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The Nicaraguan Adjustment and Central American Relief Act: Hardship Relief and Long- Term Illegal Aliens

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ABSTRACT

The Nicaraguan Adjustment and Central American Relief Act (NACARA) (P.L. 105-100, title II) establishes special procedures through which hundreds of thousands of aliens in the U.S., primarily Central Americans, may seek legal permanent resident status. This report discusses who benefits from NACARA and how the relief granted to Nicaraguans and Cubans differs from that granted to Salvadorans, Guatemalans, and certain natives of former Warsaw Pact countries. The report also discusses how enactment of NACARA was prompted by restrictions contained in the Illegal Immigration and Immigrant Responsibility Act of 1996 (P.L. 104-208, Division C). The report will be updated as implementation of NACARA progresses.

The Nicaraguan Adjustment and Central American Relief Act: Hardship Relief and Long-Term Illegal Aliens

Summary

Approximately 5 million illegal aliens were residing in the U.S. as of October 1996. This large population varies by country of origin, motive for entry, length of stay, family composition, and attachment to the community. Immigration law historically has taken these differences into account by allowing certain long-term illegal residents to become legal residents despite their being here in violation of law.

For example, our law has for decades permitted the Attorney General to allow long-term illegal residents to stay on a case-by-case basis if their removal would cause undue hardship. The rules governing this hardship relief (known until recently as suspension of deportation) have changed over time, and, in 1996, Congress significantly toughened hardship standards in amendments contained in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Furthermore, the new restrictions on relief potentially could have precluded any hardship relief for many aliens who had resided here since well before IIRIRA was enacted.

Among the aliens who were already long-term residents when IIRIRA changed the hardship rules were several hundred thousand Central Americans who came here during the civil strife of the 1980s. Under court settlements and review policies, the Government had allowed these Central Americans to reside and work here for over a decade, during which time many of them established families, careers and community ties. Not surprisingly, many Members of Congress began questioning whether it was appropriate to apply new, restrictive hardship policies to these aliens.

The issue of how IIRIRA's new hardship rules were to affect Central Americans and others who were residing here when IIRIRA was enacted was addressed in the Nicaraguan Adjustment and Central American Relief Act (NACARA) (title II of P.L. 105-100). Under this law, approximately 150,000 Nicaraguans and 5,000 Cubans are eligible to adjust to permanent resident status without having to make any hardship showing at all. Additionally, approximately 200,000 Salvadorans and 50,000 Guatemalans (along with certain Warsaw Pact natives) will be able to qualify for hardship relief under the more lenient hardship rules that existed prior to the IIRIRA amendments. A large majority of these Guatemalans and Salvadorans have an application pending with the Immigration and Naturalization Service (INS) for asylum, which is a distinct remedy based on prospective persecution abroad. Under procedures expected to be implemented in late 1998 or early 1999, these asylum applicants will be able to have their hardship relief claims decided by asylum officers (who usually consider asylum applications only) rather than having to wait for a determination by an immigration judges during removal proceedings.

While NACARA benefits some long-term residents, it makes clear that aliens not covered by its special rules (*e.g.*, Haitians and Mexicans who entered during the 1980s) must qualify for hardship relief under IIRIRA's tighter standards. The Attorney General may have authority to ameliorate the affect of IIRIRA for some aliens who are in ongoing deportation proceedings that began prior to April 1, 1997.

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The Nicaraguan Adjustment and Central American Relief Act: Hardship Relief and Long-Term Illegal Aliens

Introduction

Background on “Pipeline” Aliens

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) became law (P.L. 104-208, Division C). Among its sweeping changes are new rules on relief from removal for illegal aliens (*also called* undocumented aliens) who have resided here for an extended period. These new rules make it significantly more difficult for long-term illegal residents to obtain permanent resident status based on the hardship that would result if they were removed. As enacted, these new rules also had been interpreted as possibly applying to aliens who already had been residing in the U.S. for extended periods when IIRIRA was enacted (*i.e.*, aliens already in the “pipeline”).

According to the Immigration and Naturalization Service (INS), approximately 5 million illegal aliens were residing in the U.S. when IIRIRA became law. Of this population, about 60% entered surreptitiously and 40% overstayed temporary nonimmigrant visas (*e.g.*, tourist and student visas). Illegal aliens also varied by country of origin, reasons for staying, length of stay, family composition, and general attachment to the community.

In late 1990, the Government entered into a settlement in *American Baptist Churches (ABC) v. Thornburgh* (760 F. Supp. 796 (N.D. Cal. 1991)), a class action alleging Government failure to apply nonpolitical standards in deciding asylum cases. In settling the *ABC* case, the Government agreed to allow tens of thousands of Salvadorans and Guatemalans who had come here without documents during the 1980s to reapply for asylum and to work and live here until their asylum applications were resolved. Approximately 190,000 Salvadorans and 50,000 Guatemalans were covered by the *ABC* settlement.

In 1987, Attorney General Edwin Meese initiated a Nicaraguan Review Program (NRP) that required extended review of deportation orders issued against Nicaraguans. Thereafter, few deportable Nicaraguans were actually removed, and those who remained were allowed to work. When the NRP was terminated in 1995, an estimated 34,000 Nicaraguans were in exclusion or deportation proceedings. In ending the NRP, Attorney General Janet Reno granted affected Nicaraguans continued work authorization and encouraged them to apply for relief from removal known as suspension of deportation.

Between the military coup in Haiti in September 1991 and the institution of a blanket return policy by President Bush in May 1992, U.S. authorities interdicted over 35,000 Haitian boat people. As a result of screening interviews conducted at the U.S. naval base at Guantanamo, Cuba, the Immigration and Naturalization Service (INS) paroled into the United States approximately 10,490 Haitians who were determined to have credible asylum claims.

Even though a 1986 law sought to control future illegal migration through employer sanctions, the number of illegal aliens residing in the U.S. has increased over the past decade. The INS estimates that the undocumented alien population had been growing by about 275,000 annually as of October 1996. Of this annual growth, about 150,000 were Mexicans, according to INS (U.S. DEPT. OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE INS 197-199).

Though none of the foregoing groups of aliens had visas that permitted permanent residency, the extent of Government acquiescence in their entry and stay clearly varied. Differences in equities among various segments of the undocumented population led many Members of Congress to question whether IIRIRA's tighter hardship rules were equally appropriate for all groups of illegal residents. Some Members believed restrictive hardship standards were inappropriate for aliens who originally came from countries with repressive regimes or civil violence. Attention especially focused on Central Americans who had remained and worked in the U.S. with the Government's knowledge and tacit approval.¹ Greater disagreement arose over whether it was inequitable to judge the hardship claims of all aliens who had been here before IIRIRA by that Act's standards, or whether, on the other hand, date of entry was an appropriate criterion for setting rules at all.

Congress addressed the issue of hardship standards and "pipeline" aliens in the Nicaraguan Adjustment and Central American Relief Act, which was enacted on November 19, 1997, as part of the District of Columbia appropriations Act for FY1998 (P.L. 105-100). The provisions of this law are discussed below after a discussion of hardship relief and the changes made to it by IIRIRA.

Background on Suspension of Deportation

Since 1940, Congress has allowed the Attorney General to grant lawful status to certain aliens who, though not lawfully admitted for permanent residency, have established deep roots here. As first enacted, the Attorney General could suspend the deportation of aliens who could show 5 years of good moral character and prospective "serious economic detriment" to lawfully present members of their immediate families. However, several classes of aliens were ineligible, and Congress retained power to overturn relief by resolution.

Over time, Congress has changed the basic eligibility rules for suspension of deportation, the classes of ineligible aliens, and the role of Congress. As enacted, the Immigration and Nationality Act of 1952 (INA) expanded potential eligibility by

¹ See CRS Report 97-810, Central American Asylum Seekers: Impact of 1996 Immigration Law.

allowing relief premised on hardship to the prospective deportee and by shortening the list of ineligible groups, but relief could only be granted if both the Attorney General and Congress acted. The lists of ineligible groups for suspension under the INA, which still is our primary immigration statute, subsequently were amended further. Also, the Supreme Court has precluded congressional participation in individual suspension cases.

IIRIRA Revisions of Hardship Relief

New Name, New Standards

IIRIRA broadly revised the rules for removing aliens who violate immigration law. Among its changes, IIRIRA consolidates what were formerly separate "exclusion" and "deportation" procedures into a single "removal" process. Within the new removal process, long-term undocumented residents are subjected to tighter standards for obtaining hardship relief than previously existed for such relief under deportation procedures.

Before IIRIRA, suspension of deportation could be granted to an alien who had been physically present for 7 years, who had had good moral character, and whose deportation would result in extreme hardship to the alien or to the alien's citizen or permanent resident spouse, child, or parent. Stricter standards -- 10 years' presence and "exceptional and extremely unusual hardship" -- existed for aliens who were deportable on certain criminal, fraud, or security grounds, while eased standards existed for certain abused spouses and children.

IIRIRA tightened standards for suspension of deportation and made it part of a new remedy called "cancellation of removal." The new "suspension" remedy permits the Attorney General to cancel the removal of an alien who has been physically present at least 10 years, has had good moral character, has not been convicted of a crime that makes the alien removable, and whose removal would result in exceptional and extremely unusual hardship to the alien's permanent resident or citizen spouse, parent, or child. Thus, IIRIRA (1) generally adopts the stricter 10-year presence and "exceptional and extremely unusual hardship" standards (except for abused aliens), (2) eliminates prospective hardship to the alien as a basis for relief, and (3) disqualifies most criminal aliens (previously, criminal conviction was relevant only as it bore on "good moral character" -- *e.g.*, aliens convicted at any time of an "aggravated felony" could not be found to possess "good moral character").

Furthermore, IIRIRA restricts relief in two additional ways. First, it limits the number of aliens who may be granted relief each year. Second, it stops the time that may be counted toward meeting the physical presence requirement once an alien commits certain acts or is made subject to removal proceedings, regardless of how long the alien remains here afterwards.

The procedural changes under IIRIRA generally apply only to "removal" cases initiated on or after April 1, 1997, by the issuance of a "Notice to Appear." (IIRIRA also permits the Attorney General to terminate cases that were begun under the old "deportation" system by an "Order to Show Cause" and to restart them as "removal"

cases, in which instance IIRIRA, not prior law, applies.) Thus, as a general proposition, IIRIRA would only affect long-term residents if removal proceedings were begun against them after March 1997. However, the numerical cap and "time-stop" rules under IIRIRA were written in a way that could have affected suspension relief under old deportation cases begun many years ago.

Numerical Limits. IIRIRA imposes three separate limits of 4,000 per fiscal year on hardship-based relief from removal. A 4,000 per year limit is placed on adjustments to permanent resident status of aliens granted cancellation of removal. Another 4,000 per year limit is placed on combined "cancellations and adjustments" under IIRIRA and "suspensions and adjustments" under cases continued under prior law. A third 4,000 per year limit is placed on "suspensions and adjustments" under prior law.

Both the subject of these limitations and their implementation were problematic. Some argued that the latter two limitations were, like the first, essentially limits on adjustments only. They interpreted "cancel and adjust" and "suspend and adjust" as each comprised of two distinct acts and argued that it was permissible to "cancel" or "suspend" the expulsion of more than 4,000 aliens in one year so long as no more than 4,000 of them were adjusted in the same year. Such an interpretation bypassed the apparent arbitrariness of denying relief or delaying consideration to those aliens with meritorious applications that come before immigration judges after the yearly cancellation/suspension limit has been reached.

However, such an interpretation also raised issues as to the status of those whose expulsion had been suspended or canceled but who had not yet been able to adjust. It also could have been seen as a vehicle for bypassing any meaningful limit on suspensions or adjustments. If the limit on "suspension and adjustment" meant only that both acts could not occur in the same year for more than 4,000 aliens, what would have prevented suspending 20,000 deportations during one year and allowing those 20,000 to adjust in the subsequent year?

Retroactive Application of Tolling Provisions. IIRIRA changed the practice of allowing time spent here after the initiation of deportation proceedings to be counted toward the physical presence requirements. Under IIRIRA, "presence" ends when an alien (1) commits certain criminal or terrorist acts or (2) is served with a "Notice to Appear," the document established by IIRIRA for the initiation of removal proceedings.

Though, as mentioned above, most of the rules changes in IIRIRA apply only in cases started on or after April 1, 1997, the new "time-stop" rules might be retroactive. Section 309(c)(5) of IIRIRA, as enacted, stated that the new "time-stop" rules "shall apply to notices to appear issued before, on, or after" the date of IIRIRA's enactment (September 30, 1996). The effect of § 309(c)(5) depended on how "notices to appear issued before, on, or after" September 30, 1996, was interpreted. More particularly, if the provision were construed to apply to all deportation cases that were pending when IIRIRA was enacted, tens of thousands of Central Americans whose cases remained unresolved at that time could have been affected.

For example, INS often began deportation proceedings against Nicaraguans fleeing civil strife shortly after their arrival in the 1980s. Nevertheless, the Government tacitly allowed most of these aliens to remain here, and even encouraged them to apply for suspension of deportation when the Nicaraguan Review Program ended in 1995. However, if the "time-stop" rules of IIRIRA were applied retroactively to these aliens, they would be ineligible for suspension relief because proceedings were initiated against them before they met the minimum 7-year presence requirement for obtaining relief.

After IIRIRA's enactment, there were conflicting legal opinions on how the "time-stop" rules affected long-term residents, especially those against whom deportation proceedings were begun prior to IIRIRA's enactment. In July 1997, Attorney General Janet Reno vacated a decision of the Board of Immigration Appeals (*In re N-J-B-*, Int. Dec. 3309 (BIA 1997)) that would have put the continued stay of many long-term Central American residents in jeopardy. Earlier, a federal district judge, disagreeing with the BIA decision in *N-J-B-*, had issued a preliminary injunction barring application of the "time-stop" provisions to a class of Nicaraguans (*Tefel v. Reno*, No. 97-0805-CIV-King (S.D. Fla. 1997)).

Relief for "Pipeline" Aliens Clarified

Legislative Proposals

During the first session of the 105th Congress, at least two Senate floor amendments to the District of Columbia appropriations bill (H.R. 2607) and four freestanding bills addressed how the numerical limit and "time-stop" changes would apply to aliens who were in the "pipeline" when IIRIRA was enacted.

Though they varied, all but H.R. 2533 (introduced by Rep. Lamar Smith, chairman of the House Immigration Subcommittee) would have assured that some of the old suspension of deportation rules, and not the IIRIRA cancellation rules, would be applied to at least some classes of long-term undocumented residents, especially aliens who were covered by the *ABC* settlement. The old suspension rules that generally would have been applied under these proposals included (1) a 7-year (rather than a 10-year) presence requirement for most aliens; (2) no automatic stopping of the presence "clock" by the initiation of proceedings (though one bill would have stopped the clock at IIRIRA's effective date); (3) relief based upon personal hardship to the alien; and (4) elimination of numerical caps on relief.

Of the proposals that would have "grandfathered" the old suspension rules, S. 1076 (Sens. Mack and Graham), and the similar S. Amd. No. 1252, was the broadest in its coverage. S. Amd. No. 1253 (Sen. Mack), which was adopted by the Senate as a substitute for S. Amd. No. 1252 by a vote of 99-1, was the narrowest. H.R. 2302 (Rep. Diaz-Balart) was similar to S. 1076 in its coverage of Central Americans, but it would not have assured that the "time-stop" rules would not be applied in old deportation cases begun before April 1, 1997 (*e.g.*, against many Nicaraguans). H.R. 2442 (Rep. Meek) was substantially similar to H.R. 2302, but differed from it by its proposed application of old suspension rules to certain Haitians.

Unlike other proposals, H.R. 2533 limited relief to applying a special “time-stop” rule to the classes of aliens it covered — generally aliens covered by the ABC settlement and certain Nicaraguans. Also, the bill appeared to benefit only those covered aliens against whom deportation proceedings were pending as of April 1, 1997. H.R. 2533 also would have made clear that “time-stop” provisions under IIRIRA were to apply in all carried over deportation cases other than those involving covered aliens. The bill further required that relief granted covered aliens be offset by reductions in the numbers of visas made available to unskilled laborers.

Provisions of the NACARA

On November 19, 1997, the Nicaraguan Adjustment and Central American Relief Act (NACARA) became law as title II of the District of Columbia appropriations Act for FY1998 (P.L. 105-100). The relief contained in it arose primarily from an agreement negotiated by Rep. Diaz-Balart with Rep. Lamar Smith, with the backing of the House majority leadership. Like Rep. Diaz-Balart’s bill and the Senate’s proposal, individual hardship claims made by Salvadorans and Guatemalans covered by the ABC settlement are to be decided under pre-IIRIRA standards, regardless of when removal proceedings are initiated. Like Rep. Smith’s bill, long-term undocumented aliens not in the covered special classes must meet IIRIRA’s “time-stop” restrictions and numerical limits, and there is a reduction in certain visa categories to offset hardship relief granted to aliens who are covered by special rules. Unlike any previous proposal, however, the final bill contains a legalization provision for Nicaraguans (and certain Cubans) that allows them to adjust to permanent residency without having to make any individual hardship showing at all.

Nicaraguan and Cuban Adjustment. The NACARA *directs* the Attorney General to adjust to permanent resident status (without offset against the number of allowable immigrant visas) an alien in one of the classes listed below, if the alien meets two conditions. First, the alien must apply for adjustment before April 1, 2000. Second, the alien must not be legally inadmissible to the U.S. on grounds other than being a prospective public charge, failing to have proper documents, failing to meet certain labor-related requirements, or entering the U.S. surreptitiously (*e.g.*, aliens who are inadmissible on health grounds or as criminal aliens or security threats are ineligible for adjustment absent a waiver). The classes of aliens covered include:

- Nicaraguans and Cubans who have been in the U.S. continuously for a period beginning before December 1, 1995, and ending the date of application. An absence, or aggregate absences, of 180 days or less are not considered to disrupt continuous presence. The ability to adjust is not affected by the pendency of removal proceedings or a final order of removal. Proof of continuous presence may be made through any one of specified means or under any other method allowed by the Attorney General; and
- Nicaraguans and Cubans who are the spouses or unmarried children of aliens in the foregoing class. The same application deadline and legal admissibility requirements apply, but the physical presence requirements (*i.e.*, in the U.S. continuously since before December 1995) apply only to unmarried children

age 21 or older. Children under age 21 and spouses need only be physically present on date of application. Spouses and unmarried children who are not Nicaraguan or Cuban are not eligible under NACARA. However, they may indirectly benefit because aliens who do adjust under NACARA thereby become eligible to petition for immigration preference under the INA for their spouses and children regardless of their nationality.

Hardship Relief for Certain Central Americans and Europeans. Though they do not have the right to adjust status comparable to covered Nicaraguans and Cubans, aliens in one of the classes below may (unless they have been convicted of an aggravated felony) apply for hardship relief in deportation or removal proceedings free from the “time-stop” and numerical restriction limits of IIRIRA and (with minor exception) under the standards for suspension of deportation that existed under pre-IIRIRA law:

- Salvadoran nationals who (1) first entered before September 20, 1990, (2) were not apprehended at a time of entry after December 19, 1990, and (3) either registered for benefits under the *ABC* settlement or applied for Temporary Protected Status before November 1991;
- Guatemalan nationals who (1) first entered on or before October 1, 1990, (2) were not apprehended at a time of entry after December 19, 1990, and (3) registered for benefits under the *ABC* settlement by December 31, 1991;
- Salvadorans and Guatemalans who filed an asylum application with INS on or before April 1, 1990;
- Aliens who, at the time a decision to grant relief is rendered, are the unmarried children under age 21 or the spouses of covered Salvadorans or Guatemalans;
- Aliens who, at the time a decision to grant relief is rendered, are the unmarried adult children of covered Salvadorans or Guatemalans, if the children entered the U.S. on or before October 1, 1990; and
- Aliens who entered before 1991, filed an asylum application before 1992, and are nationals of the former Soviet Union or one of its successor states, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Latvia, Estonia, Lithuania, or Yugoslavia or one of its former components.

Offsets Against Legal Immigration. NACARA requires that the number of Salvadorans and Guatemalans who obtain permanent resident status under the special hardship relief rules be partially offset through reductions in two categories of immigrant visas — diversity visas and visas for unskilled laborers.

Beginning in FY1999, the number of aliens who may be granted immigrant visas under the diversity program for low-immigration areas is to be reduced by the following: one-half of the number of covered Salvadorans and Guatemalans receiving relief the prior fiscal year minus the total number of reductions in diversity visas for all previous fiscal years. However, in no event may reductions in any year exceed 5,000.

A similar reduction is required in the number of immigration visas for unskilled laborers, but the effective date of this reduction is delayed until all aliens who had visas petitions approved under the unskilled labor category as of the date the NACARA was enacted (November 19, 1997) are admitted.

Relief for Other “Pipeline” Aliens. At the same time NACARA benefits specified groups of Central Americans and Warsaw Pact aliens, it assures that other “pipeline” aliens will be subject to IIRIRA standards for hardship relief.

NACARA modifies § 309(c)(5) of IIRIRA to make clear that the “time-stop” rules of IIRIRA are to apply in current deportation cases that were begun before April 1, 1997, even though hardship relief in those cases is otherwise governed by the suspension of deportation standards under pre-IIRIRA law. For example, consider a hardship application being determined in 1998 in a deportation proceeding begun in 1993 against an alien who arrived in 1987. The alien would be subject to a 7-year (not a 10-year) presence requirement because prior suspension rules generally govern pre-IIRIRA cases, but the alien still would be ineligible for relief because IIRIRA now “retroactively” stops the presence clock at 1993 (when proceedings were initiated), and not when the application for relief is determined, as was typical under pre-IIRIRA practice. The Attorney General apparently has authority under § 203 of NACARA to avoid retroactive application of the time-stop rules in such a case by terminating the old deportation case and reinitiating the case as a “removal” case under IIRIRA. In the reinitiated case, IIRIRA’s 10-year presence requirement would apply, but the relevant “terminating event” would be the date “removal” proceedings started — 1998 — and not the date the old deportation case began — 1993 in our example above. Nevertheless, the Attorney General does not appear to have exercised this authority in any case yet.

The new law also amends the 4,000 per year caps on relief contained in IIRIRA. First, the law makes clear that “suspend and adjust” and “cancel and adjust” are both to be considered two parts of a single act, and that for purposes of applying the caps on relief, the date of the decision to “suspend” or “cancel” governs. Second, the law retains the aggregate 4,000 per fiscal year limit on suspensions and cancellations, but makes special provision for FY1997 and FY1998. For FY1997, only grants of relief made after April 1 counted. For FY1998, the 4,000 limit is increased by another 4,000 minus the number of grants of relief made during FY1997 after April 1.

Implementation of NACARA

Nicaraguan and Cuban Adjustments. INS published an interim rule on May 21, 1998 (63 Fed. Reg. 27,823) to govern implementation of the Nicaraguan and Cuban adjustment provisions of NACARA. The interim rule became effective June 22. Comments on the rule are due by July 20, 1998.

Much of the interim rule focuses on how an applicant may show length and continuity of presence. NACARA itself lists various types of Federal records related to work or immigration proceedings that may be submitted to show that continuous presence began before December 1995, which is the statutory cut-off date. NACARA also authorizes the Attorney General to accept other types of evidence of commencement of physical presence. To this end, the interim rules allows

submission of state and local governmental records (*e.g.*, school, hospital, police, or public assistance records). Furthermore, INS is soliciting suggestions for other means of proving when continuous presence began.

Regarding proof of continuity of presence, as opposed to proof of commencement of presence, the interim rule allows submission of one or more documents issued by a governmental or non-governmental authority, if the document bears the applicant's name, was dated contemporaneously with its issuance, and bears the signature of the issuing authority. The number of documents required will vary with their nature. For example, a single college transcript covering several years' attendance may suffice alone, while a series of rent or utilities bills may be required. In general, the documentary evidence should not contain any gap of three or more months.

Other parts of the interim rule address to whom applications are to be submitted. This varies depending upon whether the applicant is currently in proceedings before an immigration judge. The rule also explains what forms, fingerprints, and filing fees must be submitted.

Finally, the interim rule discusses what procedures are to be used in considering adjustment applications, what documentation will be issued upon approval of an application, what happens if an application is denied, and what rights to administrative review exist.

Hardship relief. Statements and memoranda issued by INS and the Office of the Chief Immigration Judge (OCIJ) have addressed the process for considering hardship applications filed by Salvadorans, Guatemalans, and Warsaw Pact natives who are covered under NACARA.

As discussed above, NACARA benefits certain Salvadorans, Guatemalans, and Warsaw Pact natives in a more limited way than it benefits covered Nicaraguans and Cubans. Instead of broadly allowing adjustment of status on proof of continuous residence, NACARA benefits these latter classes of aliens by allowing their claims for hardship relief to be determined under more lenient pre-IIRIRA standards. Historically, claims for hardship relief have been considered only by immigration judges in the context of exclusion, deportation, or (under new IIRIRA procedures) removal proceedings. There has not been a means for obtaining hardship relief before INS has actually ordered an alien to appear before an immigration judge to face possible expulsion.

Only a small portion of the potential beneficiaries of NACARA's hardship standards are currently in proceedings before immigration judges. Rather, the great majority of potential beneficiaries — including up to 240,000 Salvadorans and Guatemalan — still have asylum applications pending before INS asylum officers. Under normal circumstances, an asylum officer would have to consider and deny an asylum application (which is a separate form of discretionary relief premised upon prospective persecution abroad) before the applicant could subsequently be placed in deportation or removal proceedings before an immigration judge, and only then could the alien apply for hardship relief (which is premised primarily on deep ties that have been established here).

However, according to INS press releases and memoranda issued by the OCIJ, the Attorney General will streamline the process for considering hardship claims made by asylum applicants covered by NACARA by allowing asylum officers to determine hardship claims usually determined exclusively by immigration judges. While the intent to allow consideration by asylum officers was made public in early 1998, procedures still have not been implemented. According to some reports, asylum officers will begin to consider the hardship claims of NACARA beneficiaries in late 1998 or early 1999. In the meantime, INS has temporarily suspended processing the asylum applications of applicants who will be eligible to seek hardship relief under NACARA. An exception has been made for aliens who request expedited consideration of their asylum applications.

Regarding NACARA beneficiaries without pending asylum applications, those potential beneficiaries who have been ordered deported or agreed to voluntary departure may file one motion to reopen their cases with immigration judges for the purpose of applying for hardship relief under NACARA standards. A motion to reopen must be filed on or before September 11, 1998.

Some significant implementation issues apparently have not been completely resolved. Among these are the standards for proving the degree of hardship required for relief and whether final regulations will contain presumptions and other guidance on establishing a hardship case.

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