NLWJC - Kagan

DPC - Box 032 - Folder 009

Immigration - Deportation Rules [2]

Immigration – Deportation issues

Suspension of Deportation for Central Americans
July 11, 1997

Questions and Answers

Q. What did the Attorney General announce yesterday regarding Central American migrants?

A. The Attorney General announced the Administration's three-part course of action relating to a humanitarian form of relief called "suspension of deportation." The 1996 Immigration Act severely restricts eligibility for suspension of deportation-- traditionally available to deportable aliens who have resided in the United States for 7 years, could show good moral character, and that deportation would cause extreme hardship.

These actions are aimed primarily at fulfilling the President's promise to ease the harsh effects of the new law on Central Americans-- many of whom came to the U.S. in the 1980's fleeing civil wars and political persecution. The three-part course of action is as follows:

1. The Attorney General has decided to vacate and take under review a controversial administrative decision, Matter of N-J-B, that made it much more difficult for individuals to qualify for suspension. While she reviews the decision, the Attorney General has ordered the INS not to deport anyone who would have been eligible for suspension but for that decision.

2. Next week, the Administration will send a legislative proposal to Congress that will provide for a more fair and humane transition to the new, more restrictive rules governing suspension. Under the legislation, applicants for suspension who were in the administrative pipeline before April 1, 1997 will be required to meet the standards that applied prior to the effective date of the new law. Suspension applications filed after April 1 of this year will continue to be subject to the tighter criteria.

3. If Congress is unwilling to pass the proposed legislation, the Administration is prepared to consider other available administrative options to protect certain Salvadorans, Guatemalans and Nicaraguans who would have qualified for suspension but for the new rules.

Q. Why is the Administration taking this course of action?

A. As the President learned during his recent trip to Central America, peace and democracy are still fragile in that region. The sudden return of tens of thousands of Central Americans, who have been living in the U.S. for many years, could jeopardize these important accomplishments.

The President believes that it is vital to the national security to assist in any way he can in bringing stability to that part of the world.

The Administration also recognizes that many of these individuals, after years of being authorized to remain in the United States, have developed important ties to the country and should be treated fairly in light of the recently-passed legislation.

Q. Isn't this basically a huge new amnesty program?

A. Not at all. The Administration's approach would only ensure that those people with immigration cases already in the pipeline prior to April 1 are able to benefit from the old suspension rules in effect prior to that date. Those who apply for suspension will still have to meet several legal requirements and appear before an immigration judge who has the discretion to grant or deny the application. Not all individuals who apply for suspension will qualify.

Q. How many people are affected by these decisions?

A. The Immigration and Naturalization Service (INS) estimates that as many as 280,000 people might be eligible to appear before an immigration judge to request suspension. Of this number, INS estimates that about 160,00 might actually decide to apply for suspension. However, because suspension is decided on a case-by-case basis, it is extremely difficult to estimate how many people will be given this remedy under our proposal.

Q. Isn't the government being sued right now on some of these issues (the Tefel case)? What will this mean for cases currently in litigation?

A. This question would be best answered by the Attorney General. It is our understanding that the Department of Justice is currently reviewing its posture in these cases in light of this announcement. The government's position will be made clear in the very near future.

Q. What has been the response by the Hill?

We have just begun to notify members of Congress of our proposal. Over the past few months, we have received requests from over 125 Members and Senators asking us to look at what we could do administratively or legislatively about this problem. We will continue to work with them for a just and proper resolution to this matter.

Immigration — Deportation issue

THE WHITE HOUSE

WASHINGTON

July 3, 1997

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER
MARIA ECHAVESTE
JOHN HILLEY
BRUCE REED
CHARLES RUFF

SUBJECT: Central American Migrants

Purpose

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

Background

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

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

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

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

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

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

Forms of Relief

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

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

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

Proposed Course of Action

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

1. The Attorney General would announce her decision on *NJB*.

2. We would present our legislative proposal with bipartisan congressional support and privately refer to the possibility of DED. While key Members like Representative Lamar Smith will be hostile to legislation, they might find it less objectionable than DED. We would not propose a trade-off against legal immigration numbers which Senators Abraham and Kennedy (our strongest allies on the Hill on the issue) fear will reopen the legal immigration debate.

3. The Administration would announce temporary steps to ensure that any *ABC* or *NRP* member who would have qualified for suspension under the old rules would not be deported.

4. In the absence of legislative action by the start of the summer recess, we will come back to you with a recommendation that you grant DED.

RECOMMENDATION

That you approve the proposed course of action.

APPROVE _____ DISAPPROVE _____

Fils: Immigration - deportation issue

Bruce -

I took the liberty of opening this memo for you. I believe it went into the President on Friday.

Elena

cc: Todd, Leanne

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER
MARIA ECHAVESTE
JOHN HILLEY
BRUCE REED
CHUCK RUFF

EK -
Thanks, it looks good. Todd sent it around for comment, due today. -BR

SUBJECT: Central American Migrants

Purpose

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

Background

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

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

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ABC Guatemalans and Salvadorans: As a result of a 1990 court settlement (known as *ABC*), Salvadoran and Guatemalan asylum-seekers who came to the U.S. in the 1980s were protected from

deportation until their asylum claims could be decided under special adjudication procedures. The *ABC* class is comprised of roughly 190,000 Salvadorans and 50,000 Guatemalans.

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

Forms of Relief

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

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

Therefore, we believe we should pursue legislative action. Our proposal would restore *ABC* and *NRP* members to the status quo ante - exempting them from the cap and from the new, more stringent suspension standards. Because prospects for success are uncertain, we would hold in reserve the possibility of DED.

Proposed Course of Action

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

1. The Attorney General would announce her decision on *NJB.*

2. We would present our legislative proposal with bipartisan congressional support and privately refer to the possibility of

DED as a form of leverage. We would not agree to any trade-off against legal immigration numbers which Senators Abraham and Kennedy (our strongest allies on the Hill on this issue) have warned would reopen the legal immigration debate.

3. The Administration would announce temporary steps to ensure that any *ABC* or *NRP* member who would have qualified for suspension under the old rules would not be deported.

4. In the absence of prompt legislative action, we will come back to you with a recommendation that you grant DED.

RECOMMENDATION

That you approve the proposed course of action.

APPROVE _____ DISAPPROVE _____

File: Immigratic-deportatic issue

Bruce—
Lots of legal gobbledygook; don't spend too much time on it. Instead, read the memo signed by you! (and others)
Elena

Draft 7/2/97, 10:40 AM

Strategy regarding suspension

1. The "Stop-Time" Rule

AG issues order sua sponte to take referral in *Matter of NJB*, vacating BIA decision: 7/3/97 or week of 7/7/97 (OLA and INS Congressional Relations to advise on timing)

AG decision is issued several weeks or months later

INS issues guidance at time of order taking referral, protecting against deportation (pending the AG's decision) persons who might be able to claim suspension if the BIA ruling is reversed. Such persons would have to request of INS counsel the filing of a joint motion to reopen to preserve their protection. INS General Counsel issues guidance stating that INS will join motions to reopen and support stay of removal to permit persons otherwise prima facie eligible for suspension but for the stop-time rule to place the issue before the IJ or BIA. If AG sustains *NJB*, INS will seek to have motions dismissed. If AG reverses, IJs should go ahead and reach the merits of the suspension claims. At that point, INS will join motions filed by others prima facie eligible to claim benefits of AG decision for additional *six-month period* after AG ruling in *NJB* (and not longer).

2. The 4000 Cap

Congressional approach:

Overarching objective: legislation essentially as in INS draft:

-- No cap applies to pre-April 1 cases [cap applies to cases initiated thereafter; a later regulation will establish the mechanism, although cap is unlikely to be reached]
-- Repeal 309(c)(5) [if the legislation passes soon enough, it would moot AG merits decision in *NJB*]
-- Apply pre-IIRIRA substantive suspension rules, without cap, to ABC class, whenever put in proceedings

Discuss first with congressional allies, indicating that Administration is taking action as they advocated on *NJB* (i.e., AG's sua sponte referral), but cannot fix cap administratively and so are looking to DED (as described below) as best approximation that meets the

President's foreign policy objectives, though it has many disadvantages [limbo status for DED group, with no fixed end date and no avenue for adjusting to lawful permanent resident status; also a wider group of beneficiaries than would be covered if all designated persons could be judged by pre-IIRIRA suspension rules]; therefore we greatly prefer legislative fix

Then discuss the issue with Chairman Smith, stating our desire to work with him for a legislative fix but indicating President's intention to proceed with DED as outlined if no prompt solution; willing to work with him on shape of fix, but not willing to accept trade-off against legal immigration numbers -- perhaps try to tie in with Kyl/Abraham/Smith meeting week of July 7

"Back pocket" strategy:

Indicate informally that we conclude that cap must apply as cap on suspensions and cancellations, not just adjustments -- but President is prepared to order "deferred enforced departure" (DED) at the end of the deportation process for people who have been in the Nicaraguan Review Program (NRP) or the ABC class but don't get suspension (or other relief) IF:

> they have a prima facie case for relief under pre-IIRIRA rules (i.e. 7 years physical presence, no crime or other act that vitiates good moral character) and have not been denied suspension by an IJ applying the pre-IIRIRA rules [this means that a pre-April 1 ABC applicant will not get DED if denied by IJ for failure to show "extreme hardship"; whereas a post-April 1 ABC applicant denied by IJ will get DED, if 7 years and no crime -- because IJ will not have applied the pre-IIRIRA extreme hardship standard]

Rationale: these are the key groups the President wishes to address on basis of foreign policy reasons that arose during Central America trip; also these are the groups that were the subject of special legal measures during the civil wars in Central America (i.e. NRP for Nicaraguans, ABC settlement for Salvadorans and Guatemalans)

Prima facie standard used in many instances because we cannot get an IJ decision under pre-IIRIRA (7 year) rules for the post-April 1 cases, and we cannot practicably reproduce in INS a decision-making capacity to apply such rules for purposes of DED

Need not issue Executive Order decreeing DED, defining exact classes of beneficiaries, and ordering work authorization until mid-fall, to allow time for primary strategy on legislation to proceed. (Beneficiaries are protected from deportation until then by other INS guidance.)

Regulations:

Proceed now with the conditional-grant-only regulation, stating nothing for now about lottery or other ultimate mechanism for assigning the 4000 spaces (but we probably must indicate informally during Hill discussions that that is the likely direction if no legislative fix -- at the very least, legislative consultations must make clear that the executive branch reads the cap as a cap on suspensions/cancellations, not just on adjustments).

Separate reg on 212(a)(9) (to be issued in proposed form in July) and related guidance specify that "unlawful presence" time (toward the 3- and 10-year bars) does not run for persons who have conditional grants, DED, or pending asylum applications.

Timetable

July 3-11	Issue order taking AG referral of *NJB* and vacating BIA decision; motions filed in pending litigation asking courts to hold actions in abeyance pending AG ruling; INS guidance on motions to reopen is issued.
July 7	*Barahona* appeal brief filed, concentrating on jurisdictional issues
mid-July	OLC finishes work on statutory and constitutional limits on use of DED in this setting Interim rule promulgated allowing IJs to issue conditional grants of suspension pending final DOJ decision on how to implement the 4000 cap (thus ending current practice of reserving decision, which is under challenge in *Barahona* case)
July	Congressional consultations begin to press for preferred legislative fix, perhaps launched by Presidential meeting with key congressional players
late July	NPRM and related guidance clarifying application of 212(a)(9) to conditional grantees, DED, etc.
September	If insufficient movement toward legislative fix, prepare regulation (to be issued as NPRM in October) implementing cap by providing mechanism to select ultimate suspension beneficiaries from among the pool of conditional grantees; also prepare Executive Order or other Presidential document providing for DED
early Oct.	Issue both NPRM and Executive Order
December	Comment period closes on proposed reg
January	Issue final reg for selection mechanism; do first selection under reg and begin applying Exec Order for DED (resulting, as appropriate, in suspension grants with immediate adjustment to LPR status, deportation orders, or DED)

[Oct - Jan steps are displaced or modified if legislation passes that meets the major objectives]

Draft 7/2/97, 10:45 AM

Steps to Assure Against Deportation Pending Legislation or DED

Upon the Attorney General's taking of referral in *NJB*, INS field guidance will protect against deportation (pending the AG's final ruling) persons who might have been able to claim suspension but for the stop-time rule. Not protected will be persons who lack good moral character (primarily because they were convicted of a crime) or persons already denied suspension on a ground other than the stop-time rule. If the AG reverses the BIA decision, the affected persons will then have an opportunity to make their suspension claims in reopened proceedings. INS attorneys will join in motions to reopen for these purposes, from the time the AG takes referral through a period six months past her ruling on the merits; a joint motion overcomes the normal time limit (90 days from a final order) that applies to motions to reopen. These steps will protect anyone in proceedings before April 1, 1997, the effective date of the new rules under the 1996 immigration reform legislation. All Nicaraguans who were in the Nicaraguan Review Program, plus approximately 40,000 of the *ABC* class members (Salvadorans and Guatemalans) will be protected in this fashion.

Other pre-April 1 cases might not be blocked by the stop-time rule, but could conceivably be affected by the 4000 cap. The Executive Office for Immigration Review is not currently issuing deportation orders, however, for persons who would have received suspension under the old rules, pending final decisions by the Department on how to apply the cap. Those cases are currently being taken under advisement by the immigration judges, but a regulation will be issued in mid-July permitting conditional grants of suspension in these circumstances, with the conditional status to be resolved under procedures to be defined in a later regulation. All persons with conditional grants will have work authorization and protection against deportation. Their conditional status will last until the later reg issues; that issuance is planned for October, if not overtaken by legislative developments.

Most of the remaining *ABC* class members (those who were not in proceedings before April 1, 1997) are currently having their asylum claims reviewed by INS. They all have work authorization and protection against deportation as pending asylum applicants. As the INS asylum office finishes cases, however, those not granted asylum are placed in removal proceedings. There they can renew their asylum claims and pursue cancellation of deportation, thereby continuing the previous benefits until the order of the IJ. Very few, if any, of these post-April 1 *ABC* cases are expected to receive IJ orders before the winter -- by which time we will either have legislation or will have issued the Executive Order providing for DED. If any do reach that stage, they can preserve their protection against deportation and their right to work authorization by appealing to the BIA.

INS guidance and eventually regulations will reiterate that persons with a conditional grant of suspension or cancellation, DED, or a pending asylum application are not running "unlawful presence" time for purposes of the 3- or 10-year bars that apply under INA section 212(a)(9).

Draft 7/2/97, 10:30 AM

Description of Proposed Deferred Enforced Departure (DED)

[**Note:** The Office of Legal Counsel (OLC) has not completed its analysis of the statutory and constitutional limitations on DED use in this context. The outline below may need to be modified in light of OLC's final opinion. The description here should be sufficient for purposes of initial congressional consultations, serving as a general outline of what the President contemplates accomplishing, via Executive Order in approximately October, if a legislative fix, our preferred solution, has not been enacted.]

Deferred enforced departure (DED) is based on Presidential authority over foreign affairs and represents, in essence, a use of the executive branch's enforcement discretion in the immigration field in service of foreign policy objectives. It has previously been used to provide relief to Chinese students in 1990 in the wake of the Tiananmen Square incident and in 1992 and 1993 for Salvadorans (upon the expiration of a specific statutory provision granting them Temporary Protected Status (TPS)). The range of application must be linked to the foreign affairs objectives, and DED should be issued in time-limited increments, subject to renewal.

DED here is based on the President's foreign policy objectives with regard to Central America, reinforced during the May 1997 trip to the region, including a desire not to saddle key friendly countries with large numbers of returning residents nor to bring about the sudden end of large flows of remittances, at a time of economic recovery. It also is based upon judgments about the appropriate way to phase out the special legal measures undertaken in 1987-91 for certain nationals of Nicaragua, El Salvador, and Guatemala -- measures that themselves related to U.S. foreign policy objectives toward those countries while they were mired in civil war. At the same time, the extent of DED protection here is somewhat limited by counterbalancing concerns to advance the enforcement of U.S. immigration law.

Those special legal measures were: (1) The Nicaraguan Review Program, providing for special DOJ review of orders denying asylum to Nicaraguans. It was instituted in 1987 and was formally ended in June 1995. (2) The settlement of the *American Baptist Churches (ABC)* class action, which provided special measures for INS consideration or reconsideration of asylum applications filed by Salvadorans and Guatemalans present in the United States at specified dates in 1990. The settlement was entered into in 1991 and INS expects to be conducting the special asylum reviews on through 1999. **[check]** If not granted asylum, the individuals then ordinarily go on into immigration court where they can pursue their asylum claims and other forms of relief.

DED will be applied to persons at the end of the deportation process, because those who obtain relief during that process in some other fashion of course will not need protection. DED

will be given to nationals of El Salvador or Guatemala who were *ABC* class members or nationals of Nicaragua who were in the Nicaraguan Review Program if they are denied suspension because of the application of the 4000 annual cap or other new and tighter suspension rules adopted in the 1996 immigration reform legislation. Denial of suspension for another reason, such as commission of a crime that blocks a finding of good moral character or failure to meet the earlier law's "extreme hardship" requirement, will result in the person's ineligibility for DED.

The Executive Order providing for DED will recite the legal basis for the order, including reference to the foreign policy objectives. It will spell out the criteria for INS to provide DED and specify the time limit of the grant.. It will also provide that work authorization be issued to the persons given DED.

DRAFT

Proposed Amendments Regarding Suspension of Deportation

Background

This legislation provides a better transition to the new rules applicable to relief formerly known as suspension of deportation. In particular, it avoids any unfairness that could come from applying new rules to pending cases, and it recognizes the continuing effects of special legal measures taken over the last decade with regard to Central American countries then mired in civil war. On the other hand, it does not provide for an amnesty — instead it merely provides that applicant's for suspension of deportation who were in the administrative pipeline, as herein described, must continue to meet the standards that applied before the 1996 immigration reform law took effect.

Under previous law (former Immigration and Nationality Act [INA] § 244), suspension could be granted, in the discretion of the immigration judge, to an alien who has been present in the United States for seven years, shows good moral character, and demonstrates that deportation would cause "extreme hardship" to the alien or to a spouse, parent, or child who is a lawful permanent resident or a U.S. citizen. Under amendments adopted by the Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA], the substantive standards are considerably tightened for this relief, now called "cancellation of removal," INA § 240A(b)(1). The alien must show ten years of continuous physical presence and good moral character, and must demonstrate that removal would cause "exceptional and extremely unusual hardship" to a lawfully resident or U.S. citizen spouse, parent, or child. Hardship to the alien alone is no longer relevant. Those tighter standards apply, however, only to removal cases initiated on or after the effective date of Title III-A of IIRIRA, April 1, 1997. Cases initiated earlier may still be decided under the previous seven-year suspension standard.

IIRIRA also imposed two other restrictions on this general form of relief, however, and both have been applied to pending suspension cases as well:

(1) "Stop-time" rule. Under pre-IIRIRA suspension rules, an individual could continue accruing time toward the needed seven years after deportation proceedings had commenced. INA § 240A(d), added by IIRIRA, adopts a new "stop-time" rule, which requires that the requisite period be achieved before the charging document is served. The Board of Immigration Appeals construed IIRIRA § 309(c)(5) as making this rule applicable as well to all cases where the grant of suspension was not final on the date of enactment. *Matter of NJB*, Int. Dec. # 3309 (BIA February 20, 1997).

(2) Annual cap. INA § 240A(e) and IIRIRA § 309(c)(7) impose an annual cap of 4000 on the total of suspensions and adjustments plus cancellations and adjustments in any given fiscal year, beginning with FY 97, which began on October 1, 1996, one day after IIRIRA's enactment. This immediate application to cases in the pipeline, which are still adjudicated

under the previous suspension rules in most respects, has caused disruption in normal case processing in the immigration courts because it suddenly imposed a quantitative limit on what had previously been a purely qualitative determination, inescapably administered in decentralized fashion by over 200 immigration judges. The problem has been particularly acute because the imposition of the cap coincided with a higher volume of suspension applications, owing, *inter alia,* to developments in long-standing class-action litigation, especially *American Baptist Churches v. Thornburgh,* [*ABC*] (settlement agreement reached in 1991) and to the phasing out of the Nicaraguan Review Program initiated by the Reagan Administration.

General description of the amendments

The proposed amendments are meant to eliminate any arguably retroactive application of the new rules governing suspension-type relief. Cases in the pipeline would continue to be decided under the old suspension rules in all respects (this includes all cases previously covered by the Nicaraguan Review Program), while new, post-April 1, 1997, cases would be governed by the new standards adopted in IIRIRA § 240A(b), including the stop-time rule and the annual cap. Also, in recognition of the special circumstance of the persons covered by the Bush Administration's settlement of the *ABC* litigation in 1991, the proposed amendments apply to such persons the pre-April 1 rules. These are, in effect, "pipeline" cases, and the amendment specifically mandates that their relief applications be judged under the earlier substantive standards. None of the amendments, however, dictates that any of the affected persons shall be granted relief. Every application for suspension or cancellation must still be considered, case-by-case, by an immigration judge.

Section-by-section analysis

Section 1(a). This subsection amends INA § 240A(e) so that the annual cap set forth there applies only to cases commenced after April 1, 1997 (where the applicable relief is cancellation of removal, with its 10 year and higher hardship requirements, rather than suspension of deportation). The amendment exempts from the cap pre-April 1 cases (suspension cases) as well as battered spouses and children who receive cancellation under the special rules of 240A(b)(2).

Section 1(b). The repeal of IIRIRA § 309(c)(7) simply makes that section consistent with section 1(a)'s removal of the cap from pre-April 1 cases (because a cap that covers suspension cases was set forth both there and in INA § 240A(e)). The repeal of IIRIRA § 309(c)(5) makes it clear that the stop-time rule applies only to "cancellation of removal" relief (initiated on or after April 1, 1997), and does not apply to suspension cases already in the pipeline on IIRIRA's effective date.

Section 1(c). This subsection adds a new special rule for *ABC* class members. *ABC* class members who were not in proceedings as of April 1, 1997, will still be subject to most of the *procedural* changes adopted by IIRIRA. For example, removal proceedings would be commenced by filing a notice to appear in accordance with INA § 239. If *ABC* class members wish to seek suspension-type relief, however, they will file for cancellation under the new 240A(b)(3) added by paragraph (c)(6) of these amendments. Although this is "cancellation of removal," it is governed by the same substantive standards (seven years, extreme hardship) applicable to the former suspension relief under former INA § 244. (Class members who were formerly placed in proceedings before April 1, 1997, do not need a special rule; their cases will already be governed by the earlier suspension rules in all respects under the amendments in sections 1(a) and (b).)

Section 1(d). This subsection sets forth the effective date of the preceding subsections, applying them as of September 30, 1996, as if included in the original IIRIRA.

Section 2. EOIR regulations (8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(1)) and INA § 240(c)(6), added by IIRIRA, require that motions to reopen be filed within 90 days after a removal order becomes final, with highly limited exceptions. Some of the intended beneficiaries of section 1 will have passed this time limit by the time these amendments are enacted. This section specifically authorizes a 180 day period during which such persons may file one motion to reopen for these purposes, notwithstanding the normal statutory and regulatory limits on the timing or number of motions to reopen.

Proposed Legislation

DRAFT

SEC. 1.

(a) Section 240A, subsection (e), of the Immigration and Nationality Act is amended—

(1) in the first sentence by striking "this section" and inserting in lieu thereof "section 240A(b)(1)";

(2) by striking ", nor suspend the deportation and adjust the status under section 244(a) (as in effect before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996),";

(3) by striking the last sentence in the subsection and inserting in lieu thereof "The previous sentence shall apply only to removal cases commenced on or after April 1, 1997.".

(b) Section 309, subsection (c), of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (P.L. 104-208, Division C, 110 Stat. 3009) is amended by striking paragraphs (5) and (7).

(c) Section 240A of the Immigration and Nationality Act is amended—

(1) in subsection (b) , paragraph (3), by striking "(1) or (2)" in the first and third sentences of that paragraph and inserting in lieu thereof "(1), (2) or (3)";

(2) in subsection (b), paragraph (3), by striking the second sentence and inserting in lieu thereof "The number of adjustments of aliens granted cancellation under paragraph (1) shall not exceed 4,000 for any fiscal year.";

(3) in subsection (b), by redesignating paragraph (3) as paragraph (4);

(4) in subsection (d), paragraph (1), by striking "this section" and inserting in lieu thereof "subsections (a), (b)(1), and (b)(2).";

(5) in subsection (d), paragraph (2), by striking "(b)(1) and (b)(2)" and inserting in lieu thereof "(b)(1), (b)(2), and (b)(3)";

(6) in subsection (b) by adding after paragraph (2) the following new paragraph—

"(3) SPECIAL RULE FOR *ABC* CLASS MEMBERS.— The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(A) the alien is a member of the class of persons designated as a plaintiff and covered by the settlement agreement in *American Baptist Churches, Inc. v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991), at the time the application is filed and when it is adjudicated;

(B) the alien has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application;

(C) the alien has been a person of good moral character during such period;

(D) the removal would result in extreme hardship to the alien, or to the spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; and

(E) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a), and has not been convicted of an aggravated felony.".

(d) The amendments made by this section shall be effective September 30, 1996, as if included in Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, Division C, 110 Stat. 3009).

SEC. 2.

Any alien who was in deportation proceedings prior to April 1, 1997, who was deemed ineligible for suspension of deportation solely on the basis of Section 309(c)(5) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, Division C, 110 Stat. 3009), or who claims eligibility for suspension of deportation as a result of the amendments made by section 1, may, notwithstanding any other limitations on motions to reopen imposed by the Immigration and Nationality Act or by regulation, file one motion to reopen for suspension of deportation. The Attorney General shall designate a specific time period in which all such motions to reopen must be filed. The period must begin no later than 120 days after the date of enactment of this Act and shall extend for a period of 180 days.

Immigration -
Deportation Issue

HOGAN & HARTSON L.L.P.

MEMORANDUM

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

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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

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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

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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 reinitiate the proceedings, again under INA Title II, Chapter 4. Determinations in the terminated proceeding are not binding in the reinitiated 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

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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/

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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 then [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

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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

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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

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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

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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

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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 reinitiate 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,

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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

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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

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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.

Immigration - Deportation

Memorandum

Subject:	Date:
Request for OLC views: Interpretation of INA sections 240A(b)(3) and 240A(c) and IIRIRA section 309(c)(7)	June 11, 1997

To: Dawn Johnsen
Acting Assistant Attorney General
Office of Legal Counsel

From: David A. Martin
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We request advice from the Office of Legal Counsel on the questions outlined below. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996), imposed an annual cap of 4,000 on the traditional version of relief from deportation known as suspension and adjustment. The cap also applies to the analogue form of relief, cancellation and adjustment, that is available to aliens in removal cases initiated after April 1, 1997, the effective date of most of the reforms made by title III-A of IIRIRA. Two basic interpretations of the cap are possible: (1) the cap stands as a ceiling on the initial grant of relief itself; or (2) the cap applies only to adjustments, meaning that the initial grant of suspension or cancellation would be without numerical limitation (as many as 10,000-15,000 could be expected in any given year in FY 97-99). An earlier options paper presented by INS and EOIR to the Attorney General, which is attached,[1] presented these options along with discussion of the policy considerations. That paper took the position that interpretation (2) — the cap applies only to adjustments — "goes to the very edge of the legal authority."[2] It did not say that such a reading was impossible. Other policy considerations, however, including but not limited to extra-record information that the principal drafters in the conference committee adhered to interpretation (1), combined with concern that the Department's adoption of interpretation (2) might lead to further legislation imposing even tighter limits on relief, led the Department to base its policy to date on interpretation (1). INS and EOIR actions since

[1] Options on Suspension Issues, Feb. 27, 1997.
[2] Options on Suspension Issues at p. 9 (Note: interpretation (2) herein is referred to as Option (2) in the Options on Suspension Issues paper).

February, therefore, have been built on the understanding that the law should be read as a cap on suspension itself, not simply on adjustment. The Department has argued for that reading in pending litigation.[3]

In the aftermath of the President's trip to Central America in early May, the full range of administrative and legislative options is receiving another look, hence this request. The precise questions posed are: (A) Which is the better interpretation of the IIRIRA provisions imposing a cap of 4,000 on suspension and cancellation relief, and; (B) Is interpretation (2) —that the cap applies only to the act of adjusting the status of persons granted suspension or cancellation— a legally permissible interpretation? The remainder of this memorandum discusses the background and legislative history of the provisions at issue.

Background

The IIRIRA made significant changes to the suspension of deportation provisions found at Immigration and Nationality Act [INA] section 244(a), as in effect prior to April 1, 1997. Although repealed by IIRIRA, section 244(a) remains in effect for all aliens placed in deportation proceedings before April 1, 1997.[4] In lieu of these former suspension provisions, IIRIRA created a new form of relief for aliens facing removal from the United States, cancellation of removal, which is now found at INA section 240A(b). In considering the old suspension provisions, and the new cancellation provisions, Congress imposed a numerical cap intended to limit, in some fashion, the application of both old and new provisions.

Discussion

Three separate provisions must be considered in evaluating the extent of IIRIRA's numerical limitations on the Attorney General's exercise of her authority under section 244[5] and 240A(b) of the INA. The first provision is found at INA section 240A(b)(3), the second at 240A(e), and the third at IIRIRA section 309(c)(7) (a free-standing provision that is not codified in the INA). These provisions may be interpreted in two ways: interpretation (1)—Congress intended to place a numerical limit the Attorney General's grants of suspension and adjustment

[3] Barahona-Gomez v. Reno, No. C97-0895 CW (N.D. Cal. filed March 14, 1997).
[4] IIRIRA section 309(c)(1).
[5] References to INA section "244" are references to that section as it appeared in the INA before April 1, 1997, the effective date of IIRIRA.

of status of those grantees under INA section 244 considered as a unitary process; or interpretation (2)—Congress intended to place a numerical limit only on the Attorney General's adjustment of status of grantees under INA section 244. Only one these of interpretations can be correct, since the result of either necessarily precludes the result of the other.

The first cap provision is found in language inserted by IIRIRA section 304 into the new INA "cancellation of removal" provisions found at section 240A of the INA. This provision speaks only in terms of "adjustment of status" and provides in pertinent part that "[t]he number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year."[6] In addition, this section, by its terms, can only be applied to section 240A(b) cancellations of removal and may not be read as applying to suspension of deportation under old section 244. This provision was adopted in the full House Judiciary Committee markup of the immigration reform legislation and was crafted by Rep. Berman as a trade-off for Rep. Lamar Smith's agreement to drop retroactive application of another provision tightening eligibility for suspension-type relief. The history is as follows (the Appendices contain the evolving legislative language).

H.R. 1915 was introduced in the House of Representatives on June 22, 1995 by Rep. Lamar Smith, Chairman of the immigration subcommittee of the House Judiciary Committee. (See Appendix A.) This bill contained the first incarnation of the language now found at section 240A(b)(3) of the INA.[7] No cap of 4,000 adjustments per fiscal year was present in this provision. This bill did, however, contain a transition rule for suspension of deportation which applied a cut-off provision that deemed the qualifying time period for suspension, seven years, to have ended when the Order to Show Cause [OSC] was served on the alien pursuant to former section 242A[8] (hereafter referred to as the "stop-time" rule). This provision would have had the effect of making large numbers of aliens ineligible for suspension of deportation under section 244 since many of their OSC's would have been served prior to their having been in the United States for seven years. Moreover, the provision was applicable to all applications for suspension filed "before, on, or after the date of enactment of [H.R. 1915]"[9] thus precluding a great many pending applicants for suspension. Only a narrow class of aliens would have been able to qualify under this provision.

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[6] INA § 240A(b)(3). See Appendix D for the full text of this provision.
[7] See Appendix A, H.R. 1915, § 304.
[8] INA prior to amendment by IIRIRA.
[9] See Appendix A, H.R. 1915, § 309(a)(5).

In the full Judiciary Committee, Rep. Berman sought to remove the retroactive application of the "stop-time" rule. Rep. Smith agreed, in return for a cap of 4,000 per year on this form of relief. The full committee adopted this compromise and reported H.R. 2202 (the clean bill then under consideration as the successor to H.R. 1915). Appendix B contains the provisions that reflect the Committees actions on those points.

Before the full House took up the bill, however, the House leadership agreed to a manager's amendment, eventually adopted as the first item of business on the bill, which contained two additional provisions for numerical caps (those eventually became INA § 240A(e) and IIRIRA § 309(c)(7)). See Appendix C. They are phrased as limits on "suspend[ing] and adjust[ing]" or "cancel[ling] and adjust[ing]." This language, considered in isolation, could be read consistently with interpretation (2): the cap would not be exceeded until both cancellation or suspension and the requisite number of adjustments had taken place in a given year. Conceptually, cancellation or suspension could be unlimited so long as adjustments were held to 4,000 annually.

Such a reading, however, is hard to square with the historical sequence. H.R. 2202 already contained a cap on adjustments. Why would the other cap provisions have been added (or at least applied to cancellation) if Congress intended only to duplicate the Berman amendment's adjustment cap? A well-accepted canon of statutory construction disfavors interpretations that leave language of a statute superfluous or duplicative. Bailey v. United States, 116 S. Ct. 501, 506 (1995).

In fact, House committee staff informed INS personnel at the time of floor debate that the new language was intended precisely to avoid a situation where the statutory cap would apply only to adjustments and would permit unlimited additions to the pool of unadjusted beneficiaries of such relief, waiting years for eventual completion of the adjustment process. We have found nothing in the published legislative history, however, that expressly reflects this intent, perhaps largely because the manager's amendment occasioned no debate on the House floor.

Of course, the managers could more directly have accomplished this apparently intended result by adding a cap addressed only to "cancelling deportation," not to "cancelling and adjusting." But the longer phrase was apparently deemed necessary for a different purpose. New INA § 240A contains two different forms of cancellation. The first, INA § 240A(a) is the analogue of what was formerly INA § 212(c). Its only possible beneficiaries are lawful

permanent residents; if granted relief they simply retain lawful permanent resident status and no adjustment is needed. The floor amendment appears to have been phrased as a cap on "cancelling and adjusting" in order to signal that it applied only to suspension-analogue cancellation and not to cancellation under INA § 240A(a). INS has so interpreted this provision and considers that cancellations under INA § 240A(a) are not subject to a numerical cap.

The conference committee maintained the cap provisions in the form adopted by the House. See Appendix D. Ironically, however, it reversed course on the other part of the Smith-Berman compromise and reverted to a version of the "stop-time" rule that was to apply to charging documents issued before, on, or after the date of enactment. IIRIRA § 309(c)(5); Matter of N-J-B-, Int. Dec. 3309 (BIA 1997).

One other element of the statutory background is important. As originally adopted, suspension of deportation was temporally distinct from adjustment of status for its beneficiaries, in order to allow for congressional review and possible legislative veto of the ultimate grant of relief. See INS v. Chadha, 462 U.S. 919 (1983). After Chadha struck down the legislative veto, however, Congress amended section 244 in 1988 to eliminate the delays. Immigration Technical Corrections Act of 1988, Pub. L. 100-525, § 2(q)(3)(1), 102 Stat. 2609, 2614 (1988). Administrative practice since then has treated the procedure as a unitary process of suspending and adjusting. Indeed, INA § 244(d) explicitly stated that the date of adjustment shall be recorded as the date of suspension. Congress acted against this administrative backdrop in adopting the additional cap language of INA § 240A(e) and IIRIRA § 309(c)(7) as a supplement to the adjustment ceiling already appearing in INA § 240A(b)(3).

Conclusion

The sequence of legislative action strongly favors interpretation (1).

Appendix A

Excerpts from H.R. 1915 as introduced June 22, 1995, by Representative Lamar Smith.

H.R. 1915, § 304, (language intended for new INA § 240A(b)(3):

(3) ADJUSTMENT OF STATUS.—The Attorney General ***may adjust*** to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2). The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under this paragraph.

H.R. 1915, § 309(c)(5):

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—In applying section 244(a) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act) 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 on such date of enactment).

Appendix B

Excerpts from H.R. 2202 as it was reported from the Committee on the Judiciary with amendments on March 4, 1996[10]

H.R. 2202, § 304, (language intended for new INA § 240A(b)(3):

(3) ADJUSTMENT OF STATUS.—The Attorney General may adjust to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2). ***The number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year.*** The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under this paragraph.

H.R. 2202, § 309(c)(5):

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear ***issued after*** the date of the enactment of this Act.

[10] House Rept. 104-469, Part I, March 4, 1996.

Appendix C

Excerpts from H.R. 2202 as passed by the House of Representatives March 21, 1996.

H.R. 2202, § 304, (language intended for new INA § 240A(b)(3)):

(3) ADJUSTMENT OF STATUS.—The Attorney General ***may adjust*** to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2). ***The number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year.*** The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under this paragraph.

H.R. 2202, § 304, (language intended for new INA § 240A(e)):

(e) ANNUAL LIMITATION.—The 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 the Immigration in the National Interest Act of 1996), of a total of more than 4,000 aliens in any fiscal year. 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 such section 244(a).

H.R. 2202, § 309(c)(5):

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear ***issued after*** the date of the enactment of this Act.

H.R. 2202, § 309(c)(7):

(7) LIMITATION ON SUSPENSION OF DEPORTATION.—The 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 the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

Appendix D

Excerpts from H.R. 1610 as signed by the President, September 30, 1996.

H.R. 1610, Division C, § 309(c)(7):

(7) LIMITATION ON SUSPENSION OF DEPORTATION.—The 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 the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

H.R. 1610, Division C, § 304, (language intended for new INA § 240A(b)(3):

(3) ADJUSTMENT OF STATUS.—The Attorney General ***may adjust*** to the status of an alien lawfully admitted for permanent residence any alien who the Attorney General determines meets the requirements of paragraph (1) or (2). ***The number of adjustments under this paragraph shall not exceed 4,000 for any fiscal year.*** The Attorney General shall record the alien's lawful admission for permanent residence as of the date the Attorney General's cancellation of removal under paragraph (1) or (2) or determination under this paragraph.

H.R. 1610, Division C, § 304, (language intended for new INA § 240A(e)):

(e) ANNUAL LIMITATION.—The 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 the Immigration in the National Interest Act of 1996), of a total of more than 4,000 aliens in any fiscal year. 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 such section 244(a).

H.R. 1610, Division C, § 309(c)(5):

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear ***issued before, on, or after*** the date of the enactment of this Act.