

MEMORANDUM

November 18, 1997

RE: LEGAL AUTHORITY AND PRECEDENT FOR GRANTING ADMINISTRATIVE
RELIEF TO ABC CLASS MEMBERS

This memorandum discusses whether the Immigration and Naturalization Service (the "INS") legally may grant relief from repatriation to ABC class members under the Nicaraguan Adjustment and Central American Relief Act (the "Act") based on a group-specific administrative determination that the class members meet the "good moral character" and "extreme hardship" standards under the new special rule set forth in Section 309(f) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). 1/

I. EXECUTIVE SUMMARY

As explained in greater detail below, there is both legal authority and precedent for granting the suggested administrative relief to ABC class members:

- The courts generally have deferred to the INS in its exercise of authority under the U.S. immigration laws in granting or denying discretionary relief from repatriation, and have upheld the INS's establishment of group-specific standards to govern the consideration of applications for discretionary relief, as long as such standards are reasonably related to the statutory scheme.
- There is clear and recent precedent under the immigration laws for granting administrative relief from repatriation to a specific group of people, even without an enabling change in the underlying statutory authority.

1/ For purposes of simplicity, in this memorandum "ABC class members" are defined to include all of the Guatemalans and Salvadorans targeted for relief under the Act, including (1) Guatemalans and Salvadorans who either registered for benefits under the settlement agreement in American Baptist Churches et al. v. Thornburgh (the "ABC Settlement") or separately filed asylum applications; and (2) Salvadorans who applied for Temporary Protected Status ("TPS").

This analysis, which was prepared at the request of the Embassy of the Republic of El Salvador, was authored by T. Clark Weymouth, with the assistance of David G. Leitch, Scott M. Deutchman and Irene F. Chang. Hogan & Hartson is registered under the Foreign Agents Registration Act on behalf of the Embassy of the Republic of El Salvador. Additional information concerning this registration is on file at the U.S. Department of Justice, Washington, D.C.

II. BACKGROUND

Under the Immigration and Nationality Act (the "INA") before IIRIRA, those found to be deportable generally could apply for and be granted suspension of deportation if they could establish that (1) they had been continuously physically present in the United States for at least seven years; (2) they had been a person of "good moral character" for the seven-year period; and (3) their deportation would cause "extreme hardship" to themselves or to a spouse, parent or child who was either a U.S. citizen or a permanent resident. ^{2/} Under the Act as currently drafted, this same statutory standard would govern most ABC class members' applications for relief from repatriation. ^{3/}

It has been suggested that, because of the ABC class members' special circumstances, it would be inappropriate to require them individually to establish that they meet the subjective standards that have applied historically to those seeking suspension of deportation. This concern -- coupled with the substantial burden on individual ABC class members and the INS to establish and assess, respectively, whether a person qualifies for relief on a case-by-case basis -- has led many to advocate that, in the Act's implementing regulations, the INS should make certain group-specific determinations or adopt certain group-specific presumptions that would expedite favorable consideration of individual ABC class members' applications for relief from repatriation.

III. DISCUSSION

A. Legal authority to grant administrative relief to ABC class members

As explained in greater detail below the Act, its legislative history, and President Clinton's pronouncements concerning implementation of the Act authorize the INS to grant ABC class members relief from repatriation based on a group-specific

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

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

administrative determination that the class members meet the inherently subjective “good moral character” and “extreme hardship” standards.

The Attorney General -- and, by delegation, the INS -- has been accorded broad discretionary authority to interpret, administer and enforce the immigration laws. 4/ The courts generally have deferred to the Attorney General and the INS in the exercise of such authority, unless the INS either (a) acted arbitrarily or capriciously, or abused its discretion; or (b) failed procedurally to exercise its discretionary authority properly. 5/

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

Of particular relevance in this context, in Hotel & Restaurant Employees Union v. Smith a federal court affirmed that the INS's decision not to extend voluntary departure to Salvadorans involved foreign policy considerations and was an unreviewable exercise of the Attorney General's discretion. 8/ Related to this latter

different w/c jurisdiction of a quasi-jud. admin. procedure.

4/ See INA § 103(a), 8 U.S.C. § 1103.

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

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

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

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

point, the President has “inherent power [in the immigration area] arising out of the Executive’s plenary authority over foreign relations.” 9/ As reflected in President Clinton’s November 14, 1997 statement about the Act, the potential destabilizing effect on the fledgling democracies in Central America justifies, in the implementation process, minimizing differences in the relief accorded to Nicaraguans and to ABC class members.

In considering whether the INS has properly applied the “extreme hardship” standard in suspension of deportation cases, the courts again have deferred to the INS’s exercise of discretionary authority, limiting their inquiry to whether the INS abused its discretion in determining whether to grant relief. 10/ In limiting their inquiry in this manner, courts have relied on the Supreme Court statement that the words “extreme hardship . . . are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and [her] delegates. . . .” 11/ In considering whether the INS has properly applied the “good moral character” standard in suspension of deportation cases, the courts have applied the same standard of review. 12/

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

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

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

12/ Gonzales-Valdez v. INS, No. 94-70579, 1996 WL 111838, *1 (9th Cir. Mar. 13, 1996) (holding that courts should review a finding “that the applicant failed to prove good moral character under an abuse of discretion standard”) (unpublished disposition) (citing Estrada-Posadas v. INS, 924 F.2d 916, 920-21 (9th Cir. 1991)); Estrada-Posadas v. INS, 924 F.2d 916, 920-21 (9th Cir. 1991) (applying arbitrary and capricious standard in upholding determination that applicant was ineligible for voluntary departure because, among other factors, she had not proved she was of good moral character).

In carrying out its duty to uphold the best interests of the United States, the INS may set up general standards to govern the consideration of applications for discretionary relief, as long as such standards are reasonably related to the statutory scheme. ^{13/} In this regard, in Fook Hong Mak the court held that the Attorney General may, by regulation, decide not to use his discretionary power in favor of a particular class, if that “determination is founded on considerations rationally related to the statute he is administering. The legislature’s grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups.” ^{14/} The court also recognized that the Attorney General may, by regulation, select one characteristic as entitling a group to favorable treatment:

The administrator has simply determined that the one paramount element creates such ‘likeness’ that other elements cannot be so legally significant as to warrant a difference in treatment. This may be an even ‘juster justice’ than to accord different treatment because of trivial differences of fact; at least it is competent for the administrator to think so. ^{15/}

This principle was followed in Singh v. Nelson, in which the court held that INS regulations identifying groups of individuals ineligible for discretionary relief are permissible if “the class is rationally distinguishable from all other classes of individuals who remain eligible for discretionary relief.” ^{16/} As the court in Fook Hong Mak noted, this principle is equally applicable in reverse -- in deciding whether to grant discretionary relief, the INS may treat a particular group of individuals more favorably if the group is rationally distinguishable from those who do not qualify for such favorable treatment.

In this case, there clearly is a rational basis related to the statutory scheme for setting up general standards or presumptions to govern the consideration of

^{13/} See Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (“The statute need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him”), cert. denied sub nom., Confederation of Iranian Students v. Civiletti, 446 U.S. 957 (1980); Unification Church v. Attorney General, 581 F.2d 870, 877-78 (D.C. App. 1978), cert. denied, 439 U.S. 828 (1978); Fook Hong Mak v. INS, 435 F.2d 728, 731 (2d Cir. 1970) (the INS’s determination that a certain class of aliens should not be eligible to apply for adjustment of status was “reasonably related to the statutory scheme”).

^{14/} 435 F.2d at 729-30 (emphasis added).

^{15/} Id. at 730.

^{16/} 623 F.Supp. 545, 554 (S.D.N.Y. 1985).

ABC class members' (as well as designated family members') applications for discretionary relief. In this regard:

- The ABC class represents a statutorily defined group of people who fled civil wars in their home countries and sought refuge in the United States during the Reagan and Bush Administrations.
- Most class members long ago filed asylum applications, which either have not yet been adjudicated or were adjudicated under an incorrect legal standard.
- Under the ABC Settlement and through the TPS program, this group was permitted to remain and work legally in the United States and, in appropriate cases, given an opportunity to have their claims to permanent relief from repatriation reconsidered.
- Most of the ABC class members have lived in the United States since before 1990 and, despite the long period of uncertainty and anxiety concerning their ability to remain in the United States, have established strong and deep ties to their communities.
- As noted above, repatriating hundreds of thousands of Guatemalans and Salvadorans indubitably would destabilize the region's fragile economies and democracies.

The foregoing considerations, which again are reflected in the President's November 14 statement about implementation of the Act, led to the granting of relief to this group under the Act and justify treating the group differently. *We agree. Part more (?)*

In light of the foregoing considerations, the INS should apply the following standards in adjudicating ABC class members' requests for relief under this Act:

- **"Good moral character"** – An ABC class member should be presumed to have been a person of good moral character for the requisite time period, unless he or she is statutorily precluded from establishing good moral character because of a criminal conviction under INA Section 101(f).

- **"Extreme hardship"** –

- ◊ The better alternative would be to make a group-specific determination that, based on the special circumstances enunciated in the Act's legislative history and the President's November 14 statement, all of the ABC class members are deemed to have met the "extreme hardship" standard and therefore need only establish seven years of continuous physical presence and good moral character to qualify for relief from repatriation. In the longer term this approach would be less onerous administratively, allowing applicants and the INS to avoid the substantial burden, lengthy delays and inconsistent results

that undoubtedly would result from case-by-case adjudications of this inherently subjective standard.

) but that is what the INS does.

- ◇ Alternatively, the INS could presume that the removal from the United States of an ABC class member and any designated family members would cause them extreme hardship, unless it is determined, after the INS presents clear and convincing evidence rebutting this presumption and affording the ABC class member to respond thereto, that such removal would not result in extreme hardship. Though not as administratively efficient as the first option, this alternative presumably would limit the number of cases in which “extreme hardship” is contested.

burden as INS to disprove extreme hardship

In addition to recognizing the special circumstances to which ABC class members have been subjected, application of the foregoing standards would greatly reduce the administrative burden on the INS and minimize further delays in according relief to ABC class members and designated family members.

B. Precedent for granting administrative relief to ABC class members

There is clear and recent precedent for the Administration and the INS to grant relief from repatriation to a specific group of people, even without an enabling change in the underlying statutory authority such as the Act's establishment of a special rule for granting relief from repatriation to ABC class members. Responding to the Chinese Government's repression of pro-democracy advocates in the People's Republic of China (the “PRC”), in June 1989 President Bush announced that visa extension requests by Chinese students in the United States would be given sympathetic review. ^{17/} Soon thereafter, the Attorney General directed the INS to defer until June 5, 1990 the enforced departure of most Chinese nationals then in the United States, and the INS issued detailed instructions implementing this policy. ^{18/}

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Believing these administrative measures to be inadequate, in the fall of 1989 Congress passed legislation to confer protected status to Chinese nationals in the United States. ^{19/} In vetoing this legislation as a limitation on his “ability to manage

^{17/} Tom Raum, “Bush Calls for World to Stand With Young Man Who Braved Tanks,” Associated Press, June 5, 1989, available in Westlaw, ALLNEWS library, ASSOCPR file.

^{18/} See June 6, 1989 letter from Attorney General Dick Thornburgh to INS Commissioner Alan Nelson; June 7, 1989 and June 21, 1989 cables from INS Deputy Commissioner James L. Buck to all field offices (File CO 243.69-P).

^{19/} “Emergency Chinese Immigration Relief Act of 1989,” H.R. 2712, 101st Cong., 1st Sess. (1989).

foreign relations," President Bush nevertheless ordered, and the INS implemented through detailed directives, certain administrative measures to protect Chinese nationals in the United States, including (1) irrevocable waiver of the two-year home country residence requirement that applied to certain exchange visitors; (2) the application of a more lenient standard -- "enhanced consideration" -- to asylum applications based on the Chinese Government's policy of forced abortion and coerced sterilization; (3) assurance of continued lawful immigration status and work authorization for those in the United States as of June 5, 1989, the date of his original pronouncement; and (4) deferral of the institution of deportation proceedings for those eligible for deferred enforced departure. 20/ Significantly, each of the foregoing administrative measures involved granting discretionary relief to a specified group of people based on the application of group-specific general standards in cases that normally would have been considered on their individual merits.

Did the Chinese get presumptively extreme hardship and good moral character?

In an April 11, 1990 Executive Order, President Bush reaffirmed and further expanded the earlier-announced administrative measures, which again had been criticized as inadequate. 21/ Subsequently, Congress passed and President Bush signed into law the Chinese Student Protection Act of 1992, which allowed eligible Chinese nationals to apply for permanent resident status under special rules and procedures that were more lenient than the rules and procedures applicable to others. 22/ Discussing the reasons for the legislation, the Act's legislative history noted that Congress had acted "on several occasions to regularize the immigration status of persons who were present in the United States for a significant amount of time and who faced an uncertain future if returned to their home countries." 23/ Though the

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

21/ Executive Order 12711 (April 11, 1990); 55 Fed. Reg. 13897 (April 13, 1990). The courts later ruled that these administrative measures did not effectively overrule administrative denials of asylum applications based on the Chinese Government's policy of coercive family planning practices. See Chen v. INS, 95 F.3d 801, 804-05 (9th Cir. 1996); Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995), cert. denied, 116 S. Ct. 1271 (1996). In so doing, however, the courts merely ruled that the measures had not been implemented properly, not that the INS lacked the requisite authority to adopt and apply the measures. See Chen, 95 F.3d at 804-05; Zhang, 55 F.3d at 747-49; Zen-Zhou Chai v. Carroll, 48 F.3d 1331, 1340 (4th Cir. 1995).

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

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

underlying statute did not specifically grant relief to the spouse and minor children of the principal beneficiary, the implementing regulations did, 24/ again demonstrating the INS's willingness to confer relief from repatriation administratively through an implementing regulation.

In August 1994 the INS retreated from its earlier position of granting "enhanced consideration" to asylum applications involving coercive family planning policies, instructing INS officials to follow Board of Immigration Appeals (the "BIA") precedent on the issue in deciding whether to grant such applications. 25/ In so doing, however, the INS said that Chinese nationals denied asylum under the BIA precedent nevertheless could be granted stays of deportation if they expressed a credible fear of the PRC's coercive family planning policies. 26/

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

24/ See 58 Fed. Reg. 35,832, 35,833 (July 1, 1993).

25/ See August 5, 1994 memorandum from INS Deputy Commissioner Chris Sale.

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

MEMORANDUM

December 12, 1997

**RE: APPLICATION OF EQUAL PROTECTION PRINCIPLES TO TREATMENT
ACCORDED ELIGIBLE CLASS MEMBERS**

It has been suggested that, in implementing the Nicaraguan Adjustment and Central American Relief Act (the "Act"), the Immigration and Naturalization Service (the "INS") should establish administratively a class-specific "extreme hardship" standard that would apply to all Eligible Class Members ^{1/} seeking relief from repatriation under the new special rule set forth in IIRIRA Section 309(f). This memorandum discusses whether establishing such a standard would be consistent with the Constitution's equal protection guarantees.

I. SUMMARY

As explained below, establishing a class-specific "extreme hardship" standard for Eligible Class Members would be consistent with constitutional equal protection principles. While all persons (including non-citizens) who are physically present in the United States are entitled to equal protection under the Constitution, such protection in the context of federal immigration laws and policies affecting non-citizens is limited. Specifically, federal laws and administrative actions resulting in the repatriation of non-citizens -- including those resulting from nationality-based classifications -- have been overturned on equal protection grounds only when such laws or actions are not rationally related to a legitimate government interest.

Establishing a class-specific "extreme hardship" standard for Eligible Class Members clearly would be rationally related to a legitimate government interest. The Act itself designates Eligible Class Members for special treatment. Moreover, the Act's legislative history, as well as presidential statements about the Act, provide a rational basis for treating Eligible Class Members differently from those who are not covered by the Act.

^{1/} Eligible Class Members are defined as those specified in Section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), as amended by the Act.

This analysis, which was prepared at the request of the Embassy of the Republic of El Salvador, was authored by T. Clark Weymouth, with the assistance of David G. Leitch and Scott M. Deutchman. Hogan & Hartson is registered under the Foreign Agents Registration Act on behalf of the Embassy of the Republic of El Salvador. Additional information concerning this registration is on file at the U.S. Department of Justice, Washington, D.C.

Guatemalan and Salvadoran Eligible Class Members likely would stand the best chance of successfully challenging the Act and its implementation on equal protection grounds based on the preferential treatment accorded similarly situated Nicaraguans covered by the Act. To the extent that this statutory inequity is not remedied administratively, it is more likely that an equal protection suit challenging the Act and its implementation would be brought and won.

II. DISCUSSION

Under the Equal Protection Clause of the Fourteenth Amendment, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” 2/ Although the Equal Protection Clause is worded as a prohibition applying specifically to states, the Supreme Court has recognized the Equal Protection Clause’s applicability to federal laws and actions by virtue of the Fifth Amendment’s Due Process Clause. 3/ Thus, “if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.” 4/

If it were possible to overcome the statutory bars to judicial review of matters committed to the Attorney General’s discretion, 5/ only those who had been denied discretionary relief from repatriation based on the application of a different standard from the one applied to Eligible Class Members likely would have standing to challenge such action on equal protection grounds. By definition, this group would include only non-citizens found to be deportable or removable from the United States.

Non-citizens who are physically present within the territory of the United States (including those who are unlawfully present) are entitled to equal protection under the Constitution. 6/ In the context of federal immigration laws and policies, however, the constitutional equal protection accorded non-citizens is limited: such laws

2/ U.S. Const., amend. XIV, § 1.

3/ See Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 498 (1954).

4/ Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974).

5/ See Section 242(a)(2)(B) of the Immigration and Nationality Act (the “INA”).

6/ See, e.g., Plyler v. Doe, 457 U.S. 202, 216 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (even an alien “whose presence in this country is unlawful, involuntary, or transitory” is protected by the Fifth and Fourteenth Amendments); Hines v. Davidowitz, 312 U.S. 52, 69 (1941) (aliens are entitled to benefit of constitutional guarantee of equal protection of laws).

and policies will be sustained if they are rationally related to a legitimate government interest. 7/

Non-citizens' equal protection challenges to administrative action under the immigration laws generally fail because the courts find such action to be rationally related to a legitimate government interest. 8/ Similarly, when the federal government classifies non-citizens on the basis of nationality, the classification must be sustained if it has a rational basis. 9/

In Malek-Marzban v. INS and Narenji v. INS, Iranian nationals claimed that INS regulatory amendments, adopted in response to the Iranian hostage crisis,

7/ See, e.g., Raya-Ledesma v. INS, 42 F.3d 1263, 1265 (9th Cir. 1994) (upholding statutory limitation on discretionary relief from deportation); Campos v. INS, 961 F.2d 309, 316 (1st Cir. 1992) (upholding statute giving Attorney General discretion to grant deportation relief to aliens convicted of certain firearms crimes but not others); Azizi v. Thornburgh, 908 F.2d 1130, 1133-34 (2d Cir. 1990) (upholding statutory provision imposing two-year foreign residence requirement on alien spouses who marry U.S. citizens during pendency of deportation or exclusion proceedings); Almario v. Attorney General, 872 F.2d 147, 152 (6th Cir. 1989) (upholding statutory provision imposing two-year foreign residence requirement on alien spouses who marry U.S. citizens during pendency of deportation or exclusion proceedings).

8/ See, e.g., Carr v. INS, 86 F.3d 949, 952 (9th Cir. 1996) (upholding INS distinction between expungeable and nonexpungeable crimes in context of deportation proceedings); Perez-Oropeza v. INS, 56 F.3d 43, 46 (9th Cir. 1995) (upholding Board of Immigration Appeals' application of statutory limitation on discretionary waiver of deportation); Haitian Refugee Center, Inc. v. Christopher, 43 F.3d 1431, 1433 (11th Cir. 1995) (denying request for injunctive relief from repatriation of Haitians detained at Guantanamo Bay); Yao v. INS, 2 F.3d 317, 321-22 (9th Cir. 1993) (upholding INS policy of initiating deportation proceedings against a particular class of legalization applicants but not others). Cf. Reno v. Flores, 507 U.S. 292, 305-06 (1993) (upholding INS regulation allowing release of detained alien juveniles only to parents, other close relatives or guardians).

9/ See Malek-Marzban v. INS, 653 F.2d 113, 116 (4th Cir. 1981) (upholding regulatory amendments targeting Iranian nationals); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (upholding regulatory amendments targeting Iranian nationals); Alvarez v. INS, 539 F.2d 1220, 1224 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977) (upholding INS nationality-based distinction for commuter aliens); Noel v. Chapman, 508 F.2d 1023, 1028-29 (2d Cir.), cert. denied, 423 U.S. 824 (1975) (upholding INS policy of distinguishing between Eastern and Western Hemisphere aliens in granting relief from deportation pending adjustment of status); Dunn v. INS, 499 F.2d 856, 859 (9th Cir. 1974), cert. denied, 419 U.S. 1106 (1975) (upholding INS policy of distinguishing between Eastern and Western Hemisphere aliens in granting relief from deportation pending adjustment of status).

denied them equal protection because the amended regulations subjected Iranian nationals to stricter standards and procedures for remaining in the United States than the standards applicable to non-citizens from other countries. Though (unlike the present case) there had been no change in the underlying statutory authority, two different federal appellate courts upheld the INS regulatory amendments, finding that, in the immigration field, Congress and the Executive Branch may distinguish among aliens based on the aliens' nationality, as long as such distinctions had a rational basis. 10/ Both courts determined that the foreign policy justifications for treating Iranian nationals differently satisfied the "rational basis" equal protection standard. 11/

Similarly, in Alvarez v. INS, a Philippine national challenged on equal protection grounds the INS policy of allowing only Canadian and Mexican nationals to qualify for "commuter alien" status. The court upheld this policy, reconfirming that, in the immigration field, equal protection guarantees are satisfied if there is a rational basis for nationality-based distinctions among aliens and finding that the economic and political reasons underlying the policy justified treating Canadians and Mexicans working in the United States more favorably than nationals from other countries. 12/

Unlike cases where administrative actions affecting non-citizens have been overturned on equal protection grounds, 13/ in this case there clearly is a rational basis for treating Eligible Class Members seeking discretionary relief from repatriation differently from other non-citizens. In passing the Act Congress specifically targeted Eligible Class Members for treatment different from that accorded non-citizens who are not covered by the Act. The Act's legislative history explains the equitable, foreign policy, and administrative rationales for treating Eligible Class Members differently from other non-citizens seeking relief from repatriation. 14/

10/ See Malek-Marzban, supra, 653 F.2d at 116; Narenji v. Civiletti, supra, 617 F.2d at 747-48.

11/ Id.

12/ See Alvarez, supra, 539 F.2d at 1224.

13/ See Yeung v. INS, 76 F.3d 337, 339 (11th Cir. 1995); Garberding v. INS, 30 F.3d 1187, 1191 (9th Cir. 1994); Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976); Tefel v. Reno, 972 F.Supp. 623, 640 (S.D. Fla. 1997).

14/ It has been suggested that treating Eligible Class Members in suspension proceedings under pre-IIRIRA INA Section 244 differently from others in the same type of proceedings would violate equal protection principles. For the reasons stated above, this is not the case. In any event, this issue could be addressed by placing such Class Members in removal proceedings pursuant to IIRIRA Section 309(c)(3).

Presidential statements about the Act echo and amplify Congress' rationale for treating Eligible Class Members differently from other non-citizens. In a November 14, 1997 statement following passage of the Act, President Clinton recognized the United States' obligation to Central Americans who have established deep roots in the United States, the potential destabilizing effect of repatriating a large number of Central Americans on the fledgling democracies in Central America, and the inequities of treating similarly situated Nicaraguans more favorably than Guatemalans and Salvadorans.

In fact, Guatemalan and Salvadoran Eligible Class Members likely would stand the best chance of successfully challenging the Act and its implementation on equal protection grounds based on the preferential treatment accorded similarly situated Nicaraguans covered by the Act. ^{15/} In American Baptist Churches v. Meese, plaintiffs alleged that, in granting discretionary relief from repatriation, the defendants treated persons fleeing unrest or disorder in communist countries (such as Nicaragua) more favorably than those fleeing unrest or disorder in non-communist countries (such as Guatemala and El Salvador), arguing that such discriminatory application of the immigration laws violated the equal protection rights of Guatemalans and Salvadorans in the United States. ^{16/} In denying the defendants' motion to dismiss, the court said that it would "await further guidance from the parties before determining the legal and factual validity of [plaintiffs' equal protection claims]." ^{17/}

In deferring its decision on the merits of plaintiffs' equal protection claims, the court nevertheless discussed its view of the law in this area. The court first noted that, though it was hesitant to second-guess executive and legislative branch

^{15/} Haitians and other non-citizens who ostensibly are similarly situated might also consider an equal protection challenge to their exclusion from the Act.

^{16/} See 712 F.Supp. 756, 759, 772 (N.D. Cal. 1989). At the direction of then-Attorney General Edwin Meese, in July 1987 the INS implemented the Nicaraguan Review Program, providing preferential treatment for Nicaraguans who had received final deportation orders, as well as other policies and procedures benefiting only Nicaraguans. See 64 Interpreter Releases No. 26, 821-822 (July 13, 1987); July 31, 1987 cable from INS Central Office to all INS field offices (File No. CO 208-C). The INS discontinued the Nicaraguan Review Program in June 1995, but implemented and extended procedures allowing certain Nicaraguans to continue to obtain work authorization. See 60 Fed. Reg. 31167 (June 13, 1995); 61 Fed. Reg. 28598 (June 5, 1996). See also 72 Interpreter Releases No. 24, 839 (June 26, 1995); 73 Interpreter Releases No. 22, 760 (June 3, 1996).

^{17/} 712 F.Supp. at 773. Subsequent to this decision, the parties in American Baptist Churches v. Thornburgh reached a settlement agreement providing for de novo asylum adjudications for specified Guatemalans and Salvadorans. See American Baptist Churches v. Thornburgh, 760 F.Supp. 796 (N.D. Cal. 1991). Accordingly, the equal protection claims raised in American Baptist Churches v. Meese were not pursued.

immigration decisions based on foreign policy considerations, it likely would subject immigration policy determinations stemming from discriminatory motives to stricter scrutiny. ^{18/} With respect to the INS's application of different standards in asylum and withholding of deportation proceedings depending upon whether the applicant was from a communist country, the court stated that:

As a general rule, such nationality-based distinctions may be permissible. Because the statutory standards are wholly neutral, however, it is far from certain that the Attorney General can consider the applicant's nationality in determining his or her eligibility for relief. In effect, it would appear that Congress has instructed the Executive that nationality may not be considered when applying section 208(a) of the Refugee Act and section 243(h) of the Immigration and Nationality Act. The Executive's allegedly chronic failure to abide by its Congressional mandate could constitute a denial of the equal protection of the laws. . . . ^{19/}

In this case, Congress has passed, and the President has signed, a law expressly according preferential treatment to Eligible Class Members. Both the Act's legislative history and related presidential pronouncements have articulated legitimate and reasonable foreign policy, equitable and administrative reasons for treating Eligible Class Members differently from those not covered by the Act. On the other hand, neither the Act nor its legislative history articulates any basis for treating Nicaraguans differently from similarly situated Guatemalans and Salvadorans, and the President's November 14 statement specifically notes this inequity.

In sum, treating Eligible Class Members seeking relief from repatriation differently from those not covered by the Act would be consistent with equal protection principles. However, treating Guatemalan and Salvadoran Eligible Class Members differently from Nicaraguans covered by the Act arguably would deny such Class Members equal protection under the laws. If and to the extent that this statutory inequity is not remedied administratively, it is more likely that an equal protection suit challenging the Act and its implementation would be brought and won.

^{18/} Id. at 773 n. 9. Cf. Hotel and Restaurant Employees Union, Local 25 v. Smith, 594 F.Supp. 502, 508 (D.D.C. 1984), aff'd in part, 804 F.2d 1256, 1270-72 (D.C. Cir. 1986), rehearing en banc, 846 F.2d 1499 (D.C. Cir. 1988) (the Attorney General "acted rationally" in denying extended voluntary departure to Salvadorans and thus did not violate their equal protection rights). In a 4-4 split decision, the en banc appellate court in Hotel and Restaurant Employees Union affirmed the district court decision; the appellate court judges were sharply divided on whether and, if so, to what extent an administrative decision regarding extended voluntary departure is reviewable.

^{19/} Id. at 773-74 (emphasis added; footnotes omitted). The court went on to note that "Defendants offer no evidence to contradict these allegations, nor do they attack this claim as legally insufficient." Id.

M E M O R A N D U M

June 23, 1997

**RE: ANALYSIS OF CERTAIN PROVISIONS IN THE ILLEGAL IMMIGRATION
REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996**

This memorandum analyzes (1) whether, in all cases where a suspension of deportation application is adjudicated after enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), IIRIRA Section 309(c)(5) ("Section 309(c)(5)") terminates the applicant's continuous physical presence as of the date he or she was served with a pre-IIRIRA Order to Show Cause ("OSC"); and (2) whether IIRIRA's provisions imposing a 4,000-person annual limit on certain actions by the Attorney General preclude her, after granting suspension of deportation or cancellation of removal to 4,000 people in a fiscal year, from granting such relief to others who otherwise would be eligible.

I. SUMMARY OF CONCLUSIONS

As explained in greater detail below:

- Under the well-established presumptions against retroactivity and deportation, any ambiguity in IIRIRA must be resolved against applying the statute retroactively in a way that results in deportation or removal.
- Applying standard principles of statutory construction, Section 309(c)(5) does not affect suspension of deportation applications adjudicated under the pre-IIRIRA rules after IIRIRA's enactment; instead, it applies only in certain cases where the Attorney General elects to apply the procedures in Title II, Chapter 4 of the Immigration and Nationality Act ("INA"), as amended.
- Similarly, established principles of statutory construction support the conclusion that IIRIRA's 4,000-person annual limit permits the Attorney General to grant suspension of deportation or cancellation of removal to all who are eligible, and to allow such persons legally to remain and work in the United States pending their ability -- subject to the 4,000-person annual limit -- to adjust their status to lawful permanent residence.

This analysis was authored by T. Clark Weymouth, David G. Leitch and M. Beth Peters, with the assistance of Lucinda Yeh. Because the analysis was prepared at the request of the Embassy of the Republic of El Salvador, Hogan & Hartson has registered under the Foreign Agents Registration Act. Additional information concerning this registration is on file at the U.S. Department of Justice, Washington, D.C.

II. BACKGROUND

A. IIRIRA's effect on removing persons from the United States

1. Removal procedures effective before April 1, 1997

Under the INA before IIRIRA, certain persons seeking entry to the United States were deemed excludable and could be removed from the United States through exclusion proceedings. 1/ Those who had entered the United States and were deemed deportable could be removed through deportation proceedings. 2/ In both exclusion and deportation proceedings, persons could assert claims to asylum and withholding of deportation. 3/

Persons found to be deportable could apply for and be granted suspension of deportation if they could establish, among other things, that they had been continuously present in the United States for seven years. 4/ A person granted suspension of deportation thereafter was eligible, through a separate administrative procedure, to adjust to permanent resident status. 5/ For those granted adjustment of status under this provision, the Attorney General recorded the person's lawful admission as a permanent resident "as of the date the cancellation of deportation of such alien is made." 6/

Under the INA, "suspension of deportation," "cancellation of deportation" and "adjustment of status" historically have had different meanings. Before 1988, for anyone granted suspension of deportation, the statute required the Attorney General to provide Congress with "a complete and detailed statement . . . with the reasons for such suspension." 7/ Either House of Congress could pass a resolution disapproving the

1/ INA §§ 235, 236; 8 U.S.C. §§ 1225, 1226 (1994 & Supp. 1995).

2/ INA §§ 242, 242B, 243; 8 U.S.C. §§ 1252, 1252b, 1253 (1994 & Supp. 1995).

3/ INA § 243(h); 8 U.S.C. § 1253(h) (1994 & Supp. 1995).

4/ INA § 244(a), (c); 8 U.S.C. § 1254(a), (c) (1994 & Supp. 1995). Those seeking suspension of deportation also had to establish that they maintained good moral character for the seven-year period, and that their deportation would cause extreme hardship to themselves or to a spouse, parent or child who was either a U.S. citizen or a permanent resident.

5/ INA § 244(d); 8 U.S.C. § 1254(d) (1994 & Supp. 1995).

6/ Id.

7/ See Chadha v. INS, 462 U.S. 919, 924-25 (1983), citing former INA § 244(c)(1), 8 U.S.C. § 1254(c)(1).

suspension in that or the following congressional session, whereupon the Attorney General was required to deport the person. 8/ If neither House of Congress passed such a resolution, the Attorney General was required to cancel the person's deportation proceedings and to record the person's lawful admission for permanent residence as of the date of such cancellation.

In 1983 the Supreme Court in Chadha v. INS found the procedure allowing either House of Congress to disapprove the Attorney General's grant of suspension to be an unconstitutional one-House legislative veto. Thereafter until 1988, the Attorney General continued to report suspensions of deportation to Congress, which then had two legislative sessions to pass legislation requiring deportation if it disapproved of the Attorney General's suspension decision. 9/ If such legislation was not passed, "deportation proceedings were cancelled when the [statutory period] ha[d] expired." 10/

In 1988 Congress eliminated the statutory requirement that the Attorney General had to report grants of suspension to Congress. 11/ Despite the foregoing, suspension of deportation, cancellation of deportation and adjustment of status continued to be treated as different procedures, both substantively and procedurally. To receive a grant of suspension of deportation, a person had to demonstrate to an immigration judge that he or she met the statutory requirements for suspension enumerated above. 12/ If an immigration judge granted suspension, the Immigration and Naturalization Service ("INS") had to decide whether to appeal the judge's decision or to waive the right to appeal. If the INS appealed the grant of suspension, cancellation of deportation was tolled pending completion of the appeal. 13/ If the INS either waived or did not pursue its right to appeal, deportation proceedings were deemed cancelled and the person's file was forwarded to the INS District Office "for creation of a 'record of admission' for lawful permanent residence (Form I-181) pursuant to [INA] Section 244(d) . . ." 14/

8/ See Chadha, 462 U.S. at 925, citing former INA § 244(c)(2), 8 U.S.C. § 1254(c)(2).

9/ See Lewis v. Sava, 602 F. Supp. 571, 573 (S.D.N.Y. 1984).

10/ Id. at 572-73 (quoting Chadha, 462 U.S. at 934-35).

11/ Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, Section 2(q)(1)(B), 102 Stat. 2609, 2613.

12/ See Footnote 4 and accompanying text.

13/ See Revised Procedures for Handling Suspension of Deportation Grants Under § 244 of the INA, Memorandum from INS General Counsel Raymond M. Momboisse (April 13, 1989), reprinted in 66 Interpreter Releases 642-43 (June 6, 1989).

14/ Id.

After receiving the person's file following the immigration judge's grant of suspension of deportation, the INS District Office was responsible for adjusting the person's status to that of permanent resident. 15/ At this stage, the INS could file a motion to reopen with the immigration judge seeking a reversal of the earlier grant of suspension of deportation based on material evidence that was not available and could not have been presented at the hearing. 16/

Avoiding deportation and becoming a lawful permanent resident therefore was a two-step process. A deportable person first had to persuade an immigration judge to grant suspension of deportation under INA Section 244(a). Thereafter, following cancellation of deportation and if the INS did not move to reopen the case, the INS District Office would process the person's adjustment of status.

2. Removal procedures as of April 1, 1997

IIRIRA revised the INA's procedures for removing persons from the United States. 17/ IIRIRA eliminated the prior distinction between exclusion and deportation, replacing these and related terms with the concept of "removal" and replacing pre-IIRIRA deportation and exclusion proceedings with a single "removal" proceeding. 18/ Persons placed in removal proceedings must be given written notice through service of a notice to appear containing the information required by INA Section 239(a). 19/

Under IIRIRA, suspension of deportation relief was replaced by "cancellation of removal." 20/ Qualifying for cancellation of removal generally is more difficult than qualifying for suspension of deportation, requiring a nonpermanent resident to establish, among other things, that he or she "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date [that the person applied for cancellation of removal]." 21/ In

15/ Id.

16/ See 8 C.F.R. §§ 3.23(b), 242.22 (1996).

17/ IIRIRA Title III, subtitle A, §§ 301-309.

18/ See IIRIRA § 304(a)(3); INA § 240.

19/ IIRIRA § 304(a)(3); INA § 239.

20/ IIRIRA § 304(a)(3); INA § 240A(b).

21/ IIRIRA § 304(a)(3); INA § 240A(b)(1)(A). To qualify for cancellation of removal, a nonpermanent resident also must establish that (1) he or she has been a person of good moral character during the ten-year period and has not been convicted of certain enumerated offenses; and (2) removal would result in "exceptional and extremely unusual hardship" to a spouse, parent or child who is either a U.S. citizen or a

cancellation of removal proceedings, an applicant's period of continuous physical presence in the United States terminates when the person "is served a notice to appear under [INA] section 239(a)" or when he or she has committed certain enumerated offenses, whichever is earlier. 22/

The Attorney General may adjust the status of a nonpermanent resident granted cancellation of removal to that of a permanent resident; the number of such adjustments must not exceed 4,000 for any fiscal year. 23/ Moreover, "[t]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of [IIRIRA]), of a total of more than 4,000 aliens in any fiscal year. . . ." 24/ This limitation applies regardless of when a person applied for cancellation of removal and adjustment of status and whether the person previously had applied for suspension of deportation under INA Section 244(a) before its amendment by IIRIRA. 25/

3. Transition rules for persons in exclusion or deportation proceedings as of April 1, 1997

As a general matter, the provisions of IIRIRA apply prospectively, taking effect on April 1, 1997. 26/ The IIRIRA amendments discussed above, however, generally do not apply (even after April 1, 1997) to persons who were in exclusion or deportation proceedings on April 1, 1997. Under IIRIRA Section 309(c)(1), such

permanent resident. IIRIRA § 304(a)(3); INA § 240A(b)(1)(B)-(D). Certain battered spouses and children may qualify for cancellation of removal under more lenient rules. IIRIRA § 304(a)(3); INA § 240A(b)(2).

22/ IIRIRA § 304(a)(3); INA § 240A(d)(1). Under INA § 240A(d)(2), an applicant for cancellation of removal is deemed to have failed to maintain continuous physical presence if he or she has left the United States for a single period of more than 90 days or an aggregate period of more than 180 days.

23/ IIRIRA § 304; INA § 240A(b)(3). The Attorney General must record the person's lawful admission for permanent residence as of the date of the cancellation of removal determination. Id.

24/ IIRIRA § 304; INA § 240A(e).

25/ Id.

26/ IIRIRA § 309(a).

persons are to be processed under the pre-IIRIRA rules, “[s]ubject to the succeeding provisions of [IIRIRA Section 309(c)] . . . ” 27/

In some circumstances, however, the provisions of IIRIRA may apply after April 1, 1997, even to those who were in exclusion or deportation proceedings before that date. Under IIRIRA Section 309(c)(2), for example, if an evidentiary hearing had not begun by April 1, 1997, “the Attorney General may elect to proceed under chapter 4 of title II of [the INA] (as amended by this subtitle).” 28/ If the Attorney General makes such an election, notice of the election must be provided to the person before the hearing, and the “notice of hearing” provided to the person under the pre-IIRIRA exclusion and deportation rules “shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.” 29/

Under IIRIRA Section 309(c)(3), if there has not been a final administrative decision, the Attorney General may elect to terminate the proceedings and to reinstitute the proceedings, again under INA Title II, Chapter 4. Determinations in the terminated proceeding are not binding in the reinstituted proceeding. 30/

The two statutory provisions upon which this Memorandum focuses also are found in IIRIRA Section 309(c). Section 309(c)(5), entitled “Transitional rule with regard to suspension of deportation,” provides that “Paragraphs (1) and (2) of section 240A(d) of the [INA] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after [September 30, 1996].” 31/ IIRIRA Section 309(c)(7) (“Section 309(c)(7)”), entitled “Limitation on suspension of deportation,” provides that “[t]he Attorney General may not suspend the deportation and adjust the status . . . of more than 4,000 aliens in any fiscal year (beginning after [September 30, 1996]). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.” 32/ These provisions have already been

27/ IIRIRA § 309(c)(1) (“Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of [April 1, 1997] — (A) the amendments made by this subtitle do not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.”).

28/ INA Title II, Chapter 4 includes, among other things, the post-IIRIRA removal and cancellation of removal provisions. See INA §§ 231-244.

29/ IIRIRA § 309(c)(2).

30/ IIRIRA § 309(c)(3).

31/ IIRIRA § 309(c)(5).

32/ IIRIRA § 309(c)(7). The other provisions of IIRIRA Section 309(c) are not directly relevant to this analysis. IIRIRA Section 309(c)(4) purports to define the parameters of judicial review of final orders of exclusion or deportation entered more

interpreted by both administrative entities and courts; those interpretations are described below.

B. In re N-J-B (Interpreting Section 309(c)(5))

In N-J-B 33/ the respondent, a Nicaraguan woman, arrived in the United States in 1987 34/ and was served with an "Order to Show Cause and Notice of Hearing" on August 27, 1993, thereby initiating deportation proceedings. At an August 17, 1994 hearing, the respondent presented claims for asylum, withholding of deportation, and suspension of deportation, all of which were denied. With respect to the respondent's claim for suspension of deportation, the immigration judge found that, although she met the seven-year physical presence requirement, she failed to establish the requisite extreme hardship to herself.

On August 26, 1994, nine days after her hearing, the respondent appealed the immigration judge's decision to the Board of Immigration Appeals ("BIA"). IIRIRA was enacted over two years after her appeal was filed but before it was decided, raising the question of whether Section 309(c)(5) operated to terminate the respondent's continuous physical presence when she was served with the OSC less than seven years after arriving in the United States, thereby rendering her ineligible for suspension of deportation.

In N-J-B, a 7-5 majority of the BIA determined that the respondent's continuous physical presence terminated with the service of the OSC. The BIA majority determined that a Section 309(c)(5) "notice to appear" are "synonymous with" an "Order to Show Cause and Notice of Hearing," and that service of an OSC, regardless of when and under what circumstances it had occurred, terminated a person's period of continuous physical presence. 35/

than 30 days after September 30, 1996. IIRIRA Section 309(c)(6) establishes a transition rule for certain persons who qualify for family unity benefits.

33/ File A28 626 831, 1997 WL 107593 (BIA Feb. 20, 1997).

34/ The BIA majority opinion lists the date of arrival as August 5, 1987; the Guendelsberger dissent lists the time of arrival as April 1987.

35/ Id. at *5. The BIA majority and the Guendelsberger dissent also considered whether Section 309(c)(5) applied to persons in exclusion or deportation proceedings whose cases were adjudicated between IIRIRA's date of enactment (September 30, 1996) and its effective date (April 1, 1997). N-J-B was decided during this period, making this an issue in the case.

Five BIA board members dissented, with three members writing separate opinions. 36/ In dissent, board member Villageliu disputed the majority's principal contentions. 37/ In his view, INA Section 240A(d)(1) does not apply to those who are in exclusion or deportation proceedings under the pre-IIRIRA rules, but applies only to those who are in removal proceedings and are seeking cancellation of removal under the INA as amended by IIRIRA.

In support of his position Villageliu invoked several principles of statutory construction. He found that the plain meaning of the statute reveals a legislative intent to apply INA Section 240A(d)(1) only to those served with a "notice to appear under [INA] section 239(a)," that is, a notice initiating removal proceedings under the provisions of the new law. In his view, the presumptions against retroactivity and deportation in interpreting ambiguous statutes -- principles not discussed in the majority opinion -- further support non-retroactive application of INA Section 240A(d)(1).

Because the transition rule in Section 309(c)(5) refers to "notices to appear issued before" IIRIRA's enactment despite the non-existence of such documents, Villageliu concluded that the best way to give meaning to that language is to read Section 309(c)(5) as merely a jurisdictional provision that precludes a person from challenging jurisdiction once he has been placed in removal proceedings. In his view, a person is therefore subject to the post-IIRIRA law if placed in removal proceedings either by a notice initiating removal proceedings under INA Section 239(a), or by a notice indicating that the Attorney General has elected under IIRIRA Section 309(c)(2) to convert proceedings under the pre-IIRIRA law to removal proceedings.

Board Member Lory D. Rosenberg wrote a separate dissent, 38/ particularly criticizing the majority for failing to consider and address the fundamental principles of statutory construction that presume only prospective application of legislation and construction of ambiguous statutory provisions in favor of the alien. 39/

36/ The dissent of board member Guendelsberger, joined by board chairman Schmidt, concluded that Section 309(c)(5) did not apply to suspension of deportation applications adjudicated before IIRIRA's effective date, therefore the respondent should have been granted suspension of deportation relief under the pre-IIRIRA rules. Id. at *15. Fred W. Vacca simply noted his concurrence with the three dissenting opinions.

37/ Id. at *20-*26.

38/ Id. at *26-*28.

39/ Rosenberg stated that "I simply am forced to conclude that in their opinion today, [the majority] communicate the message that, after the IIRIRA, the benefit of the doubt has been turned on its head." Id. at *27.

The N-J-B decision has already been rejected, at least preliminarily, by one federal court. In Tefel v. Reno, 40/ a federal district court granted a temporary restraining order blocking the deportation of thousands of Nicaraguan refugees and temporarily halting the enforcement of N-J-B on other applications for suspension of deportation, concluding, among other things, that the plaintiffs were likely to prevail in their legal challenge to the N-J-B decision. In so doing, the Court explained that:

when [Section 309(c)(5) and INA Section 240A(d)(1)] are read together, the only reading that gives effect to all the language in both statutes is that § 309(c)(5) applies only to a person who is issued (but not served with) an Order to Show Cause before September 30, 1996 and thereafter is served with a notice to appear for a removal proceeding under INA § 239(a). The only time that this can occur actually or constructively is when the Attorney General elects under § 309(c)(2) or (3) of IIRIRA to put a person in a removal proceeding who was (or could have been) in a deportation proceeding. 41/

In reaching this conclusion, the court also relied on the presumption against retroactive legislation and the presumption of construing statutory ambiguities in favor of the alien, stating that applying these principles to Section 309(c)(5) "compels a different determination than [sic] that rendered by the majority in Matter of N-J-B-. The statute cannot be applied to disenfranchise so many who would have otherwise qualified for suspension of deportation." 42/

The N-J-B decision itself has been appealed directly to the Eleventh Circuit, with oral argument scheduled for July 28, 1997. 43/ Moreover, the applicability of Section 309(c)(5) is also being considered in the Seventh Circuit in a case involving a woman whose application for suspension of deportation was denied by a divided BIA on grounds that she failed to establish "extreme hardship" resulting from deportation, with IIRIRA being enacted during the pendency of her appeal. 44/

C. Barahona-Gomez v. Reno (Interpreting Section 309(c)(7))

On February 13, 1997, Chief Immigration Judge Michael J. Creppy and BIA Chairman Paul W. Schmidt of the Executive Office for Immigration Review

40/ No. 97-0805-CIV-KING (S.D. Fla. May 20, 1997) (order granting temporary restraining order).

41/ Id. at 17, n.4.

42/ Id. at 18.

43/ N-J-B v. Reno, No. 97-4400 (11th Cir.).

44/ Urban v. INS, No. 96-3815 (7th Cir.).

("EOIR") issued directives interpreting the 4,000-person annual limit in Section 309(c)(7) to apply immediately upon the enactment of IIRIRA (September 30, 1996) to limit suspensions of deportation per se and directing all immigration judges and BIA board members to stop processing cases "which might result in the grant of suspension of deportation." 45/

On March 14, 1997, a lawsuit was filed seeking a temporary restraining order against enforcement of the Schmidt and Creppy directives. 46/ The plaintiffs in Barahona-Gomez would have qualified for suspension of deportation but for the Creppy and Schmidt directives. 47/

Among their other arguments, the plaintiffs asserted that the Creppy and Schmidt directives incorrectly interpreted Section 309(c)(7) as limiting suspensions of deportation. Instead, they argued, the plain meaning of the statute -- and in particular the use of the conjunctive "and" in the reference to actions by the Attorney General to suspend deportation and adjust status -- indicates that the provision applies only to adjustment of status following suspension of deportation. 48/ Furthermore, the plaintiffs asserted that Congress' failure to provide for separate treatment of adjustments and suspensions in Section 309(c)(7) establishes its intent to limit suspension and adjustment, not simply suspensions. 49/ Plaintiffs also claimed that interpreting Section 309(c)(7) to apply only to adjustments of status that follow a

45/ See Barahona-Gomez v. Reno, No. C97-0895 CW, at 2-3 (N.D. Cal. Mar. 14, 1997) (order granting temporary restraining order).

46/ See id.

47/ Later certified as a class action, the case originally was brought on behalf of a (1) Filipino family whose appeal before the BIA was on hold despite a recent Ninth Circuit decision supporting their position; (2) a Nicaraguan family whose suspension of deportation claim was found deserving but was denied because of the Creppy directive; (3) a fourteen-year old Salvadoran whose application for suspension may be halted because of the Creppy directive; and (4) another Nicaraguan family whose suspension of deportation application could also be barred from proceeding because of the Schmidt directive.

48/ Plaintiffs' Points and Authorities in Support of Application for Temporary Restraining Order and Order to Show Cause at 15-16. The plaintiffs also asserted that the Creppy and Schmidt directives constituted improper interference with the independent judgment of immigration judges and BIA members by attempting to dictate how these judges should interpret Section 309(c)(7), thus violating due process. Id. at 12-13.

49/ Id. at 21 (comparing to INA Sections 208 and 209(b), which allow the Attorney General to grant asylum claims, but limiting the number of asylees that may adjust their status).

suspension of deportation comports with an underlying policy of INA Section 240A and Section 309(c)(7) to maintain family unity.

The district court granted plaintiffs' motion for a temporary restraining order and later entered a preliminary injunction. In entering the TRO restraining implementation and enforcement of the Creppy and Schmidt directives, the court found that the "statutory language [of section 309(c)(7) and of INA section 240A(b)(3)] raises serious questions as to whether section 309(c)(7) limits the number of suspensions of deportation." 50/ Similarly, in granting the preliminary injunction, the court observed that "Plaintiffs have raised serious questions as to whether section 309(c)(7) of the IIRIRA limits the number of suspensions of deportation unaccompanied by adjustments of status . . ." 51/

D. Potential effect of the current interpretations of Sections 309(c)(5) and 309(c)(7) on ABC class members

If upheld, the current interpretations of Sections 309(c)(5) and 309(c)(7) could have a substantial effect on many people, including Guatemalans and Salvadorans who are members of the American Baptist Church v. Thornburgh ("ABC") class settlement. On January 31, 1991, Judge Peckham approved the ABC settlement, requiring the INS to establish procedures for adjudicating the asylum applications of thousands of Guatemalan and Salvadoran refugees. 52/ The settlement further authorizes ABC class members to reside and work legally in the United States while their asylum applications are pending.

III. ANALYSIS 53/

Under the well-established presumptions against retroactivity and deportation, any ambiguity in IIRIRA must be resolved against applying the statute retroactively in a way that results in removal. Applying standard principles of

50/ Temporary Restraining Order and Order to Show Cause at 6 (filed Mar. 21, 1997).

51/ Order Granting in Part Plaintiffs' Motion for Provisional Class Certification, Granting in Part Plaintiffs' Motion for a Preliminary Injunction, Denying Defendants' Request for a Stay at 10 (filed Mar. 28, 1997)

52/ See American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991).

53/ This analysis focuses on the proper construction of certain provisions of IIRIRA Title III, Subtitle A. It does not explore possible constitutional law, contract law and estoppel arguments that certain classes of people in the United States -- including members of the ABC class and others -- might have with respect to the application of this Title to their specific circumstances.

statutory construction, (1) IIRIRA Section 309(c) does not affect suspension of deportation applications adjudicated under the pre-IIRIRA rules after IIRIRA's enactment; and (2) IIRIRA's 4,000-person annual limit authorizes the Attorney General to grant suspension of deportation or cancellation of removal to those who are eligible, regardless of the limit on adjustments of status. To give effect to these interpretations consistent with the presumptions against retroactivity and deportation, the Attorney General should reverse both the BIA majority's decision in N-J-B and the current EOIR policy not to process suspension of deportation applications because of the 4,000-person annual limit.

A. Any ambiguity in IIRIRA must be resolved against applying the statute retroactively in a way that results in removal

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 54/ In determining whether a federal statute applies retroactively, a court must

determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. 55/

In its opinion the Landgraf Court relied on Chew Heong v. United States, 56/ an immigration case raising issues similar to those raised by IIRIRA. In Chew Heong, the Supreme Court reviewed the applicability of the Chinese Restriction Act of 1882 -- requiring certain Chinese nationals departing the United States to obtain a certificate to re-enter the United States -- to Chinese nationals who left before the statute's enactment date without obtaining re-entry certificates. In holding that such persons could not be barred from reentering the United States under the Chinese

54/ Landgraf v. USI Film Products, Inc., 511 U.S. 244, 265 (1994).

55/ Id. at 280. See also Hughes Aircraft Co. v. United States ex rel. Schumer, No. 95-1340, 1997 WL 321246 at *4 (U.S. June 16, 1997) ("The 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' . . . Accordingly, we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary") (citations omitted).

56/ 112 U.S. 536 (1884).

Restriction Act, the Court “observed that the law in effect before the 1882 enactment accorded laborers a right to reenter without a certificate, and invoked the ‘uniformly’ accepted rule against ‘giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.’” 57/

Similarly, when ambiguity in a federal statute might lead to deportation, the Supreme Court consistently has held that the harshness of deportation militates in favor of interpreting ambiguities in favor of the alien. 58/ Not only have the federal courts consistently affirmed this presumption, but the BIA has applied this doctrine as well. 59/

As currently interpreted by the INS, Section 309(c)(5) would apply the new INA Section 240A(d) physical presence rules to all suspension of deportation applicants, including those whose applications are adjudicated under the pre-IIRIRA rules after the date of IIRIRA’s enactment. If correct, this interpretation would operate retroactively to deny suspension of deportation for many people who qualify for such relief under the pre-IIRIRA rules. Moreover, under the EOIR’s interpretation of IIRIRA’s 4,000-person annual limit, many people who qualify for suspension of deportation or cancellation of removal would be deported or removed based only on when their claims were adjudicated and regardless of the merits of their case.

57/ Landgraf, 511 U.S. at 271-272 (explaining Chew Heong, 112 U.S. at 559).

58/ See INS v. Cardoza-Fonseca, 480 U.S. 421, 429 (1987) (noting the continuing vitality of the principle); INS v. Errico, 385 U.S. 214, 225 (1966) (“the doubt should be resolved in favor of the alien . . . even where a punitive section is being construed . . .” (citations omitted)); Barber v. Gonzales, 247 U.S. 637, 642 (1954) (“[a]lthough not penal in character, deportation statutes as a practical matter may inflict ‘the equivalent of banishment or exile’ . . . and should be strictly construed”)(citations omitted); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (“since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used”).

59/ See In re Rosalva Farias-Mendoza, File A92 716 636, 1996 WL 139465, at *5 (BIA Mar. 12, 1996) (“When confronted with statutory ambiguity, courts have held that doubts should be resolved in favor of the alien”)(citing INS v. Errico, 385 U.S. at 225); In re Hou, 20 I & N Dec. 513 (BIA 1992) (“we reference in closing the canon of statutory interpretation uniquely applicable to the immigration laws, which requires any doubts in construing those statutes to be resolved in favor of the alien due to the potentially drastic consequences of deportation”)(citations omitted); In re Tiwari, 19 I & N Dec. 875, 881 (BIA 1989).

In sum, the Government's interpretation of IIRIRA would operate retroactively to deny relief from deportation to many people who otherwise would have been granted suspension of deportation under the pre-IIRIRA rules. ^{60/} Fundamental fairness considerations aside, under the presumptions against retroactivity and deportation, this interpretation can only be given effect if and to the extent that Congress has clearly articulated its intention that IIRIRA is to be applied in this manner.

B. Section 309(c)(5) does not affect cases where a suspension of deportation application is adjudicated under the pre-IIRIRA rules after IIRIRA's date of enactment

In N-J-B the BIA majority correctly concluded that, to give effect to the language of Section 309(c)(5), "notices to appear" as used in that provision must encompass at least some documents that existed before IIRIRA's enactment. Contrary to the determination made by the N-J-B majority, however, we are unable to conclude that Section 309(c)(5) applies in all cases where a pre-IIRIRA OSC was issued. Instead, to give maximum effect to the INA as amended by IIRIRA, and consistent with presumptions against retroactivity and deportation, Section 309(c)(5) should be interpreted as not affecting suspension of deportation applications adjudicated under the pre-IIRIRA rules after IIRIRA's date of enactment.

1. Section 309(c)(5) "notices to appear" do not include only INA Section 239(a) "Notices to Appear," but also do not include all OSCs issued under the pre-IIRIRA rules

In construing the effect of a statute, one first must look to its plain language. ^{61/} At issue is the language in Section 309(c)(5) directing that INA Sections 240A(d)(1) and (d)(2) "shall apply to notices to appear issued before" IIRIRA's enactment date. The difficulty with interpreting this language, however, lies in the fact that "notices to appear" -- a statutory term of art under INA Section 239(a) -- did not exist prior to the enactment of IIRIRA. Thus, a literal application of the plain language of Section 309(c)(5) would render meaningless the references to notices to appear issued "before" the enactment of IIRIRA. The term "notice to appear" as used in Section 309(c)(5) therefore must be intended to include not only notices to appear formally issued under INA Section 239(a), but also certain pre-IIRIRA documents that are to be treated as if they were notices to appear. The issue, therefore, is which pre-IIRIRA documents are to be treated as notices to appear for purposes of Section 309(c)(5).

^{60/} ABC class members have the additional argument that the ABC settlement agreement entitles them to processing under the pre-IIRIRA rules.

^{61/} United States v. James, 478 U.S. 597, 604 (1985).

As an initial matter, the plain language of Section 309(c)(5) does not clearly evince Congress' intent that all pre-IIRIRA documents initiating deportation proceedings are to be treated as notices to appear for purposes of interrupting physical presence. If that were Congress' intent, it could have expressed this intent much more directly than the ambiguous language used in Section 309(c)(5). The provision does not say, as it well might have, that the requirements of INA Sections 240A(d)(1) and (2) must apply to all proceedings as of the date of enactment and that for such purposes all documents initiating proceedings against the alien must be treated as if they were notices to appear issued "under 239(a)" within the meaning of INA Section 240A(d)(1). The long-standing presumptions against retroactive application of new legislation and against reading statutes in a manner that would result in deportation also suggest a narrower scope to Section 309(c)(5).

Nevertheless, the language of Section 309(c)(5) -- and in particular the language concerning notices to appear issued "before [or] on" the date of enactment of IIRIRA -- must have some meaning. To confirm a narrower interpretation of Section 309(c)(5) than that ascribed by the N-J-B majority, it therefore is necessary to identify in the statute a reasonable alternative interpretation that gives effect to this language.

Tracing the statutory references in Section 309(c)(5) itself does not provide the answer. Section 309(c)(5) does not define the term "notices to appear," but applies provisions of INA Section 240A(d) to notices to appear. INA Section 240A(d)(1), in turn, refers to the effect of "a notice to appear under section 239(a)." As noted above, however, notices to appear "under section 239(a)" did not exist prior to IIRIRA and thus could not themselves have been issued "before [or] on" the date of enactment. The inquiry therefore must turn to other provisions of IIRIRA to determine whether some subset of pre-IIRIRA documents are to be treated as if they were notices to appear under IIRIRA.

In fact, IIRIRA Section 309(c)(2) appears to mandate such treatment in some circumstances, creating a link between a "notice of hearing provided to the alien under [INA] section 235 or 242(a)" and new INA Section 239(a). In particular, Section 309(c)(2) provides the Attorney General with the option, where an evidentiary hearing under the pre-IIRIRA rules has not commenced, to elect to proceed under the new post-IIRIRA procedures. The section also states that "if the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of [the INA] shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge."

The reference in Section 309(c)(2) to "notice[s] of hearing[s] provided to the alien under section 235 or 242(a)" is a reference to documents issued in pre-IIRIRA exclusion or deportation proceedings. By stating that such notices shall be valid "as if" provided under INA Section 239, Congress in effect provided that some pre-IIRIRA notices of hearing must be treated as if they were "notices to appear" under Section 309(c)(5). Accordingly, Section 309(c)(2) provides at least one example of pre-IIRIRA notices that are treated as if they were notices to appear under IIRIRA, and gives

meaning to the reference in Section 309(c)(5) to notices to appear issued before enactment of IIRIRA. These documents, issued before enactment of IIRIRA, are constructively treated as notices to appear under IIRIRA Section 309(c)(2).

This reading is confirmed by the fact that construing Section 309(c)(5) as applying the new INA Section 240A(d) special rules on continuous physical presence to all pre-IIRIRA OSCs would render part of IIRIRA Section 309(c)(2) surplusage, in contravention of established rules of statutory construction. 62/ If Section 309(c)(5) effectively treated all pre-IIRIRA OSCs as if they were notices to appear under INA Section 239(a), it would be unnecessary for Section 309(c)(2) to specify, in circumstances where the Attorney General can and does make an election, that pre-IIRIRA OSCs there too are to be treated as if issued under Section 239. Thus, the direction in Section 309(c)(2) confirms that Congress plainly contemplated that some, but not all, pre-IIRIRA OSCs would be subject to Section 309(c)(5).

IIRIRA's legislative history indicates that Congress expressly rejected expansive and retroactive application of the special physical presence rule in INA-Section 240A(d) to all suspension of deportation applications adjudicated after IIRIRA's date of enactment. As originally introduced on August 4, 1995, the text of Section 309(c)(5) provided that, for most suspension of deportation applications adjudicated after the date of enactment, the applicant's continuous physical presence would be deemed to have terminated on the date the applicant was served with an OSC:

In applying section 244(a) of the [INA] . . . with respect to an application for suspension of deportation which is filed before, on, or after the date of the enactment of this Act and which has not been adjudicated as of 30 days after the date of the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act (as in effect before such date of enactment). 63/

Congress rejected this approach. The version of H.R. 2202 that was reported to the House of Representatives on March 8, 1996, and passed the House on March 21, 1996, substituted the following text in Section 309(c)(5):

Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence)

62/ Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

63/ H.R. 2202, 104th Cong. § 309(c)(5) (Aug. 4, 1995 version), available on Westlaw at 1995 CQ US HR 2202 at *176 (introduced in House).

shall apply to notices to appear issued after the date of enactment of this Act. 64/

This text, which closely tracks the language in Section 309(c)(5) as enacted, demonstrates that the House of Representatives fundamentally rejected the original proposal to terminate suspension of deportation applicants' continuous physical presence retroactive to the date when they were served with an OSC. To the contrary, this provision evinces an intent not to apply INA Section 240A(d)(1) retroactively to OSCs issued on or before the date of enactment. 65/ The Conference Committee's decision to insert the phrase "before, on or" in Section 309(c)(5), rather than to recapitulate to the original text of Section 309(c)(5), suggests that Congress intended Section 309(c)(5) to apply in more limited circumstances. 66/

2. Interpreting Section 309(c)(5) to apply in certain cases where the Attorney General elects to proceed under IIRIRA Sections 309(c) gives fuller meaning to the INA as amended by IIRIRA

The conclusion that Section 309(c)(5) does not apply in all cases where a pre-IIRIRA OSC was issued finds further support in the principle that a statute must be construed to give maximum meaning and effect to all of its provisions. 67/ In this

64/ H.R. Rep. No. 104-469, Part I at 42 (1996); H.R. 2202, 104th Cong. § 309(c)(5) (Mar. 21, 1996 version), available on Westlaw at 1996 CQ US HR 2202 at *194 (passed in House).

65/ Nowhere in the text or accompanying explanations is there an explicit reference to apply INA Section 240A(d)(1) to OSCs issued on or before the date of enactment. The section-by-section analysis accompanying the March 8, 1996 version of the bill as reported to the House explains that Section 240A(d)(1) and (2) "shall apply to any notice to appear (including an Order to Show Cause under current Section 242A) issued after the date of enactment of this Act." H.R. Rep. No. 104-469 Part I at 240 (1996) (emphasis added). This explanation is identical to the one given on September 24, 1996 in the Joint Explanatory Statement of the Conference Committee. H.R. Rep. No. 104-828 at 223 (1996). A subsequent technical amendment also failed to clarify whether and, if so, which OSCs were included. See Extension of Stay in United States for Nurses, Pub. L. No. 104-302, § 2 (1996).

66/ The language "before, on, or" was added to the September 28, 1996 version as engrossed in the House of Representatives. See H.R. 4278, 104th Cong. § 309(c)(5) (Sept. 28, 1996 version), available on Westlaw at 1996 CQ US HR 4278 (engrossed in House). No explanation stated that OSCs issued before or on the enactment date were included.

67/ Reiter, 442 U.S. at 339 ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used").

regard, in cases where the Attorney General elects to put a person in removal proceedings pursuant to IIRIRA Section 309(c), Section 309(c)(5) clarifies that an earlier-served pre-IIRIRA notice of hearing, not any later-served written notice of post-IIRIRA removal proceedings, terminates continuous physical presence for cancellation of removal purposes. Accordingly, Section 309(c)(5) would not affect cases where a 309(c) election is not made, including suspension of deportation proceedings adjudicated under the pre-IIRIRA rules.

In making an election under IIRIRA Sections 309(c)(2) or (c)(3), the Attorney General may proceed under the new removal procedures in INA Section 240. If, pursuant to IIRIRA Section 309(c)(2), she makes this election in an exclusion or deportation proceeding where the evidentiary hearing was not commenced by April 1, 1997, she must notify the person of this election at least 30 days before the evidentiary hearing in the removal proceedings. In such cases, the notice of hearing served on the person in the earlier-initiated exclusion or deportation proceeding "shall be valid as if provided under [INA Section 239 as amended,] to confer jurisdiction on the immigration judge." If, pursuant to IIRIRA Sections 309(c)(3), she elects to reinstitute removal proceedings under INA Title II, Chapter 4, she must comply with the service of notice requirements in INA Section 239(a).

In such cases, where the person against whom the election has been made has been served with a pre-IIRIRA notice of hearing, Section 309(c)(5) specifies that it is the date of service of the notice of hearing, not the date of service of any written notice of post-IIRIRA removal proceedings, that terminates continuous physical presence for cancellation of removal purposes. This interpretation is consistent with the sentence in IIRIRA Section 309(c)(2) stating that an earlier-served "notice of hearing" is valid as if provided under INA Section 239(a) to confer jurisdiction on the immigration judge in the removal proceedings.

In sum, the foregoing construction is based on the plain language of IIRIRA Section 309(c), giving full effect to all of its provisions, including Section 309(c)(5). It gives full effect to the term "notice to appear issued before, on or after" September 30, 1996, construing that term to include both INA Section 239(a) notices to appear issued in post-IIRIRA removal proceedings and, in appropriate circumstances, pre-IIRIRA notices of hearing. It does not overbroadly interpret Section 309(c)(5) in a manner that is inconsistent with its plain meaning or its legislative history and otherwise redundant to another provision in the same section. Finally, it gives full effect to the interplay of Section 309(c)(5) with the other provisions in the section, clarifying the date upon which continuous physical presence terminates where someone has been served with a pre-IIRIRA notice of hearing.

3. The presumptions against retroactivity and deportation support this interpretation of IIRIRA Section 309(c)

For the reasons articulated above, IIRIRA Section 309(c)(5) does not apply to suspension of deportation applications adjudicated under the pre-IIRIRA rules. To the extent that there is any ambiguity in the statutory language, such ambiguity must

be resolved against retroactive application and in favor of those who, under a different construct, would be subject to deportation or removal from the United States.

Under the Landgraf test, Section 309(c)(5) should not operate retroactively because Congress has not clearly expressed its intent to apply Section 309(c)(5) retroactively to all pre-IIRIRA OSCs. Indeed, the intense debate waged over the meaning of Section 309(c)(5) refutes the argument that such clarity exists. Absent express intent, one must look to whether the law has retroactive effect, *i.e.*, whether it alters a party's primary, substantive right. Applying INA Section 240A(d)'s new special physical presence rules for cancellation of removal to someone who is eligible for suspension of deportation under the pre-IIRIRA rules could lead that person to be deported, whereas he or she would not have been deported under the rules in effect before IIRIRA. This provision clearly affects a substantive right and, in such a case, Landgraf compels the non-retroactive application of Section 309(c)(5). The N-J-B majority erred in failing to consider and give effect to this fundamental principle of law.

IIRIRA Section 309(c) and IIRIRA's legislative history support this presumption. Nothing in the legislative history indicates an intent to apply the new provisions to OSCs issued before or on the enactment date. As noted earlier, the only textual reference in Section 309(c)(5) to OSCs occurred in the earliest version and was deliberately replaced with a reference only to notices to appear. 68/ Only in the Joint Explanatory Statements attached to two Conference Reports were there references to OSCs, and they explain that INA Sections 240A(d)(1) and (2) apply to OSCs issued after IIRIRA's enactment date. 69/

Even when, just before IIRIRA's enactment on September 30, 1996, the language of Section 309(c)(5) was changed to read that INA Sections 240A(d)(1) and (2) "shall apply to notices to appear issued before, on, or after the date of enactment of this Act," no mention was made in the final correction as to the applicability of Section 309(c)(5) to all OSCs issued before, on, or after the enactment date. 70/ Congress had the opportunity to clarify that Section 309(c)(5) applied to OSCs issued before or on enactment when it approved a technical amendment on October 11, 1996,

68/ See H.R. 2202, 104th Cong. § 309(c)(5) (Aug. 4, 1995 version), available in Westlaw at 1995 CQ US HR 2202 at *176; H.R. Rep. No. 104-469 Part I at 42 (1996) (Mar. 4, 1996); H.R. 2202, 104th Cong. § 309(c)(5) (March 21, 1996 version), available in Westlaw at 1996 CQ US HR 2202 at *194 (passed in House).

69/ See Section-by-Section Analysis in Report of the Committee on the Judiciary, H.R. Rep. No. 104-469 Part I at 240 (Mar. 4, 1996) (emphasis added); Joint Explanatory Statement of the Committee Conference in the Conference Report, H.R. Rep. 104-828 at 223 (1996) (Sept. 24, 1996).

70/ See IIRIRA § 309(c)(5). See generally Villageliu's dissent in N-J-B, 1997 WL 107593 at *23.

but it did not. ^{71/} Thus, the last reference in any of the legislative materials made to an “Order to Show Cause” was an indication that Section 309(c)(5) would apply to OSCs issued after the date of enactment, and even this language was not in the statute, but only in accompanying explanations to the Committee Report.

C. IIRIRA’s 4,000-person annual limit does not preclude the Attorney General from continuing to grant suspension of deportation or cancellation of removal after the annual limit on adjustments of status is reached

Nothing in IIRIRA’s provisions concerning the 4,000-person annual limit compels the conclusion that the limit restricts suspensions of deportation and cancellations of removal per se. On the contrary, the better interpretation is that the statutory language means what it says, establishing a numerical limitation on the Attorney General’s ability to “cancel the removal and adjust the status” under new INA Section 240A or to “suspend deportation and adjust the status” under former INA Section 244(a). ^{72/}

IIRIRA specifies a 4,000-person annual limit in three provisions. Two of these provisions are codified in new INA Section 240A on cancellation of removal and adjustment of status, added by IIRIRA Section 304. As noted above, ^{73/} INA Section 240A(b)(3) establishes a 4,000-person annual limit on adjustments of status for nonpermanent residents granted cancellation of removal. INA Section 240A(e) provides that “[t]he Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of [IIRIRA]) of a total of more than 4,000 aliens in any fiscal year (beginning after the date of enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment and whether such an alien had previously applied for suspension of deportation under section 244(a).” Finally, Section 309(c)(7) provides in a transitional rule that “[t]he Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of enactment of this Act [September 30, 1996]). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.”

^{71/} See Extension of Stay in United States for Nurses, § 2 (amending IIRIRA §§ 309(c)(1) and 309(c)(4)).

^{72/} IIRIRA § 304(a)(3), INA § 240A(b)(3) & (e) (emphases added). See also IIRIRA § 309(c)(7) (limit applies to “suspension of deportation and adjustments to status”) (emphasis added).

^{73/} See Footnotes 23-25 & 32 and accompanying text.

We begin the task of statutory interpretation, as the Supreme Court has repeatedly directed, with the language of the statute. 74/ INA Section 240A(b)(3), which applies to nonpermanent residents granted cancellation of removal, clearly indicates that cancellation of removal and adjustment of status are two different steps, and that the 4,000-person annual limit applies only to adjustments of status, not cancellations of removal, under INA Section 240(b). 75/ This section makes clear that Congress was concerned not with limitations on cancellation of removal and suspension of deportation, but rather on adjustment of status.

Consistent with this interpretation and based on the statutory language itself, both new INA Section 240A(e) and Section 309(c)(7), by their terms, limit the number of persons to whom the Attorney General may grant cancellation of removal or suspension of deportation and adjustment of status. In using the conjunctive “and,” Congress adopted language that is “to be accepted for its conjunctive connotation rather than as a word interchangeable with ‘or’ except where strict grammatical construction will frustrate the clear legislative intent.” 76/ While “and” need not always be interpreted by its ordinary conjunctive meaning, case law establishes that -- like all statutory language -- its ordinary meaning controls unless there is a good reason in law to find otherwise.

Here, the ordinary meaning of INA Section 240A(e) and Section 309(c)(7) is that they prohibit the Attorney General from exceeding the 4,000-person annual limit when she does both acts specified, i.e., when she (1) “cancel[s] the removal and adjust[s] the status” or “suspend[s] the deportation and adjust[s] the status” under INA Section 240A(e); or (2) grants “suspension of deportation and adjustment of status” under Section 309(c)(7) (emphases added). In this regard, as noted above, 77/ under

74/ See, e.g., Negonsott v. Samuels, 507 U.S. 99, 104-05 (1993); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 474 (1992).

75/ The Attorney General “may adjust” the status of a nonpermanent resident granted cancellation of removal; “[t]he number of adjustments under this paragraph shall not exceed 4,000 . . .” IIRIRA § 304; INA § 240A(b)(3) (emphases added).

76/ Bruce v. First Federal Savings and Loan Ass’n of Conroe, Inc., 837 F.2d 712, 715 (5th Cir. 1988). See Webster’s Ninth New Collegiate Dictionary 84 (“and” used “to indicate connection or addition especially of items within the same class or type”) (emphasis added). See also Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 356 (1991) (“tripartite conjunctive structure is self-evident, and should be assumed to accurately express the legislative purpose”) (internal quotations and citations omitted); City of Rome v. United States, 446 U.S. 156, 172 (1980) (“By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be pre-cleared unless both discriminatory purpose and effect are absent”).

77/ See Footnotes 7-16 & 72-73 and accompanying text.

the INA both before and after IIRIRA, adjustment of status administered by the INS was and is distinct from suspension of deportation under the pre-IIRIRA rules and cancellation of removal under the post-IIRIRA rules, both of which latter procedures were and are administered by the EOIR. At least one federal court has endorsed this interpretation of the proper application of IIRIRA's 4,000-person annual limit. 78/

Any other reading would render the reference to "and adjust[ment of] status" -- language that Congress repeatedly added to the reference to cancellation or suspension -- wholly superfluous, and therefore such readings should be avoided. 79/ Thus, for example, the indications that the EOIR intends to apply the limit to suspensions of deportation and cancellations of removal without regard to adjustments of status fail to take into account the additional statutory language that accompanied adoption of the limit.

By contrast, applying the limit to adjustments of status that follow cancellation of removal or suspension of deportation does not render references to these latter two terms superfluous, for under the INA adjustments of status can follow other actions (e.g., the granting of asylum), and Congress has adopted different limits for those adjustments. 80/

Further supporting this interpretation of the 4,000-personal annual limit is the statutory language that Congress used in IIRIRA Section 601. In that Section Congress first redefined the term "refugee" to include persons who were persecuted for resisting coercive population control methods. 81/ It then amended the INA Section

78/ See Order Denying Motion to Dismiss, Certifying Class, and Appointing Lead Counsel, Granting Temporary Restraining Order, and Setting Preliminary Injunction Hearing for May 27, 1997 in Tefel v. Reno No. 97-0805-CIV-KING (S.D. Fla. filed May 20, 1997) at 14 n.3 ("IIRIRA 309(c)(7) prohibits the Attorney General from performing both -- rather than either -- of suspension and adjustment for more than 4,000 people in a fiscal year. The Attorney General is free, therefore, to grant as many suspension applications as she finds eligible provided that no more than 4,000 aliens are adjusted to permanent residency in any fiscal year"). See also Footnotes 49-50 and accompanying text.

79/ See Reiter, 442 U.S. at 339.

80/ See INA § 209(b) (establishing a 10,000-person annual limit on the number of asylees who may adjust their status, with no concomitant annual limit on the number of asylum applications that can be filed with INS). Cf. INA § 203(b)(3)(B) (establishing a 10,000-person annual limit on the number of unskilled workers who may apply for permanent resident status (some of whom apply for adjustment of status), with no concomitant annual limit on the number of unskilled worker petitions that can be filed with INS).

81/ IIRIRA § 601(a), amending INA § 101(a)(42).

establishing limits on annual admission of refugees to include the following numerical limitation: "For any fiscal year, not more than a total of 1,000 refugees may be admitted [as refugees] or granted asylum . . . pursuant to a determination [that they were persecuted for resisting coercive population control methods]." 82/ By using the word "or" in establishing a different numerical limitation in the same statute, Congress demonstrated its ability to distinguish between the conjunctive term "and" and the disjunctive term "or" in defining those subject to IIRIRA's numerical limitations. 83/

If there were any reason to doubt the plain reading of the statutory language, the presumptions against retroactivity and readings that result in deportation, discussed above, further support reading the provisions of IIRIRA to limit annual adjustments of status following cancellation of removal or suspension of deportation, and not as a limit on cancellation of removal or suspension of deportation per se.

~~If there were any reason to doubt the plain reading of the statutory language, the presumptions against retroactivity and readings that result in deportation, discussed above, further support reading the provisions of IIRIRA to limit annual adjustments in status following cancellation and/or suspension, and not as a limit on cancellation and/or suspension per se.~~ In addition, we have identified nothing in the legislative history that calls this reading into doubt. We recognize that one section of the Conference Report on the bill that became IIRIRA does describe INA Section 240A(e) as a limit on "the granting of cancellation of removal and suspension of deportation under current Section 244 to not more than an aggregate total of 4,000 aliens per fiscal year." 84/ In our view, it is certainly reasonable to discount this observation in light of the language of the statute under which the limitation quite clearly applies not just to cancellation and/or suspension but rather to "cancellation and adjustment" and/or "suspension and adjustment." While it may sometimes be useful to consult legislative history to shed light on the meaning of an unclear statute, no principle of which we are aware permits -- let alone, requires -- use of legislative history to write terms out of a statute enacted by both Houses of Congress and signed by the President.

82/ IIRIRA § 601(b), amending INA § 207(a) (emphasis added).

83/ See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each"); Legacy Emanuel Hospital and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996) ("Indeed, the use of different language by Congress creates a presumption that it intended the terms to have different meanings")(citation omitted); Neal v. Honeywell, Inc., 33 F.3d 860, 863 (7th Cir. 1994) ("[In construing a statute] there is a longstanding principle that different language implies different meaning")(citation omitted).

84/ H.R. Rep. No. 104-828, at 214 (1996).

Finally, a word about INA Section 240A(b)(3), which imposes a 4,000 annual limit on "adjustments" for nonpermanent residents who qualify for cancellation of removal. This section, in concert with INA Section 240A(e) and Section 309(c)(7), appears to accomplish a transition from the suspension of deportation procedures under the pre-IIRIRA rules to the cancellation of removal procedures under the post-IIRIRA rules, imposing limits on the number of adjustments that may be granted in any fiscal year. Thus, under Section 309(c)(7), in any fiscal year after the enactment of IIRIRA -- including a period when cancellations of removal are not yet operative -- there is a 4,000 limit on suspension of deportation and adjustment of status. During the period after April 1, 1997 -- when both cancellations of removal under the post-IIRIRA rules and suspensions of deportation under the pre-IIRIRA rules may be granted -- INA Section 240A(e) establishes an aggregate limit of 4,000 on adjustments of status following cancellation of removal or suspension of deportation. After suspensions of deportation no longer are being granted -- i.e., once the former system is completely phased out -- INA Section 240A(b)(3) applies the 4,000 limit to adjustments of status following cancellation of removal.

To be sure, the statute without INA Section 240A(b)(3) could be read to have the same effect (when suspensions counted toward the limit under INA Section 240A(e) are zero), but that redundancy would exist whether INA Section 240A(e) were read to limit adjustments of status after suspension of deportation or cancellation of removal or simply suspensions of deportation and cancellations of removal themselves. For the reasons explained above, the former reading of INA Section 240A(e) -- and Section 309(c)(7) -- is more faithful to both the language of the statute and to principles of statutory construction.