satisfy the Administration's and the outside groups' desires for a procedural change.

EOIR is opposed to this proposal on several grounds:

- What about this?*
1. The INS Asylum Office is not now handling its caseload in a timely fashion. The addition of greater caseload responsibilities cannot help processing timeframes in either area.
 2. It may be far more difficult to train INS Asylum Officers in this complex area of the law quickly and effectively than the Service asserts. In addition, it is hard to believe that the Service can do the training, publish new regulations, establish new procedures, hire new staff, and move the process more quickly at the same time.
 3. If the Asylum Office grants a higher percentage of suspension cases than the Immigration Court, our oversight committee will raise the specter of "Citizenship USA" and charge that INS is not taking adequate care with the cases. If the Asylum Office grants fewer suspensions than the Immigration Court, both the Administration and the NGO's will be upset.
 4. The transfer of this procedure to INS will underline the special status of these groups and make the filing of lawsuits based on both disparate treatment and lack of equal protection under the law even more likely.

Finally, the case for EOIR's retention of suspension jurisdiction in its entirety is both clear and strong. It includes the following:

- We have over 200 sitting Immigration Judges, fifteen Board Members and over 100 Board staff who have been handling suspension cases and the intricacies of the suspension doctrine for years. In short, we are trained and ready to handle this caseload, as well as being the recognized experts in the field.

Briefing Paper

Page 3

- EOIR adjudications are done on a case-by-case basis by Immigration judges and Board members who are enjoined to decide cases independently. Therefore, they make the Department far less subject to a charge that the Department has somehow tightened or loosened the standard to satisfy one group or another.
- Last year, we handled almost 80,000 combined suspension and asylum cases. We have room on the docket to do that again this year. In addition, we are currently expediting the scheduling of asylum cases, and can do so here as well.

Overall, we believe both the Department and the Administration are best served by leaving this function with EOIR. It is both the more efficient and the more prudent alternative.

NATIONAL SECURITY COUNCIL

FAX COVER SHEET

***Office of Democracy, Human Rights
and Humanitarian Affairs*****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
To: JULIE FERNANDEZ
Agency:
Fax Number: 65581
Date/Time:
No. of pages to follow: 13
Message:

Background on immigration
legislation plus stuff J Martin
sent to me.

Central Americans Legislation
November 19, 1997

Q: What is the Administration's view of the immigration legislation that addresses the situation of Central Americans?

A: The Administration is pleased that the Congress has acted on the President's initiative to ameliorate the harsh impact of the new immigration law as it relates to Central Americans. This makes good on the President's pledge when he went to Central America last spring. As the President made clear during that trip, the United States has a particular obligation to help these people -- not only because they have now established deep roots in our communities -- but also because sending them home at this time would very likely disrupt the important progress these countries have made towards peace, democracy, and economic reform.

Nevertheless, we are concerned about several aspects of the bill passed by Congress:

First, we believe it inappropriately provides different treatment for similarly situated persons. Central Americans who came to the United States because of persecution or civil strife war in their countries and have established substantial ties here should be treated similarly. However, we believe that these differences can be minimized in the implementation process. The President has asked the Attorney General to consider the ameliorative purposes of the legislation and the history and circumstances of the people covered by it in that process.

Second, we are concerned that it fails to address the situation of Haitians, many of whom the Bush Administration brought to this country after the overthrow of President Aristide in 1991. Like persons from Central America, these persons were fleeing persecution and civil strife and have developed substantial ties to the U.S. We will pursue a legislative solution for these people in the next session of Congress.

Third, Congress should not have continued to permit the application of new, harsher immigration rules to other persons with pending cases. Changing the rules in the middle of the game is unfair, unnecessary, and contrary to our values. We intend to revisit this issue as at the earliest opportunity.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

November 14, 1997

STATEMENT BY THE PRESIDENT

Immigration Bill

During my trip to Central America in May, I pledged to address the circumstances of Central Americans who were treated unfairly by last year's immigration bill. The bill's strict new rules threatened to uproot hundreds of thousands of people who came to our shores fleeing violence and persecution. In July, I transmitted to the Congress a legislative proposal that offered relief to these people. I am very pleased that the Congress has now passed provisions that do just that.

In the 1980s, a large number of Central Americans sought refuge in the United States because of the civil war and human rights abuses that then plagued that region. As I noted during my trip, the United States has a particular obligation to help these people because they and their families have now established deep roots in our communities and because sending them home in large numbers at this time would very likely disrupt the important progress these countries have made towards peace, democracy, and economic reform. As a result of these new provisions, these people may now be considered for permanent status under more generous rules than were imposed by the recent immigration bill.

Nevertheless, I am concerned about several aspects of this legislation. First, I am troubled by the fact that it treats similarly situated people differently. The Central Americans covered by this bill fled similar violence and persecution; they have established similarly strong connections to the United States; and their home countries are all fledgling democracies in need of our assistance. The relief made available to these people should be consistent as well. I believe, however, that these differences can be minimized in the implementation process.

I am also concerned about the plight of certain Haitians who are not covered by this legislation. Before we helped restore democracy to Haiti, many Haitians were also forced to flee their country because of persecution and civil strife. They deserve the same treatment that this legislation makes possible for other groups. We will seek passage of legislation providing relief to these Haitians early in the next session of Congress, and take appropriate administrative action while we pursue this solution.

Finally, I believe that Congress should not have continued to permit the application of new, harsher immigration rules to other persons with pending cases. Changing the rules in the middle of the game is unfair, unnecessary, and contrary to our values. We intend to revisit this issue at the earliest opportunity.

#

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

November 19, 1997

STATEMENT BY THE PRESIDENT

Today I am pleased to have signed into law H.R. 2607, the "District of Columbia Appropriations Act, 1998."

I am particularly pleased that the Act provides sufficient funding to implement the National Capital Revitalization and Self-Government Improvement Act of 1997 (Revitalization Act), which includes the main elements of the plan for the District of Columbia that I proposed in my 1998 budget in February. That plan, which was the most comprehensive plan that any Administration had ever proposed for the District, was designed to achieve two goals: to revitalize Washington, D.C., as the Nation's capital and to improve prospects for "home rule" to succeed. The Congress adopted the Revitalization Act as part of the historic balanced budget agreement that I signed into law last summer. Now, with this 1998 appropriations bill, the Congress has provided the funds to implement it.

The Act also drops several of the objectionable micro-management and other provisions in the original House-passed version of the bill such as Federal funding for private school vouchers, the requirement to reopen Pennsylvania Avenue, the limitation on public assistance payments, the prohibition on Treasury borrowing authority for the District, and restrictions on the District's authority to make improvements in its financial management system.

The Act continues to contain abortion language that would prohibit the use of Federal and District funds to pay for abortions except in cases in which the life of the mother is endangered or in situations involving rape or incest. The continued prohibition on the use of local funds is an unwarranted intrusion into the affairs of the District.

In addition, the Act makes important changes to last year's immigration bill by offering more generous treatment to Central

Americans than was available under that bill. These changes make good on the pledge I made during my trip to Central America last spring. Nevertheless, I have several concerns. First, I am troubled by the differences in relief offered to similarly situated persons. I believe, however, that these differences can be minimized in the implementation process. I therefore am asking the Attorney General to consider the ameliorative purposes of this legislation and the unique history and circumstances of the people covered by it in giving effect to its provisions. Second, I believe that similar relief should be made available to Haitians and will seek a legislative solution for this group. Finally, I ask the Congress to revisit its decision to continue to apply some of the harsher rules under last year's immigration bill to other persons with pending immigration cases who are not covered by H.R. 2607. I commend to the public my statement of November 14 for a further discussion of these issues.

WILLIAM J. CLINTON

THE WHITE HOUSE,
November 19, 1997.

#

Dear Mr. Chairman:

Thank you for your letter regarding the immigration situation of Haitians in the United States.

As you note, the President believes that certain Haitians -- primarily the so-called "Guantanamo Haitians" and others who have longstanding asylum claims in the United States -- should be offered legislative relief similar to that provided to Central Americans and others by the Nicaraguan Adjustment and Central American Relief Act. This belief is premised on several fundamental similarities between these two groups. First, this group of Haitians was also forced to seek the protection of our country because of persecution and civil strife. We know this because the vast majority of them were deemed to have a "credible fear of persecution" before they were brought here. In addition, these individuals have developed substantial ties to the United States during the time they have been here.

Furthermore, while we have been encouraged by Haiti's evolution following the restoration of democratic government in 1994, the situation remains fragile. We are working, along with the international community, to bolster Haitian stability and promote economic development, but this process is gradual. Providing this group of Haitians with an opportunity to be considered for permanent status in the United

States is one of several ways we can support our fundamental interest in a stable and democratic Haiti. A stable and democratic Haiti, in turn, is the best safeguard against a renewed flow of Haitian migrants to the United States.

Although the Guantanamo Haitians came to the United States under different circumstances than Central Americans, we do not believe that this difference warrants different treatment now. On the contrary, because of the similarities described above, we think there is a very powerful case for similar treatment.

We hope to have your support for a legislative solution for this group of Haitians and look forward to discussing the issue further with you.

Sincerely,

John Hilley
Senior Advisor to the President
and Assistant to the President
for Legislative Affairs

The Honorable Lamar Smith
Chairman
Subcommittee on Immigration and Claims
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Thank you for your recent letters to me and the Attorney General concerning the plight of certain Haitian nationals in the United States. As you know, the Administration supports legislative relief for particular classes of Haitians similar to that extended to Central Americans and others under the Nicaraguan Adjustment and Central American Relief Act. We are also committed to some form of temporary administrative relief for these Haitians while legislation is pursued in Congress next session. We expect to announce a decision on this administrative relief shortly.

I appreciate your support of the Department's efforts on behalf of Haitians and look forward to working with you on this important matter over the coming months.

Sincerely,

Eric H. Holder, Jr.
Deputy Attorney General

Simple thank you.
Any heartburn?
— John

Executive Office for Immigration Review
Fiscal Year 1996 Suspension Decisions for Four Base Offices

Base Office	Grant	Deny	% Grant
Miami	2,668	307	89.7%
Los Angeles	1,427	834	63.1%
San Francisco	1,093	87	92.6%
New York City	484	184	72.5%

* This table does not include suspension cases completed without a grant or denial of suspension, for example, cases administratively closed or granted another form of relief.

** The percentages listed above provide suspension grant rates for fiscal year 1996. These percentages in no way predict the percentage of suspension cases to be granted in any future year. The percentage of cases granted suspension of deportation varies from year to year and varies from court to court. Every adjudication of suspension of deportation is distinct, fact specific and involves an exercise of discretion. There is no way to calculate or predict grant rates for future suspension of deportation cases.

Proposed Model for Implementation of Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Modification of Certain Transitional Rules (a) Transitional Rules with Regard to Suspension of Deportation

We propose that implementation of the new cancellation provisions in NACARA be integrated into the affirmative asylum process. Asylum officers would be given jurisdiction to grant cancellation of removal when the asylum officer concludes that the applicant is eligible for the benefit. EOIR would have jurisdiction to adjudicate those cases in which the applicant is already in proceedings, with the exception of certain ABC applicants, and cases that are referred by the Asylum Division.

The benefits of adopting this process include efficiency, expediency, and substantial cost-savings to both tax-payers and applicants. The great majority of beneficiaries of the statute are in the asylum backlog and, according to the original ABC settlement, they necessarily will be funneled through the affirmative asylum process. If the Asylum Program also adjudicates the cancellation aspect of these cases - likely to be relevant in almost all of these cases - those individuals granted cancellation or asylum would not require further processing by the immigration courts, saving both the government and the applicant the added and more expensive costs of judge, trial attorney and government-provided interpreters in immigration court. The cons are that INS will have to develop new forms and procedures and train personnel; whereas EOIR currently has a process in place. However, we believe that the overall benefits of adopting such a process outweigh the added costs and effort of preparing the Asylum Program to adjudicate these claims.

EOIR has expressed concerns that creating a new adjudication process for certain beneficiaries of NACARA may raise equal protection claims, both by those beneficiaries who may not apply affirmatively because they have been placed in proceedings, and by other groups of aliens who are not beneficiaries of NACARA and therefore cannot apply affirmatively for cancellation. While we agree that it is important to consider equal protection challenges to ensure that the new legislation is fairly implemented, the creation of an affirmative application process for the beneficiaries of NACARA would withstand such challenges. There is precedent to base the type of application process available to an applicant on the procedural posture of the case - asylum, for example. Therefore, a process that provides an affirmative application process for NACARA beneficiaries who are not in proceedings would be consistent with current practice. Equal protection challenges based on alleged discriminatory treatment between beneficiaries of NACARA and those not covered by the new law can be defended against on the basis that Congress has already singled out the group identified in NACARA for special substantive benefits, not accorded to other aliens seeking cancellation of removal. To provide a separate and more efficient adjudication process for these individuals is consistent with Congress's treatment of this group. Finally, EOIR expresses concerns that the nature of cancellation of removal first requires a determination that an individual is removable, which falls within the realm of EOIR's jurisdiction. However, we note that asylum officers have jurisdiction, in certain cases, to adjudicate requests for withholding of removal. There does not appear to be any significant reason to differentiate between the two adjudications, in terms of jurisdiction.

We realize that there are several procedural issues that still need to be resolved, and therefore present below only a broad outline, leaving many details to be worked out during the regulation-writing and consultation process.

Proposed Process

- Potential beneficiaries of NACARA who have an asylum application pending with the Asylum Program, or any child, spouse, or unmarried son or daughter of such an applicant files an application for cancellation of removal with a Service Center.
- Service Center checks for jurisdiction and, if asylum office has jurisdiction, forwards application to appropriate asylum office. The Asylum Program would not have jurisdiction if the applicant has been placed in proceedings with EOIR, with the exception of ABC eligible applicants over whom EOIR and the Asylum Program have joint jurisdiction.
- An asylum officer interviews applicant, eliciting information for both asylum and cancellation.
- Asylum Office concurrently processes both applications:
 - If applicant is eligible for cancellation, asylum officer grants cancellation and dismisses asylum request, unless applicant requests to pursue asylum request.

- If applicant is eligible for asylum, but not cancellation, asylum officer grants asylum.
- If applicant is not eligible for either cancellation or asylum, asylum officer denies or refers asylum request (depending on ABC status) and refers cancellation request to EOIR. If ABC application previously was in proceedings, then applicant will have to file motion to reopen with EOIR to pursue asylum and cancellation.

Setting the Process in Place

Time-Line: January: Consult with NGO's, begin drafting regulations
February/March: Develop training program and finish drafting regulations
April: Publish interim regulations and train asylum officers

Asylum Program Capacity: With no additional staff, it is projected that the Asylum Program will complete the ABC/Farmer Soviet Bloc backlog in approximately 8 to 10 years, depending on no-show rates. With an additional 85 Asylum Officers hired for a limited term of 4 years to keep current with receipts while the majority of veteran officers focus on ABC, we estimate that the Asylum Program can adjudicate the caseload in 3-4 years, depending on no-show rates. The added cost to the Asylum Program would be approximately \$8.5 million per year, which may be offset by fees associated with suspension applications.

Julie A. Fernandes
11/13/97 06:43:40 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP, Leanne A. Shimabukuro/OPD/EOP

Subject:

I sat in on a meeting, chaired by Maria Echaveste, with the Central American advocacy groups. The topic was reaction to the package of relief for the Central Americans.

Though generally pleased with what we have accomplished, there were concerns expressed about ensuring some administrative relief for the Guatemalans and Salvadorans that looks more like what the Nicaraguans got. Specifically, they want two things: (1) a regulation that provides that those defined as a class by the legislation (essentially Guat. and Sal.) are assumed to meet the "extreme hardship" trigger for suspension of deportation; and (2) that those that are going through this process not have to present their suspension case to the immigration court; rather, that they be allowed to be handled administratively (similar to asylum applications). This would obviate, to a large extent, the necessity for lawyers and would be a generally lower burden. Maria pointed out that they all knew the limitations of suspension of deportation as relief from the beginning, and it is all that they ever wanted. However, they still stated an intent to press on. There was some limited discussion of NJB relief (legislatively, next year), but it didn't really go anywhere.

Finally, Cong. Gutierrez stated that he was looking into an e.p. type challenge to the law -- why a Mexican who has been here as long, is not entitled to the relief now afforded a Nicaraguan or Guatemalan. He stated that he would like the Administration to be "behind his efforts."

Julie -
Are either of these things
within the realm of
possibility?
Elena

11/26/97 WED 10:15 FAX 202 225 3672

IMMIGRATION & CLAIMS

002

MAJORITY MEMBERS

A. HYCEL BLUMEN, CHAIRMAN
 P. JAMES BRESNAN, JR., WISCONSIN
 BILL MCCOLLUM, FLORIDA
 GEORGE W. GEZAS, PENNSYLVANIA
 EDWARD COBLE, SOUTH CAROLINA
 JAMES E. SMITH, TEXAS
 STEVEN SCHIFF, NEW MEXICO
 BLYNN CALLEGARY, CALIFORNIA
 CHARLES T. CARNEY, FLORIDA
 BOB LEE, SOUTH CAROLINA
 BOOZELLE, VIRGINIA
 STEVE BUYER, INDIANA
 SCOTTY BORD, CALIFORNIA
 ED BRYANT, TENNESSEE
 STEVE CHABOT, OHIO
 BOB BAHR, GEORGIA
 WILLIAM L. JENNINGS, TENNESSEE
 ASA RUTCHESON, ARIZONA
 EDWARD A. PEASE, NEBRASKA
 CHRISTOPHER S. CANNON, UTAH

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-8218

(202) 225-3951

<http://www.house.gov/judiciary>THOMAS E. MEENEY, JR.
CHIEF OF STAFF - GENERAL COUNSELJOE BUDAS
STAFF DIRECTOR - DEPUTY GENERAL COUNSEL

MINORITY MEMBERS

JOHN CORNYN, JR., TEXAS
 BARRY FRANK, MASSACHUSETTS
 CHARLES E. SCHUMER, NEW YORK
 HOWARD L. BERNAN, CALIFORNIA
 RICK BOUCHER, VIRGINIA
 JEROLD RADER, NEW YORK
 ROBERT C. "BOBBY" SCOTT, VIRGINIA
 MELVIN L. WATT, NORTH CAROLINA
 ZOE LOMBER, CALIFORNIA
 GREGG JACOBSON, TEXAS
 MAXINE WATERS, CALIFORNIA
 MARTIN T. BRENNAN, MASSACHUSETTS
 WILLIAM D. DELAHANTY, MASSACHUSETTS
 ROBERT WELLS, FLORIDA
 STEVEN E. GUTTMAN, NEW JERSEY

JULIAN PETER
MINORITY STAFF DIRECTOR

November 26, 1997

The Honorable Janet Reno
 Attorney General of the United States
 Department of Justice
 10th St. and Pennsylvania Ave. NW
 Washington, D.C. 20530

Dear Madam Attorney General:

The Nicaraguan Adjustment and Central American Relief Act of 1997, P.L. 105-100 at 111 Stat. 2160 (Nov. 19, 1997) ("NACARA"), established two separate frameworks for adjudicating the claims of nationals from specified countries for adjustment to lawful permanent resident status and for relief from deportation. It is imperative that, in the implementation of NACARA, the Department of Justice maintain the distinction between these frameworks.

The first framework is set forth in section 202 of NACARA. It permits nationals of Nicaragua and Cuba present in the United States since December 1, 1995, and who meet other specified criteria, to apply for and to be granted adjustment of status. The statute thus creates a structure for adjudication of these claims distinct from existing processes in the Immigration and Nationality Act for determining claims for relief from deportation or removal.

The second framework is set forth in section 203 of NACARA. It permits nationals of El Salvador, Guatemala, and certain Eastern European countries who have met specified criteria of continuous physical presence and who have filed asylum applications by specific deadlines to apply either: (a) in cases filed before April 1, 1997, for suspension of deportation under former section 244(a) of the INA with no imposition of a "stop-time" rule based on prior filing of an Order to Show Cause; or (b) in cases filed after April 1, 1997, for cancellation of removal under current section 240A of the INA with revised requirements of 7 years continuous physical presence and a showing of "extreme hardship."

There is a clear and fundamental difference between the treatment of aliens covered in section 202 of NACARA and those covered in section 203. Section 202 requires the adjustment to permanent resident status of Nicaraguans and Cubans who meet the defined statutory criteria. Section 202 represents a Congressional determination that the defined classes of aliens should receive adjustment to lawful permanent resident status.

The Honorable Janet Reno
November 26, 1997
Page 2

Section 203, on the other hand, represents a Congressional determination that aliens in the defined categories should have an opportunity to apply for *discretionary* relief from deportation under standards different from those applied to other illegal aliens by IIRIRA.

Section 203 further mandates a case-by-case administrative process during which the discretionary criteria for relief from deportation (specifically "good moral character" and "extreme hardship") will be applied consonant with the legal standards that govern adjudications under section 244(a) of the INA. This mandate is clear from the structure and language of section 203. Congress did not create a new administrative structure for the adjudication of such claims for relief. Congress clearly could have done this, as it did in the case of Nicaraguans and Cubans, but it did not do so. Furthermore, the language of section 203 employs concepts that have been associated with the case-by-case process of adjudicating claims for relief from deportation ever since such avenues of relief first became available under the INA. This is in marked contrast to section 202 of NACARA, which is modeled after provisions of the Cuban Adjustment Act.

Section 203 rules out the possibility, as some have apparently urged, of a blanket determination that all aliens in the defined classes meet the good moral character or extreme hardship requirements. There is no precedent for such determinations in the context of section 244(a), and to do so in these cases would represent not only a clear departure from precedent, but a direct contradiction to the intent of Congress as clearly expressed in section 203.

Substantial change to the standards or procedures under which relief from removal is granted also would violate the fundamental intent and impetus for this legislation. President Clinton and you have urged Congress to exempt specific classes of aliens with long-standing asylum applications from certain provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") in order to give these aliens the opportunity to apply for relief from removal that they would have had if their cases were concluded before the enactment of IIRIRA. The argument was not that these aliens should have an *improved* opportunity to obtain relief; just an opportunity *equivalent* to that existing before IIRIRA.

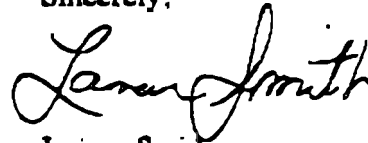
That opportunity assumes several things: the burden of proof upon the alien to establish that he or she should be accorded a favorable grant of discretion; a firm legal standard that requires aliens to demonstrate hardship above and beyond that which would ordinarily accompany any forced removal or deportation; and an open forum in which the INS and the alien (with right to attorney) can present evidence and cross-examine witnesses. Given the volume of cases that may be involved, you will undoubtedly give consideration to avenues for making this process more efficient. But the aliens in question, and their advocates, have heretofore asked simply that the "rules not be changed in the middle of the game" to their detriment. Now that Congress has acted upon this request, it would be highly inappropriate to further "change the rules" in their favor.

11/26/97 WED 10:16 FAX 202 225 3672

The Honorable Janet Reno
November 26, 1997
Page 3

I understand that the process for implementation of NACARA is still in the planning stages. It would be appropriate for your staff, and other components of the Administration, to consult with the Subcommittee as part of the planning process. Accordingly, I request that you direct your staff not later than December 15, 1997, to brief the Subcommittee staff regarding plans for implementing NACARA and to include in that briefing options being considered for the adjudication of claims for relief from removal for aliens affected by section 3 of NACARA.

Sincerely,



Lamar Smith
Chairman

Subcommittee on Immigration and Claims

157 JUL 4 1997

THE WHITE HOUSE
WASHINGTON

July 3, 1997

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM:

SAMUEL BERGER
MARIA ECHAVESTE
JOHN HILLEY
BRUCE REED
CHARLES RUFF

SUBJECT:

Central American Migrants

Purpose

To obtain your approval on a strategy to provide relief to Central American migrants affected by the new immigration law.

Background

The new immigration law severely restricts the availability of suspension of deportation -- the remedy traditionally available to deportable aliens who have resided in the U.S. for considerable periods of time. The law imposes more stringent standards for suspension, arguably sets a 4,000 annual cap on the number of suspensions and requires migrants to be in the U.S. ten rather than seven years. The law also no longer permits time spent in removal proceedings to count toward the residency requirement, the so-called "stop-time" rule. In a decision known as *NJB*, the Board of Immigration Appeals (BIA) ruled that this rule applies retroactively.

These changes dramatically reduce the number of migrants eligible for suspension. Consequences are most profound for Central Americans who entered the U.S. in the 1980s in response to civil war and political persecution, particularly two groups who had been authorized to remain in the U.S. under various special measures:

Nicaraguans under the Nicaraguan Review Program (NRP): The Reagan Administration protected roughly 40,000 Nicaraguans from deportation during the pendency of a DOJ review of their asylum applications known as NRP. The program ended in June 1995.

ABC Guatemalans and Salvadorans: As a result of a 1990 court settlement (known as ABC), Salvadoran and Guatemalan asylum-

seekers who came to the U.S. in the 1980s were protected from deportation until their asylum claims could be decided under special adjudication procedures. The ABC class is comprised of roughly 190,000 Salvadorans and 50,000 Guatemalans.

Under prior rules, roughly 120,000 individuals in these groups could have obtained relief; under the new law, only a small fraction will be able to benefit from suspension. The change in rules as applied to these groups has prompted criticism from Central American leaders, human rights groups, and Members of Congress, including prominent Republicans such as Senator Abraham and Speaker Gingrich.

Forms of Relief

We can provide some relief to NRP and ABC class members through administrative action. Specifically, the Attorney General has decided to invoke her authority to review *NJB*, the decision applying the stop-time rule retroactively. The Attorney General's announcement will be applauded by Central Americans and their governments.

Administrative steps are not available to address fully the other harmful provisions of the law - the cap and the more stringent standards. The most we could do would be to issue a presidential grant of deferred enforced departure (DED) for 18 months with the potential for further extensions. DED would protect its beneficiaries (qualified NRP and ABC members) from deportation; however it offers only a temporary solution, as it would not result in naturalization or permanent resident status and could be terminated by a future President. (DED is an inherent Presidential foreign policy authority, which was used to provide relief to Chinese students in 1990 after the Tiananmen incidents and in 1992 and 1993 for Salvadorans. Here, it would be justified by the foreign policy implications of a sudden return of thousands of Central American migrants. The Office of Legal Counsel is looking into whether any intervening legislation may have circumscribed the President's authority.)

Therefore, we believe we should pursue legislative action. Our proposal would restore ABC and NRP members to the status quo ante - exempting them from the cap and from the new, more stringent suspension standards. Although DED provides incomplete relief, it allows us to protect Central Americans from deportation, at least in the near term, and we would hold it in reserve in case the legislative effort is unsuccessful.

Proposed Course of Action

After informing key Members of Congress, we would take the following steps:

1. The Attorney General would announce her decision on *NJB*.
2. We would present our legislative proposal with bipartisan congressional support and privately refer to the possibility of DED. While key Members like Representative Lamar Smith will be hostile to legislation, they might find it less objectionable than DED. We would not propose a trade-off against legal immigration numbers which Senators Abraham and Kennedy (our strongest allies on the Hill on the issue) fear will reopen the legal immigration debate.
3. The Administration would announce temporary steps to ensure that any ABC or NRP member who would have qualified for suspension under the old rules would not be deported.
4. In the absence of legislative action by the start of the summer recess, we will come back to you with a recommendation that you grant DED.

RECOMMENDATION

That you approve the proposed course of action.

APPROVE _____

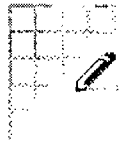
DISAPPROVE _____

OK

Julie -

Where are we on this?

Elena



Julie A. Fernandes
12/12/97 06:39:43 PM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: Central Americans

Elena,

This afternoon, Maria held an advocates meeting to discuss the implementation of the Central American legislation. First, the fax that I sent you earlier was more of an advocacy piece by the EOIR on why we should not do an administrative remedy (they want to keep it). DOJ has since convinced EOIR of their decision to proceed with this administrative alternative if possible.

At the meeting, the advocates stated that: (1) they want a regulation that provides for a presumption of extreme hardship for those covered by the legislation. The advocates maintain that the INS grant rates are actually much lower for Salvadorans and Guatemalans than INS says they are, in part because of the wide discretion given to immigration judges that allows for caprice to sometimes determine outcomes. Thus, they argue that without a regulation that provides a presumption of extreme hardship, they will still have low grant rates; and (2) that they would prefer, with or without a regulation, to proceed with an administrative adjudication rather than with EOIR (admin judges).

We explained to them our concerns about doing a regulation: (1) that we could not do administratively what the Congress expressly did not do by legislation -- i.e., provide amnesty for the Guat. and Sal.; and (2) that we do not want to create by regulation a definition of "extreme hardship" for this class of aliens for this adjudication that is different from how we adjudicate extreme hardship in other circumstances. However, we did express a willingness to further explore an administrative adjudicative process (within INS), and that we would look into developing training materials and guidance for the asylum officers who would be adjudicating these claims that sets out with particularity the standard that should be used for making these determinations. It would not be as clean as a regulation, but it would provide strong guidance to the INS officers on what factors to look for, and thus somewhat direct their discretion in a way that looks favorably on the group covered by the legislation.

So, we are pretty much where we were with three remaining concerns: (1) I would like to better clarify the grant rates for Salvadorans and Guat. discussed by INS. They say that the grant rates are much higher than the groups think is valid (and did not come with the very specific information that we had asked for last time) and, according to DOJ, there are wildly disparate grant rates for these groups between offices (92% grant rate in S.F.; 62% grant rate in LA). Morton from DOJ had no explanation for this. (2) DOJ still owes us a breakdown of how many people covered by the legislation are in each of the relevant procedural categories; i.e., how many ABC class members v. non-ABC (rem: ABC class members have an entitlement to an asylum process anyway, so the admin. option would be folded into what they would already be doing); how many have already had an asylum hearing; how many are in some other INS process, etc.; and (3) according to the legislation, those people with a letter of deportation (b/c, for example, they were denied asylum but did not qualify for suspension under the 1996 law) will have to file a motion to re-open within

240 days of January 14, 1997. According to many present, this is too short a time period to get a lawyer (\$) and file a motion, unless the filing is pro forma. INS has to decide how to make this a reasonable process.

All agree that we have to decide asap whether we are doing this admin. adjudication and what it will look like. (to allow for notice to communities, etc.). I am, as before, in favor of the administrative option, provided we can get some answers in the next couple of days on the remaining questions. Scott and DOJ also favor the admin. adjudication. Maria, I think, is on board with the admin. adjud. as opposed to the reg., as long as the training and guidance are there.

julie

Positive direct:

DOJ has talked to advocates

Hasn't had a chance to sit down w/ DAG.

AG on Board w/ doing admin. proz.

Should have final go-ahead end of
January
(Wed)

→ 240 days to re-open