05-6537-ag

To Be Argued By:
PETER D. MARKLE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-6537-ag

CESAR AGUILAR,

Petitioner,

-vs-

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

In this immigration case, Petitioner Cesar Aguilar ("Petitioner"), a native and citizen of Guatemala, seeks review of a final order of removal entered by the Board of Immigration Appeals ("BIA") on November 17, 2005, JA 1-3, affirming a removal order entered on March 5, 2004, by Immigration Judge Michael Straus sitting in Hartford, Connecticut, JA 40-46.[1]

Petitioner's removal proceeding commenced on October 8, 1997, upon issuance of a Notice to Appear by the Immigration and Naturalization Service ("INS"). JA 428-29. As proceedings were commenced after April 1, 1997, this Court has jurisdiction to review Petitioner's case under the permanent rules for judicial review in Section 242 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252 (2006). As explained in Part I below, however, this Court lacks jurisdiction to consider the issue of whether Petitioner satisfied the requirements for cancellation of removal under the special rules of the Nicaraguan and Central American Relief Act of 1997 ("NACARA"), Pub. L. No. 105-100, 111 Stat. 2193-2201

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[1] The abbreviation "JA" followed by a number or letter refers to the page of the Joint Appendix on file with this Court. Numeric page numbers correspond to the pagination of the Certified Administrative Record. Alphabetic page numbers refer to materials, such as the petition for review, which were subsequently filed in this Court. The abbreviation "Pet. Br." followed by a number refers to a page of Petitioner's brief on file with this Court.

(Nov. 19, 1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644-45 (Dec. 2, 1997). Specifically, section 309(c)(5)(C)(ii) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996), divests this Court of jurisdiction to review the Attorney General's determinations as to whether an alien has satisfied the statutory requirements for relief under NACARA.

Petitioner filed this timely petition for review on December 12, 2005, within thirty days of the BIA's final order issued November 17, 2005. See 8 U.S.C. §1252(b)(1). Venue in this Court is proper because the immigration judge ("IJ") decided Petitioner's case in Hartford, Connecticut. *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether this Court lacks jurisdiction under section 309(c)(5)(c)(ii) of IIRIRA to review Petitioner's statutory eligibility for relief under NACARA and, if not, whether Petitioner failed to prove that the record evidence compels the conclusion, contrary to the holdings reached by the IJ and BIA, that he established his eligibility for relief.[2]

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[2] Under section 309(c)(5)(c)(ii) of IIRIRA, a Guatemalan national who entered the United States prior to October 1, 1990, and who registered for *ABC* benefits before December 31, 1991, is eligible for cancellation of removal under NACARA's special rules. "*ABC* benefits" are benefits obtained pursuant to the settlement agreement in *American Baptist Churches, et al. v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

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BRIEF FOR ALBERTO GONZALES
Attorney General of the United States

Preliminary Statement

In this immigration case, Petitioner Cesar Aguilar, a native citizen of Guatemala, seeks review of a decision of the Board of Immigration Appeals ("Board") dated November 11, 2005, JA 2-3, which adopted and affirmed Immigration Judge Michael W. Straus' decision, JA 40-46, to deny Mr. Aguilar relief under the Nicaraguan Adjustment and Central American Relief Act

("NACARA"), Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (Nov. 19, 1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997). Specifically, the BIA and the IJ both held that Petitioner had failed to prove that he had registered *ABC* benefits in a timely manner.

Because Congress has expressly divested the courts of jurisdiction to review an administrative decision to deny benefits under NACARA, *see* § 309(c)(5)(C)(ii) of IIRIRA, the petition for review should be dismissed for lack of jurisdiction.

Statement of the Case

On November 1, 1989, Petitioner first entered the United States. JA 43, 82.

In October 1997, Petitioner was served with a Notice to Appear before an Immigration Judge, charging him with being removable from the United States on the grounds that he was an alien present in the United States without having been admitted or paroled, or having arrived in the United States at any time or place other than designated by the Attorney General, in contravention of INA § 212(a)(6)(A)(i). JA 428.

On May 13, 1998, Immigration Judge William Cassidy denied the Petitioner's application for asylum. JA 311, 313.

On June 11, 1998, Petitioner appealed IJ Cassidy's decision to the Board of Immigration Appeals. JA 298-303.

On July 30, 2002, the BIA remanded the case to the Immigration Court for new proceedings, finding that the IJ's decision and the transcript were "replete with indications of indiscernible utterances" and that the record was not amenable to review. JA 263-65.

On remand, at a hearing before IJ Michael Straus on April 29, 2003, Petitioner indicated his desire to apply for NACARA benefits, and the IJ rescheduled the merits hearing. JA 70-71.

On February 6, 2004, Petitioner filed a written application for relief under NACARA. JA153-61, 171-261.

On March 4, 2004, Petitioner had a hearing at the Hartford Immigration Court before IJ Straus. JA74-101. At the outset of that hearing, Petitioner withdrew his asylum application and opted to proceed exclusively on his request for NACARA relief. JA 75-76.

On March 5, 2004, IJ Straus denied Petitioner's Application for Special Rule Cancellation. JA 40-46.

On March 11, 2004, Petitioner appealed IJ Straus' decision to the BIA. JA 4-9.

On November 17, 2005, the BIA adopted and affirmed IJ Straus' decision by per curiam opinion. JA 1-3.

On December 12, 2005, Petitioner filed a timely petition for review with this Court. JA d-e.

STATEMENT OF FACTS

Because Petitioner withdrew his asylum application before the IJ, and challenges only the denial by the IJ and the BIA of his application for NACARA benefits, the Government sets forth only those facts relevant to the issues presented in this petition for review.

Petitioner is a native and citizen of Guatemala. JA 83. He is separated from his wife, who lives with their three children in Guatemala. JA 84, 157. He entered the United States on November 1, 1989, JA 83, and now has a girlfriend and home in the United States, JA 84-85.

On February 6, 2004, Petitioner filed a written application for cancellation of removal under NACARA. JA 154-61. He claimed eligibility as a national of Guatemala who first entered the United States on or before October 1, 1990, and who had registered for benefits under the settlement agreement in *American Baptist Churches, et al. v. Thornburgh (ABC),* 760 F. Supp. 796 (N. D. Cal. 1991). JA 154. In his written application, he checked off four boxes in a list of hardships that he or his family would face if he were removed: that he would not be able to obtain employment in Guatemala (#4); that he or his family would experience emotional or psychological impact if he were removed (#7); that current conditions in Guatemala would cause him or his family extreme hardship if he were removed (#8); and that he presently

had no other way to adjust his status to that of a permanent resident in the United States (#9). JA 159. Appended to his application, he wrote:

> I have been here for 14 years, it would cause extreme hardship to me to be return[ed] to Guatemala. I am an American now. There is still extreme political violence. [I am] used to being able to express my opinions, [which] I could not do there. Also, my family in Guatemala is dependent on the money I send to them. Unemployment is very high there. [If] I am returning there would be no one to help and no way to support ourselves. I am also 61 years old, it is too late to start over, and no one would hire me.

JA 161.

At a merits hearing on March 5, 2004, Petitioner testified on his own behalf. JA 82-92. He claimed at his hearing that it would be "hard" for him to return to Guatemala because he would be separated from his girlfriend, Guatemala is poor and there is crime against persons who come back from the United States. JA 85-86.

In support of his claim that he had registered for *ABC* benefits in a timely manner, Petitioner testified that he completed an application for asylum at some point during 1991, JA 87-88, and he seemed to suggest that he also completed documents for *ABC* registration around the same time. Petitioner's testimony, however, was not clear as to when he actually completed the *ABC* registration

documents. When DHS counsel asked when he submitted his application, Petitioner first responded "Back in 1991. I do not have the date or the month, but it was in 1991." JA 87. When counsel asked whether it could have been an asylum application that was filed at that time, he replied, "Yes. It was the first thing that I filed." JA 87. On re-direct, Petitioner stated that he completed the *ABC* registration in "2000 or 2001," JA 88, and that the *ABC* registration "is the one that I don't remember the date that it is." JA 89. He testified that he had been assisted in completing the application by a woman named Mariana Andradea and a man named Mr. Azima, and that they had given him a copy but "it got moved from one room to another and I lost it." JA 91-92.

Petitioner then presented an affidavit and telephonic testimony from Mariana Andradea, the woman who was purported to have helped him file his *ABC* registration documents. In her affidavit, Andradea stated that she ran a bridal shop as well as a wire-transfer and mail services business in Stamford, Connecticut, and that Cesar Aguilar was among her Guatemalan customers. JA 103. She stated that in 1991, she referred some of her customers to Jean Azima, who was in the business of filling out asylum applications. JA 103. Andradea stated that "Mr. Azima prepared [Petitioner's] asylum application." JA 103. She also said that in 1991, "a Washington church was helping people get asylum if you wrote to them," that "Mr. Aguilar told me one of the papers had to be sent to that church," that "I mailed the asylum application and the forms to the Washington church under the heading ABC," and that

"every person who went to Jean Azima came back with envelop[e]s to send to ABC." JA 103.

In her oral testimony, Andradea stated that she knew Petitioner from "1990, 1992, '93. I don't know – I don't recall exactly," JA 94, and that she helped approximately 200 to 250 people apply for asylum and *ABC* benefits at the time she was helping Petitioner. JA 95. She testified that she could not remember more than a few names of people who had successfully received *ABC* benefits because "it's so – it's long time ago, you know, I don't remember." JA 97. When asked whether she mailed out the asylum application and the *ABC* form at the same time, she replied, "Yes." JA 99.

At the conclusion of the hearing, the IJ concluded that Petitioner had not satisfied his burden of proving that he successfully registered for *ABC* benefits before December 31, 1991. JA 42-46. The IJ based his findings on the fact that "[t]he Service records do not reflect or establish that the respondent was an *ABC* class member," JA 45, and furthermore, "the testimony of the respondent and Ms. Andradea were not exactly clear (sic) when the respondent's application was actually filed." JA 45-46.[3]

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[3] The IJ added (erroneously) that the deadline for filing an *ABC* registration form was October 31, 1991, JA 45, and suggested as an additional ground for his decision that even if Petitioner had filed an *ABC* form at the same time as his asylum application (which was dated December 21, 1991), it still would have been untimely, JA 46.

Petitioner appealed the decision to the BIA. In his written brief, the sole claim Petitioner raised was that the IJ was incorrect in his determination that Petitioner had not proven that he had registered for *ABC* benefits prior to December 31, 1991. JA 4-10. On November 17, 2005, the BIA issued a per curiam opinion in which it adopted and affirmed the findings of the IJ.[4] JA 2-3. The BIA agreed that the Petitioner "failed to show by a preponderance of

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[4] The opinion noted the IJ's error in stating that *ABC* registration had to be completed before October 31, 1991, rather than December 31, 1991, but the BIA concluded that the mistake was harmless error, in light of the parties' repeated reference throughout the hearing to December 31, 1991, as the due date. JA 2. Petitioner agrees that the incorrect date referred to in the IJ decision was harmless error. Pet. Br. at 3. In light of the error, if this Court had jurisdiction to review the merits of Petitioner's claim, the Government would not defend the IJ's alternative holding – namely, that even if Petitioner had proved that he filed an *ABC* registration form simultaneously with his asylum application, it still would have been untimely.

The Government notes for the Court's benefit that – despite the Government's position that the Court lacks jurisdiction over this petition for review – the parties have, by mutual consent, sought a number of extensions of the briefing schedule in this Court, so that the Government could determine whether there might be additional public records that could substantiate Petitioner's claim to have registered for *ABC* benefits. Despite diligent efforts to assist Petitioner in satisfying his burden of proof, the Government has been unable to uncover any useful information in this regard. The Government will advise the Court and opposing counsel if it locates anything further.

the evidence that he is a registered *ABC* class member, and therefore he is ineligible for special rule cancellation." JA 3. The BIA found that Petitioner had no documentary evidence showing that he had registered, and agreed with the IJ that the testimony of both Petitioner and his witness was "vague regarding specifically when his ABC registration was filed." JA 2. The BIA also noted inconsistencies which undermined the weight of Petitioner's proffered evidence. For example, the BIA contrasted Petitioner's testimony that Andradea had completed his application, with Andradea's testimony that a third party (Azima) had done so, and she had only mailed them out. JA 2. The BIA also contrasted Petitioner's testimony that he has seen Andradea every week since they met in 1990 or 1991, with Andradea's testimony that she hadn't seen Petitioner in years until he came looking for copies of the papers she filed for him. JA 3.[5]

This timely petition for review followed.

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[5] The BIA appears to have misread the record when it also "note[d]" that "although an attorney assisted in the filings [JA 94], the firm was not contacted by the respondent to see if they had copies of the ABC registration [JA 77-78]." Petitioner and Andradea testified that one Mr. Azima was in the business of preparing asylum applications, and had assisted Petitioner in doing so. JA 91, 98-99, 103-04. The Government has not located any testimony to the effect that Mr. Azima was an attorney. Moreover, the "firm" which Petitioner's counsel had "not contacted" was Morrison and Foerster, JA 77-78, which is listed as counsel of record in the *ABC* case, 760 F. Supp. at 796. There is no indication in the record that the IJ was under the misimpression that Azima was affiliated with the firm.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the determination by the IJ and the BIA that Petitioner failed to satisfy the statutory requirements of having registered for *ABC* benefits necessary for cancellation of removal under NACARA's special rules. Section 309(c)(5)(c)(ii) of IIRIRA specifically precludes judicial review in these circumstances. Moreover, Petitioner's claims are strictly limited to the administrative factual finding that he failed to adduce sufficient proof of timely filing. These purely factual issues do not raise a constitutional claim or question of law that would fall within the savings clause of 8 U.S.C. § 1252(a)(2)(D). Thus, the petition for review should be dismissed for lack of jurisdiction.

Even if this Court did have jurisdiction to review such factual matters, Petitioner failed to establish compelling evidence that he registered for such benefits. He produced no documentary evidence of his registration, and the testimony offered by himself and his witness was vague.

ARGUMENT

I. The Petition for Review Should Be Denied Because This Court Lacks Jurisdiction To Consider Whether Petitioner Registered for *ABC* Benefits, and There Is No Compelling Evidence To Establish Petitioner Is a Registered *ABC* Class Member

A. Governing Law and Standard of Review

Petitioner contends that he has proven by a preponderance of the evidence that he registered for *ABC* benefits prior to December 31, 1991, and therefore, that the determinations of the IJ and BIA to the contrary should be overturned by this Court. Pet. Br. 1, 5-15.

In 1985, the American Baptist Churches filed a class action lawsuit against the United States Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (DOS) claiming the government agencies discriminated against Guatemalan and Salvadoran immigrants in their asylum claims. The parties agreed to settle the matter and on December 19, 1990, United States District Judge Peckham filed a Stipulated Order Approving the Class Action Settlement Agreement. This case became commonly referred to as *ABC,* and individuals that qualify are referred to as *ABC* class members. Under this agreement, certain Guatemalans and Salvadorans are entitled to a stay of deportation and *de*

novo asylum review regardless of a previous denial of asylum. *ABC* class members would not be eligible if they have committed a crime; were a risk to national security; or a threat to public safety. *ABC* class members would need to submit their *ABC* registration form by a specified date, and the registration form contained in the *ABC* Settlement advised registrants to maintain evidence of their registration by keeping a copy of the form they completed and mailed to the INS. *ABC*, 760 F. Supp. at 814.

Certain Guatemalan nationals, like Aguilar, may be eligible for NACARA relief if, *inter alia*, they first entered the United States on or before October 1, 1990, and registered for *ABC* benefits on or before December 31, 1991.[6] *See* IIRIRA § 309(c)(5)(C)(i)(I)(bb) (as amended by NACARA § 203(a)(1)); IIRIRA § 309(f) (as amended by NACARA § 203(b)); *see also* 8 C.F.R. §§ 1240.60, 1240.61(a)(1), 1240.66(a). Specifically, clause (i) of section 309(c)(5)(C) provides that, in specified conditions, a Guatemalan immigrant is eligible for cancellation of removal if, *inter alia*, the alien "was not apprehended after December 19, 1990, at the time of entry," § 309(c)(5)(C)(i)(I), and is "a Guatemalan national who first entered the United States on or before October 1, 1990, and who registered for benefits pursuant to [the settlement agreement in *American Baptist Churches, et al.*

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[6] On NACARA generally, see *Tanov v. INS*, 443 F.3d 195, 197-99 (2d Cir. 2006) (addressing questions of statutory interpretation of NACARA and equal-protection challenge); *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 231 n.4 (2d Cir. 2005).

v. Thornburgh (ABC), 760 F. Supp. 796 (N.D. Cal. 1991)] on or before December 31, 1991," § 309(c)(5)(C)(i)(I)(bb). The burden of proving eligibility for *ABC* relief rests with the applicant. 8 C.F.R. § 1240.64 ("The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief.").

However, once the IJ and BIA have made a determination as to whether or not an alien registered for *ABC* benefits, courts lack jurisdiction to consider the alien's eligibility any further. IIRIRA section 309(c)(5)(C)(ii) states:

> **Limitation on judicial review.** – A determination by the Attorney General as to whether an alien satisfies the requirements of clause (i) is final and *shall not be subject to review by any court*.

(Emphasis added).

B. Discussion

1. This Court Lacks Jurisdiction Over Final Administrative Determinations Regarding NACARA Eligibility

The IJ denied Petitioner's application for cancellation of removal under NACARA's special rules because he found that Petitioner had failed to prove by a preponderance of the evidence that he had successfully registered for *ABC* benefits in a timely manner. JA r-s. The BIA affirmed the IJ's holding and concluded that Petitioner "is ineligible for special rule cancellation." JA 3. The administrative decision as to whether Petitioner satisfied this statutory requirement is final, and is foreclosed from review by this Court by section 309(c)(5)(C)(ii) of IIRIRA.

Although this Court has not had occasion to rule on the applicability of section 309(c)(5)(C)(ii), it has enforced identical language found in other preclusion-of-review provisions in the immigration context. For example, Congress enacted section 440(a) of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), to amend 8 U.S.C. § 1105a(a)(10) (now repealed) to read: "Any final order of deportation against an alien who is deportable by reason of having committed [specified criminal offenses] *shall not be subject to review by any court*." (Emphasis added). In *Hincapie-Nieto v. INS*, 92 F.3d 27, 29 (2d Cir. 1996), this Court held that such language "facially deprives this Court of jurisdiction that would otherwise exist" to consider a covered alien's

petition for review. *See also Henderson v. INS*, 157 F.3d 106, 118 (2d Cir. 1998) (confirming that this language, as well as language contained in IIRIRA, "'repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]'") (quoting *Hincapie-Nieto*, 92 F.3d at 28).[7]

Unlike the judicial review provisions of section 242(a)(2)(b) of the INA, 8 U.S.C. § 1252(a)(2)(b), which preclude judicial review of the discretionary decisions of the Attorney General relating to the granting of relief from removal or deportation, section 309(c)(5)(C)(ii) of IIRIRA precludes judicial review of the Attorney General's determination as to whether an alien satisfies the statutory

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[7] This Court has consistently enforced other statutory provisions that preclude appellate review of administrative immigration decisions. For example, in *De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006), and *Bugayong v. Gonzales*, 442 F.3d 67 (2d Cir. 2006), this Court dismissed petitions for review for lack of jurisdiction, on the ground that the alien was barred from seeking review of a discretionary denial of relief by administrative authorities. In *De La Vega*, the Court held that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B) to review the BIA's denial of an alien's request for cancellation of removal; and in *Bugayong*, this Court held that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(I) to review the IJ's discretionary denial of petitioner's request for a waiver of inadmissibility and for an adjustment of status. Although the present case does not involve a discretionary denial of relief, these cases nevertheless reinforce the conclusion that preclusion-of-review provisions are generally enforced.

requirements for relief under NACARA, whether those requirements are discretionary or non-discretionary in nature. Therefore, because 309(c)(5)(C)(ii) clearly divests this Court of jurisdiction to review the IJ's determination that Petitioner failed to register for *ABC* benefits, the petition for review should be dismissed.

The Court of Appeals for the Sixth Circuit has reached the same conclusion, determining that it lacked jurisdiction to consider whether or not an alien registered for *ABC* benefits. In *Cifuentes Ruiz v. Gonzales*, 455 F.3d 661, 662 (6th Cir. 2006) (per curiam), the court dismissed the petition for review and held that "[d]eterminations by the Attorney General as to whether an alien satisfies the requirements of § 309(c)(5)(C)(i)(I)(bb) are 'final and shall not be subject to review by any court.'"[8]

Although Petitioner does not discuss the jurisdictional issue at all, it should be noted that his challenge is addressed purely to the IJ's factual finding – affirmed by the BIA – that he did not prove that he had filed a timely *ABC* registration. Because Petitioner's claim involves this

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[8] The Eleventh Circuit has dismissed a petition for review based on parallel language barring judicial review of other NACARA claims. *See Ortega v. U.S. Attorney General,* 416 F.3d 1348, 1350 (11th Cir. 2005) (per curiam) (dismissing alien's claim that he had established his physical presence in United States at relevant time, and holding that jurisdiction was barred by NACARA § 202(f), which states that "[a] determination by the Attorney General as to whether the status of any alien should be adjusted under this section is final and shall not be subject to review by any court").

strictly factual matter, it does not raise a "constitutional claim or question of law" that might be reviewable under the savings clause of 8 U.S.C. § 1252(a)(2)(D).[9] As this Court has explained, there is no jurisdiction "to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's fact-finding . . . and raises neither a constitutional claim nor a question of law." *Xiao Ji Chen v. Gonzales*, No. 02-4631, 2006 WL 3690954, at *8 (2d Cir. Dec. 7, 2006) (holding that IJ's determination that alien failed to demonstrate "extraordinary circumstances" justifying late filing of asylum application did not present constitutional claim or question of law that was judicially reviewable).

2. Even If This Court Had Jurisdiction To Review Factual Findings Regarding NACARA Eligibility, the Petition for Review Should Be Denied

Even assuming, *arguendo*, that this Court has jurisdiction to consider whether Petitioner is statutorily eligible for relief under NACARA, Petitioner has failed to

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[9] Section 1252(a)(2)(D) provides:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

show compelling evidence that he registered for *ABC* benefits prior to December 31, 1991.

The Court reviews the agency's factual determinations under the deferential substantial evidence standard. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992). Under this standard administrative findings of fact are "conclusive unless any reasonable adjudicator would be *compelled to conclude to the contrary*." 8 U.S.C. § 1252(b)(4)(B) (emphasis added); *Zhou Yun Zhang v. INS,* 386 F.3d 66, 73 & n.7 (2d Cir. 2004) ("Indeed, we must uphold an administrative finding of fact unless we conclude that a reasonable adjudicator would be compelled to conclude to the contrary."). The Court may not reverse the agency's findings simply because it disagrees with its conclusions or evaluation of the evidence, or because the Court might have considered the case differently.[10]

During the hearing Petitioner introduced no documentary evidence that he had ever filed an ABC registration form, and even his oral testimony was vague

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[10] In *Xiao Ji Chen*, this Court noted that in 1996, Congress replaced the "substantial evidence" rule drawn from general adminstrative law with a new standard set forth in 8 U.S.C. § 1252(b)(4)(B), that "the administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary." (Emphasis added). Despite the fact that this new standard appeared to be even more deferential, the Court was compelled by precedent to continue to characterize its review in terms of "substantial evidence." *Xiao Ji Chen*, 2006 WL 3690954 at *11 n.13.

as to when he claimed to have filed that form. Although he proffered a written asylum application dated December 20, 1991, JA 397-404, he failed to present any documentary evidence that this form was in fact mailed before December 31, 1991, much less that an *ABC* form had been submitted simultaneously. Petitioner's own testimony, and that of Mariana Andradea, was likewise inconclusive as to whether he had registered for *ABC* benefits prior to December 31, 1991. Petitioner admitted that he did not remember when he registered, JA 89, and he gave a variety of dates for when he claimed to have sent the form. Ms. Andradea could only testify that she helped the Petitioner apply for asylum and *ABC* registration in "'91, '92, something like that." JA 96. Taken together, this equivocal evidence is not sufficient to *compel* any reasonable adjudicator to conclude that Petitioner had in fact registered for *ABC* benefits by December 31, 1991.

The final piece of evidence that Petitioner relies upon in order to prove that he registered in a timely manner is a response from the Arlington Asylum Office that states that it cannot determine whether Petitioner registered or not because "there are others on the database with similar names." JA 105. Petitioner contends that this statement means that there is at least one Cesar Aguilar with a date of birth of September 3, 1942, who is registered in the system, Pet. Br. 6, but that is not what the Asylum Office said. The response indicated that it had received a *request* that listed an alien's name, date of birth, and A-Number, but its reply indicated only a similarity of *names* given that limited reply, a reasonable adjudicator is in no way compelled to reach the conclusion that there is in fact a

Cesar Aguilar with that date of birth who registered on time, or that the Cesar Aguilar in the database is necessarily the Petitioner.[11]

It is unfortunate that the records contained by the Arlington Asylum Office could not give a more definitive response with regard to whether or not the Petitioner had registered for *ABC* benefits,[12] but it is Petitioner's obligation to maintain his own records regarding his registration, and to demonstrate his eligibility for *ABC* benefits. Therefore, his failure to provide conclusive evidence that he registered by December 31, 1991, leads to the conclusion that the decisions by the IJ and the BIA that he was not statutorily eligible for special rule cancellation were reasonable.

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[11] Although the record does not contain any information about the composition of the *ABC* registration database for Guatemalans, the Government can represent, based on discussions with the Arlington Asylum Office, that registrants' dates of birth are *not* contained in the database.

[12] The original *ABC* registration form adopted as part of the Settlement Agreement asked only for an applicant's name, A-Number (if one existed), citizenship, and current street address. *ABC*, 760 F. Supp. at 814. It did not ask for an applicant's date of birth or any other unique identifying information.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction, or alternatively denied on the merits.

Dated: January 3, 2007

Respectfully submitted,

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ADDENDUM

Section 309(c)(5)(C)(i) - (ii) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-3546 (Sept. 30, 1996):

(C) Special rule for certain aliens granted temporary protection from deportation and for battered spouses and children.–

(i) In general.– For purposes of calculating the period of continuous physical presence under section 244(a) of the Immigration and Nationality Act (as in effect before the title III-A effective date) or section 240A of such Act [section 1229b of this title] (as in effect after the title III-A effective date), subparagraph (A) of this paragraph and paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act shall not apply in the case of an alien, regardless of whether the alien is in exclusion or deportation proceedings before the title III-A effective date, who has not been convicted at any time of an aggravated felony (as defined in section 101(a) of the Immigration and Nationality Act and–

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

(aa) a Salvadoran national who first entered the United States on or before September 19, 1990, and who registered for benefits pursuant to the settlement agreement in American Baptist Churches, et al. v. Thornburgh (ABC), 760 F.Supp. 796 (N.D.Cal.1991) on

or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or

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

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

(III) is the spouse or child (as defined in section 101(b)(1) of the Immigration and Nationality Act [section 1101(b)(1) of this title]) of an individual, at the time a decision is rendered to suspend the deportation, or cancel the removal, of such individual, if the individual has been determined to be described in this clause (excluding this subclause and subclause (IV));

(IV) is the unmarried son or daughter of an alien parent, at the time a decision is rendered to suspend the deportation, or cancel the removal, of such alien parent, if –

(aa) the alien parent has been determined to be described in this clause (excluding this subclause and subclause (III)); and

(bb) in the case of a son or daughter who is 21 years of age or older at the time such decision is rendered, the son or daughter entered the United States on or before October 1, 1990;

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

(VI) is an alien who was issued an order to show cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act [Oct. 28, 2000]); or

(VII) (aa) was the spouse or child of an alien described in subclause (I), (II), or (V) – **(AA)** at the time at which a decision is rendered to suspend the deportation or cancel the removal of the alien;

(BB) at the time at which the alien filed an application for suspension of deportation or cancellation of removal; or

(CC) at the time at which the alien registered for benefits under the settlement agreement in American Baptist Churches, et. al. v. Thornburgh (ABC), applied for temporary protected status, or applied for asylum; and

(bb) the spouse, child, or child of the spouse has been battered or subjected to extreme cruelty by the alien described in subclause (I), (II), or (V).

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

8 U.S.C. § 1105a. Judicial review of orders of deportation and exclusion, and special exclusion (1997) (repealed)

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that–

. . . .

(10) Final orders of deportation not reviewable

any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 1251(a)(2) (A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses, without regard to the date of their commission, otherwise are covered by section 1227(a)(2)(A)(i) of this title, shall not be subject to review by any court.

8 U.S.C.A. § 1252. Judicial review of order of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review–

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

. . . .

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

. . . .

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

. . . .

(4) Scope and standard for review

Except as provided in paragraph (5)(B)–

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

. . . .

8 C.F.R. § 1240.60 Definitions.

As used in this subpart the term:

ABC means *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

ABC class member refers to:

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

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

Asylum application pending adjudication by the Service means any asylum application for which the Service has not served the applicant with a final decision or which has not been referred to the Immigration Court.

Filed an application for asylum means the proper filing of a principal asylum application or filing a derivative asylum application by being properly included as a dependent spouse or child in an asylum application pursuant to the regulations and procedures in effect at the time of filing the principal or derivative asylum application.

IIRIRA means the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub.L. 104-208 (110 Stat. 3009-625).

NACARA means the Nicaraguan Adjustment and Central

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

Registered ABC class member means an ABC class member who:

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

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

8 C.F.R § 1240.61 Applicability.

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

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

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service.

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

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

(5) An alien who is:

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

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

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

8 C.F.R. § 1240.64 Eligibility--general.

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

8 C.F.R § 1240.66 Eligibility for special rule cancellation of removal.

(a) Applicable statutory provisions. To establish eligibility for special rule cancellation of removal, the applicant must show he or she is eligible under section 309(f)(1) of IIRIRA, as amended by section 203 of NACARA. The applicant must be described in § 1240.61, must be inadmissible or deportable, must not be subject to any bars to eligibility in sections 1240(b)(7), 1240A(c), or 1240B(d) of the Act, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in section 241(b)(3)(B)(I) of the Act (relating to persecution of others).

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

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

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

(3) The alien has been a person of good moral character during the required period of continuous physical

presence; and

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

(c) Aliens inadmissible or deportable on criminal or certain other grounds. To establish eligibility for special rule cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by section 203 of NACARA, the alien must be described in § 1240.61 and establish that:

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

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

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

(4) The alien’s removal from the United States would result in exceptional and extremely unusual hardship to the alien or to the alien's spouse, parent, or child, who is a

United States citizen or an alien lawfully admitted for permanent residence.