# NLWJC - Kagan

# DPC - Box 032 - Folder 011

# Immigration - Deportation Rules [4]

Immigration -
Deportation Issue

NOTE TO: ELENA KAGAN

FROM : ROB MALLEY

SUBJECT: Suspension of Deportation

I've spoken to Rob Weiner, who told me where things stood on the cap issue. As I told you on Friday, I think this is one on which Berger or Steinberg may well want to weigh in before the brief is filed in the Ninth Circuit. I have read over the INS/GC memo to OLC, and though I found it rather persuasive, I still don't think the alternative position is indefensible.

With regard to the NJB issue, I understand that OLC does not wish to opine formally because we already have taken a position in the court of appeals. I also know that OLC already has provided its views informally to the AG. I have read the advocates' brief (attached) over the weekend, though, and here too my conclusion is that their view is not indefensible.

The bottom line is that the statute is poorly drafted and, with regard to the NJB issue specifically, internally inconsistent. The statute contains two relevant provisions:

**Section 240A(d)(1)** provides that "any period of continuous residence or continuous physical presence in the US shall be deemed to end when the alien is served a notice to appear under section 239(a)"

**Section 309(c)(5)** provides that section 240A(d)(1) "shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 28, 1997]."

On the face of it, the two provisions are inconsistent since "notices to appear under section 239(a)" technically could not be issued before April 1, 1997.

The INS and a majority of the BIA have adopted one position to make sense of the inconsistency -- namely that the reference in 240(A)(d)(1) to notices to appear under section 239(a) should be deemed to refer to orders to show cause under the former statute as well. But that position is hard to reconcile with the plain language of the statute, and there obviously was a clearer way for Congress to achieve this result.

The dissent and the advocates have adopted a different view -- namely that only notices to appear terminate continuous physical presence and that this could happen even in a pre-April 1 case provided the AG exercised her option under 309(c)(2) to apply the new law to a pending case. Indeed, the statute specifically

provides that, should the AG choose to exercise that option, the order to show cause shall be treated as a notice to appear. However, this position stretches the interpretation of the clause "notices to appear issued before, on, or after the date of enactment."

My own view, for what it is worth, is that neither interpretation is fully satisfactory. But I am certainly not persuaded that the latter is beyond the pale.

I understand that DOJ and INS are arguing in favor of a purely legislative strategy and therefore are not inclined to revisit their statutory interpretations. However, that is not the position of our allies on the hill and, as you know, we should be receiving a letter from Abraham and Kennedy urging the Administration to adopt the advocates' position on both issues, and attaching a Hogan & Hartson memorandum to that effect. I think we need to reach a decision on these as soon as possible; the meeting chaired by Sylvia is now planned for a week from Wednesday, but that may be too late. Perhaps a smaller meeting could take place beforehand (though Sylvia will be gone as of this Thursday).

Please give me a call, and let's discuss.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-4400

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N-J-B-,

Petitioner,

vs.

JANET RENO, ATTORNEY GENERAL
and THE IMMIGRATION AND
NATURALIZATION SERVICE,

. Respondent.

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# OPENING BRIEF OF PETITIONER

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## STATEMENT OF JURISDICTION

This case is on petition from an order entered by the Board of Immigration Appeals ("BIA" or "Board"). This Court has jurisdiction to review the BIA's decision pursuant to 8 USC § 1105(a), as amended by Section 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"), where petitioner's deportation proceedings were conducted in the Southern District of Florida.

## STATEMENT OF THE ISSUES

Should this Court uphold the majority's decision in *Matter of N-J-B-*, Int. Dec. #3309 (BIA 1997), where the decision ignored basic rules of statutory construction, is contrary to the legislative history of the section it interprets, violates Supreme Court precedent regarding the retroactive application of statutes, and violates Petitioner's due process and equal protection rights?

Should this Court defer to the Board of Immigration Appeals, in its interpretation of § 309(c)(5) of IIRIRA, where the issue is one of pure statutory construction, the agency has violated numerous canons of statutory construction, and where its decision contradicts its own regulations and recent decisions?

Is Petitioner's interpretation of § 309(c)(5) of IIRIRA, that it applies only when respondents' initiate proceedings pursuant to § 309(c)(2) or (c)(3) of IIRIRA, correct in light of the statutory language, legislative history, Supreme Court precedent on retroactivity, and the Fifth Amendment to the Constitution?

## STATEMENT OF THE CASE

### I. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Petitioner, Norma de Jesus Baldizon, entered the United States on April 5, 1987. Record on Appeal ("R") at 214. She has been physically and continuously present in the United States since that date. (R.197). Ms. Baldizon was issued an Order to Show Cause on August 27th, 1993. (R.282-86). At a hearing on April 1, 1994, the immigration judge ("IJ") denied Ms. Baldizon's applications for asylum,[1] withholding of deportation, suspension of deportation, and voluntary

[1]Although Ms. Baldizon's asylum claim was heard by the IJ, many Nicaraguans withdrew their asylum claims in reliance upon the government's representation that other relief,

departure. (R.135-46). Ms. Baldizon filed a timely Notice of Appeal on August 23, 1994. (R.129-130).

Ms. Baldizon subsequently filed a brief in support of her appeal. (R.124-126). The Immigration and Naturalization Service ("INS") also filed a brief in which it adopted the decision of the immigration judge as its position on appeal. (R.127). At some point during the pendency of Ms. Baldizon's appeal, the Board solicited briefs from several sources that were not parties to this litigation. *See* (R.84-123) (briefs filed in this matter in response to the BIA's solicitation). As part of this spontaneous solicitation, this Board solicited *additional* briefing from the INS, even though the INS exhausted their original opportunity to fully set forth their appellate arguments by adopting, wholesale, the opinion of the IJ. *See* (R.113-123) (supplemental brief of INS submitted after reply brief was filed). Respondent was never informed of the Board's solicitation and, therefore, was never heard on the legal issues before the Board that would ultimately decide the fate of her appeal.

The Board issued its 7-5 decision in this matter on February 20, 1997. *Matter of N-J-B-*, Interim Decision #3309 (BIA 1997). Petitioner's Appendix ("P.A.") at 1-41. The slightest majority held that Ms. Baldizon was not eligible for suspension of deportation because the retroactive application of Section 309(c)(5) of IIRIRA prohibited her from satisfying the requirement that she be physically present in the United States for a continuous period of seven (7) years before suspension is granted. (P.A. at 2-14). Subsequently, Ms. Baldizon filed her Motion to Reconsider

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namely suspension of deportation, would be more readily available to them if they would withdraw their asylum claims. (P.A. at 116-17). Thus, many Nicaraguans faced with the same Section 309(c)(5) issues will not even have the opportunity to have their asylum claims heard before an IJ.

this matter in light of the fact that the Board received briefs from opposing counsel and other parties on the decisive issue without providing her an opportunity to respond. (R.19-36). Ms. Baldizon was given the right to file a brief. (r.1-2). However, the Board has maintained the effect of the decision, notwithstanding the procedural deficiencies. (R.1-2).

Subsequent to the preparation of the record in this case, Ms. Baldizon filed her supplemental brief with the BIA on May 29, 1997 (P.A. at 42-60). This supplemental brief is the first time Ms. Baldizon has had the opportunity to submit arguments to the BIA in support of her position that IIRIRA Section 309(c)(5) does not apply retroactively. Her supplemental brief advances significant arguments that were not made by the other parties who submitted briefs to the BIA in reference to § 309(c)(5) issues. (P.A. at 57-60). At the time of the filing of the instant brief, the BIA has not yet addressed Ms. Baldizon's supplemental brief. The BIA has not indicated how it intends to address the supplemental brief, nor if it intends to consider the brief at all. However, if the BIA reconsiders its decision in light of Ms. Baldizon's supplemental brief and correctly rules that Section 309(c)(5) does not apply retroactively, the instant proceedings could be rendered moot.

## II. CONCURRENT FEDERAL PROCEEDINGS

On March 19, 1997 Ms. Baldizon filed a protective notice of appeal in this Court. Subsequent to Ms. Baldizon's notice, scores of other persons similiarly situated filed identical protective notices of appeal. This Court, by order of May 16, 1997 expedited this appeal and stayed decision in all other pending appeals until it decides this appeal.

On March 28, 1997, a verified class action complaint was filed in the United States District Court for the Southern District of Florida styled *Roberto Tefel, et. al. v. Janet Reno, Attorney General, et. al.*, Case No. 97-0805-Civ-King (P.A. 61-98). The suit was brought by forty-one (41) individuals on behalf of themselves and a class of persons whose constitutional and statutory rights

have been violated while seeking suspension of deportation. The plaintiffs and class members seek, *inter alia*, to enjoin permanently *Matter of N-J-B-* (P.A. at 63). The defendants in the suit include all respondents in this case. Among the named plaintiffs in the case is Norma J. Baldizon, the petitioner in this case.

On May 20, 1997, United States District Judge James Lawrence King entered a temporary restraining order against the defendants. (P.A. at 99-120). The Court ordered the defendants to restrain from deporting plaintiffs and class members, from enforcing *Matter of N-J-B-* and from otherwise pretermitting applications for suspension of deportation based on *Matter of N-J-B-* or its rationale. *Id.* On May 27, 1997, Judge King extended the temporary restraining order until June 12, 1997, at which time he will hear argument on Ms. Baldizon's and the other plaintiffs' and class members' request for a preliminary injunction. (P.A. at 121-26).

On May 29, 1997, this Court denied plaintiffs motion to abate expedited briefing in this case in light of *Roberto Tefel, et. al. v. Janet Reno, et. al.* A renewed motion to abate is pending at the time of filing this brief.

## III. STATEMENT OF THE FACTS[2]

Petitioner, Norma de Jesus Baldizon, was born in Leon, Nicaragua on August 6, 1945. (R.214). She supported her four children for 20 years by working as a school teacher. (R.189, 219). Ms. Baldizon was able to teach and support her family until the Sandinistas gained full control of the government in 1979 and then implemented their Marxist ideology. (R.205). The teaching and promotion of Marxist/socialist propaganda and rhetoric to Nicaraguan children was a major part of the Sandanista's attempt to indoctrinate the Nicaraguan people with their ideology. (R.206-7, 219). Ms. Baldizon was forced to teach children Sandinista propaganda in contradiction to her political and personal beliefs. (R.219). She refused to follow the Sandinista education system and, as a result, was constantly subjected to Sandinista scrutiny and harassment. *Id.*

Further, Ms. Baldizon's children were continuously persecuted by the Sandinistas because they chose to participate in anti-Sandinista activities rather than Sandinista activities. *Id.* Her children were also denied admission to college because of their political beliefs. *Id.*

Additionally, Ms. Baldizon was subject to the daily hardships which faced many Nicaraguans who did not participate in the Sandinista regime. She was repeatedly pressured and threatened to

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[2]This section is included for the purpose of providing this Court with the general background of Ms. Baldizon's case, even though the particular facts of Ms. Baldizon's case have little to do with the issues of law averred in this appeal. The BIA erroneously concluded that retroactive application of IIRIRA Section 309(c)(5) pretermitted Ms. Baldizon from applying for suspension of deportation and, therefore, never made any factual determinations based upon the merits of Ms. Baldizon's suspension claim for suspensionof deportation.

join the Sandinista movement. (R.178-79, 206). Refusal to join the Sandinistas often resulted in decreased rations, withdrawn work authorization, and withdrawn residency authorization. (R.207). She also lived in fear that her home would be ransacked and vandalized by organized mobs of Sandinistas, whose sole purpose was to increase the pressure on the Nicaraguan people to join the Sandinistas. *Id.*

Fearing for her life, Ms. Baldizon left Nicaragua in 1987 and came to the United States on April 5, 1987 on a tourist visa. (R.197). She has continuously resided in this country for over ten years. *Id.* She has taken courses to learn English (R. 177) and she works and pay taxes.(R. 175). She was the support for her family while in Nicaragua and her only family are her four children who reside in the United States. (R. 160). She is separated from her husband and is the only child of deceased parents. *Id.* She has no family in Nicaragua. (R.175) She is 51 years old (R.214), and she is in ill health. She has severe and recurrent problems with her kidneys and is under constant medical care. (R. 168-172). She could not get the medical treatment she needs if she were deported to Nicaragua (R.175) because she could not pay for medical treatment, nor could she find a job because of her age and the extremely high rate (50%) of unemployment. (R.175-176). Notwithstanding her situation, Ms. Baldizon was placed in deportation proceedings for overstaying her visa. She was ordered deported by the IJ who denied both her suspension and asylum claims. Although the BIA affirmed the denial of her asylum claim, it never addressed the merits of her suspension application. (P.A. at 14-15). Rather, it determined as a matter of law that Ms. Baldizon was not eligible for suspension of deportation. The BIA determined that even though Ms. Baldizon had been in the United States almost ten years at the time the BIA heard her case, she was ineligible for suspension of deportation because she had been served with an order to show cause by INS six-and-a-half years after entry, thus cutting off the seven years needed for suspension. (R.37-77).

## IV. STATEMENT OF THE STANDARD OF REVIEW

All agency decisions and interpretations which are based upon errors of law are subject to plenary review. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed. 34 (1987) (reversing the agency's application of an incorrect standard of proof in asylum determinations); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Petitioner asserts that the BIA's interpretation of IIRIRA Section 309(c)(5) is erroneous. Therefore, the instant petition is subject to plenary review.

Petitioner's asylum and withholding claims are subject to the substantial evidence test as to the facts of the claim. *Hartooni v. INS*, 21 F.3d 336 (9th Cir. 1994). The ultimate decision to grant asylum is subject to an abuse of discretion standard. *Rojas v. INS*, 937 F.2d 186, 189-190 (5th Cir. 1991).

## SUMMARY OF THE ARGUMENT

On September 30, 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility of 1996 ("IIRIRA"). This case addresses the interpretation of § 309(c)(5) of IIRIRA rendered by the BIA in *Matter of N-J-B-*, Int. Dec.#3309 (BIA 1997). The BIA's decision not only affects the petitioner in this case, but literally thousands of persons similarly situated throughout the jurisidiction of this Circuit.

Under IIRIRA, Congress ended deportation and exclusion proceedings as of April 1, 1997 and replaced them with a unified removal proceeding. Under the new removal proceeding, a person can obtain "cancellation of removal" if he can show he has been physically present in the United States for ten years and can meet other very restrictive requirements. However, the new law prohibits someone from accruing the ten years physical presence if he has been served with a notice to appear under section 239(a) of the new law. Immigration and Nationality Act ("INA") § 240A(d)(1).

Under IIRIRA Congress left in tact deportation and exclusion proceedings that were ongoing before April 1, 1997. IIRIRA § 309(c)(1). This included suspension of deportation proceedings that were in progress under § 244 of the former INA, which required that a person only have seven years physical presence to be eligible for suspension of deportation. Thus, a person such as the petitioner, who was in deportation proceedings prior to April 1, 1997 and had applied for suspension of deportation under former § 244, would continue their proceedingsunder the old law. Congress, however, wrote two exceptions to the continuing-under-the-old-law provision. Under §§ 309(c)(2) and 309(c)(3), the Attorney General could elect to put persons who were in deportation proceedings into the new removal proceedings under certain circumstances. In addition, Congress maintained another "transition" rule which provided that the new § 240A(d)(1) will cut off physical presence if the respondent is served with a notice to appear under 239(a), and would apply "to notices to

appear issued before, on, or after the date of enactment" of IIRIRA. IIRIRA § 309(c)(5). In *Matter of N-J-B-*, the BIA interpreted § 309(c)(5) to apply retroactively to persons in suspension of deportation proceedings, so that the seven years needed for suspension would be cut off if someone had been served with an order to show cause prior to the seven years.

The retroactive application of § 309(c)(5) of IIRIRA to Petitioner, as expressed in the slim majority opinion in *Matter of N-J-B-*, Int. Dec.# 3309 (BIA 1997), ignores basic rules of statutory construction, is contrary to the statute's legislative history, violates principles concerning the retroactive application of statutes as established by the Supreme Court, and violates petitioner's due process and equal protection rights.

The Board of Immigration Appeals ("BIA") decision is entitled to no deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) because the issue before this Court is one of pure statutory construction. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987) ("The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide."). This Court has not hesitated to reverse the BIA when its decision on legal questions or construction of the INA has been in error or is unreasonable. *Acosta-Montero v. INS*, 62 F.3d 1347, 1349 (11th Cir. 1995); *Melian v. INS*, 987 F.2d 1521, 1525 n.6 (11th Cir. 1993). Moreover, the BIA's decision here is entitled to no deference because it violated numerous well settled canons of statutory construction and because it contradicts the agency's own regulations and recent decisions.

The most appropriate reading of § 309(c)(5) of IIRIRA is that this transition rule applies only to cases where the Attorney General exercises her authority to place a person in removal proceedings pursuant to §§ 309(c)(2) and 309(c)(3) of IIRIRA. This reading, unlike the majority's in *Matter of N-J-B-*, gives effect to all the language in § 309(c)(5) as well as the statute it relates to, § 240A(d)(1)

of the INA. This interpretation gives meaning both to the term "issuance" under § 309(c)(5) and "service under 239(a)" of § 240A(d)(1) -- language completely ignored by the majority in *Matter of N-J-B-*.

This construction of the statute also avoids a challenge to the presumption against retroactivity expressed in the Court's opinion in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483 (1994). A statute should not be applied retroactively, as the Board did here, unless there is an "unambiguous directive" or an "express command" from Congress that it intended retroactive application. *Id.* at 1496, 1505. The legislative history supports Petitioner's reading of the statute and not the sweeping interpretation of the Board majority.

The BIA's construction of § 309(c)(5) also results in raising serious constitutional questions which should normally be avoided. *Webster v. Doe*, 486 U.S. 592 (1988). Its construction would result in serious due process and equal protection violations, although a full record on these issues awaits development in the district court in *Tefel v. Reno*, Case No. 97-0805-Civ-JLK (S.D. Fla. 1997). In reaching its decision, the Board also violated the due process rights of the Petitioner by depriving Peitioner's counsel of the right to brief the issues that were ultimately the basis for the decision, while inviting the INS, *ex parte*, to brief the issues. A deprivation of counsel of this nature is a *per se* violation of due process.

Finally, the BIA erred in denying petitioner's claim for political asylum in the United States. On the facts of her case, petitioner established a strong claim for political asylum when she was forced to flee the Sandanista dominated government in Nicaragua.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. INTRODUCTION

This petition seeks review of the BIA's precedent decision in *In re N-J-B-*, Int. Dec. # 3309 (BIA 1997). Petitioner is N-J-B-. In this case, a 7-5 majority of the BIA held that a provision of the new immigration law retroactively changed the statutory requirements for suspension of deportation. That provision, the BIA majority held, applies retroactively to terminate Petitioner's accrual of "physical presence" in the United States, thus preventing her from qualifying for suspension of deportation.

The BIA majority held that as a technical matter of law, Petitioner's "physical presence" ended when the INS served her with an Order to Show Cause in 1993, notwithstanding that she remained in the United States after that date and notwithstanding that she exceeded the statutory requirements for physical presence at the time of her hearing and at the time of her appeal.

Petitioner argues herein that the BIA majority's statutory interpretation is fatally flawed. The majority expressly discards important statutory phrases, violating one of the cardinal principles of statutory construction. The majority distorts the language of the statute in a vain attempt to articulate its case. The majority opinion generated three separate dissenting opinions, was inconsistent with the agency's own recently-promulgated regulations, and is not supported by a facial reading of the statute. For these reasons and others discussed herein, this Court must reverse the decision of the BIA majority.

### II. STATUTORY AND REGULATORY BACKGROUND

#### A. Removal and Cancellation of Removal

This appeal concerns sections of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). The IIRIRA

significantly amended the Immigration and Nationality Act (INA). Most of its amendments took effect on April 1, 1997, including those relevant to this case.

Before April 1, 1997, the INS expelled aliens through deportation or exclusion proceedings. The INA authorized the INS to suspend an alien's deportation if he or she had been physically present in the United States for at least seven years, and met other requirements. Former INA § 244(a)(1).

On April 1, 1997, the IIRIRA replaced deportation and exclusion proceedings with removal proceedings. INA § 240. Relief from removal is possible under INA § 240A. The IIRIRA replaced suspension of deportation with a new form of relief called "cancellation of removal," and imposed additional and more stringent requirements for obtaining the relief. INA § 240A(b). Joint Explanatory Statement of the Committee of Conference on H.R. 2202, H.R. Conf. Rep. No. 104-828, available in 104 Cong. Rec. 10841, 10896 (daily ed. Sept. 24, 1996) and 1996 WL 563320. Among the requirements for obtaining cancellation of removal is that the applicant have been continuously "physically present" in the United States for at least 10 years before applying for the relief. INA § 240A(b)(1)(A).

**B. Special Rule Regarding Physical Presence**

A "special rule" affects the accrual of a person's time for "physical presence." INA § 240A(d). This rule, which also took effect on April 1, 1997, terminates that time automatically, regardless of how long the applicant was physically present, upon any of three occurrences.

- -- when the applicant is "served with a notice to appear under § 239(a);"
- -- when the applicant committed an offense that renders him or her inadmissible or removable; or
- -- where the applicant departed for specified periods.

§ 240A(d)(1) and (2).[3] The BIA's decision in *N-J-B-* focused on the first of these occurrences, service of a notice to appear under § 239(a).

### C. IIRIRA Transition Rules

Yet more wrinkles are added by § 309 of the IIRIRA.[4] That section provides effective dates and transition rules for some parts of the IIRIRA. Relevant here are §§ 309(c)(1); 309(c)(2); 309(c)(3); and 309(c)(5).

Section 309(c)(1) says that, with the exceptions noted elsewhere in § 309, deportation or exclusion proceedings pending before April 1, 1997 continue under the old law. That is, cases that began under pre-April 1, 1997 law presumptively are not affected by the IIRIRA.

Section 309(c)(2) allows the Attorney General to elect to apply the new law to a pending case if an evidentiary hearing has not been held in the case. If the Attorney General does so elect, the statute explicitly says, the notice of hearing that had been provided to the alien under prior § 235 (for

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[3]Section 240A(d)(1) provides:

> (1) TERMINATION OF CONTINUOUS PERIOD.- For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under § 239(a) or when the alien has committed an offense referred to in § 212(a)(2) that renders the alien inadmissible to the United States under § 212(a)(2) or removable from the United States under § 237(a)(2) or 237(a)(4), whichever is earliest.

Section 240A(d)(2) provides:

> (2) TREATMENT OF CERTAIN BREAKS IN PRESENCE.- An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

[4]Section 309 was not codified into the INA.

exclusion cases) and 242(a) (for deportation cases) is valid as if provided under § 239 of the new law. That is, the old notice of hearing issued under the prior INA is, in effect, converted to a Notice to Appear under new INA § 239(a).

Section 309(a)(3) provides that the Attorney General may, at any time before there is a final order of deportation or exclusion, terminate proceedings and initiate a removal proceeding by serving a notice to appear under § 239 of the new law.

A special transition rule for suspension of deportation is set out at § 309(c)(5):

> (5) Transitional Rule With Regard To Suspension of Deportation.-- Paragraphs (1) and (2) of § 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 enactment of this Act.

It is the operation of this transitional rule, § 309(c)(5), in combination with the rule for the termination of continuous physical presence, INA § 240A(d), that is the focus of this case. The INS argues, and the BIA majority held, that the automatic termination of physical presence under § 240A(d)(1) applies retroactively to pending cases. That is, the majority held that the automatic cut-off applies retroactively, to terminate retroactively the accrual of "physical presence" as of the date of service of an Order to Show Cause under prior law. In Petitioner's case, the BIA held that her physical presence was automatically terminated in 1993, when she was served with an Order to Show Cause.

**D. The Order To Show Cause vs. the Notice to Appear**

The IIRIRA replaced the "Order to Show Cause" with a "Notice to Appear." INA § 239(a), 8 CFR § 239.1(a). The phrase "Notice to Appear" was not used in the prior INA.[5] The INS

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[5]The BIA majority acknowledged that the term "Notice to Appear" was first used in § 304 of the IIRIRA, creating new INA § 239(a). Until April 1, 1997, the majority conceded,

acknowledged the new terminology in its regulations issued to implement new § 239(a) and 240A. 8 CFR § 239.1(a).

The INS also has acknowledged that the term "Notice to Appear" did not apply in cases pending before April 1, 1997. 8 CFR § 3.13. In that regulation, the INS defines "charging document." For proceedings initiated before April 1, 1997, the INS' regulation says, "charging documents" include an "Order to Show Cause" but do not include a Notice to Appear. In proceedings initiated after April 1, 1997, the regulation continues, charging documents include a "Notice to Appear" but not an "Order to Show Cause."

In § 239(a), Congress provided extensive and detailed requirements for the new notices to appear. Orders to Show Cause under prior law did not comply with all of these requirements. Most significantly, § 239(a) requires that all "notices to appear" state "[t]he time and place at which the proceedings will be held" and "[t]he consequences under § 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceeding." Section 239(a)(1)(G)(i) and (ii). Orders to show cause under pre-IIRIRA § 242B(a)(1) were not required to include either of these advisals.

Further, before June 1992, the INA did not even refer to an "Order to Show Cause," nor did it require that a respondent be served a written charging document.[6] Rather, then-INA § 242(b)

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respondents have been served with an "Order to Show Cause." *N-J-B-* (P.A. at 9).

[6]Effective June 13, 1992, § 545(a) of the Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978, 5061, codified the requirement for Orders to Show Cause, and specified additional advisals that the Order to Show Cause must include. *See* pre-IIRIRA INA § 242B(a)(1). Orders to Show Cause issued before June 13, 1992 did not include the additional advisals required by 242B(a)(1). The BIA majority in *N-J-B-* ignores the fact that many pending suspension of

directed the Attorney General to promulgate regulations governing commencement of proceedings. Then-8 CFR § 242.1(b) (1991), said, in pertinent part:

> The Order to Show Cause shall contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law, and a designation of the charge against the respondent and of the statutory provisions alleged to be violated. The Order shall require the respondent to show cause why he should not be deported. The Order shall call upon the respondent to appear before an Immigration Judge for a hearing at a time and place which shall be specified by the Office of the Immigration Judge.

In contrast to these minimal requirements for an Order to Show Cause, current INA § 239(a) specifies numerous requirements for the Notice to Appear.[7]

## III. DECISION OF THE BIA MAJORITY AND THE DISSENT

The BIA majority held that § 309(c)(5) operates to retroactively terminate Petitioner's right to seek suspension of deportation because she was served with an Order to Show Cause before she accrued seven years of physical presence in the United States.[8]

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deportation cases were initiated before June 1992 under the pre-June 1992 Orders to Show Cause. Although Petitioner's Order to Show Cause was not issued before June 1992, Petitioner is informed and believes that, under the authority of *N-J-B-*, the BIA has dismissed other suspension cases with the older Orders to Show Cause.

[7]The BIA majority's decision in *N-J-B-* did not distinguish between pre and post-June 1992 Orders to Show Cause. It did not address the very significant differences between pre-June 1992 Orders to Show Cause and the current Notice to Appear under 239(a).

[8]It should be observed that the BIA majority's decision does not necessarily encourage lawful conduct. Rather, it rewards those who evaded detection by the INS for at least

As discussed more fully below, the BIA majority could reach this result only by expressly discarding three important words. Section 240A(d)(1) terminates physical presence "when the alien is served with a notice to appear *under § 239(a)*." (emphasis added). The majority's reading severs those last three words from the statute.

The majority's holding also necessarily ignores all the differences between the terms "Order to Show Cause" and "Notice to Appear." Especially before June 1992, an Order to Show Cause was a very different instrument from the current Notice to Appear under § 239(a).

Further, the majority's decision disregards the differences between "issuance" of a charging document and "service" of a charging document. *Compare*, IIRIRA § 309(c)(5) and INA § 240A(d)(1).

The majority's decision prompted five dissents and three separate dissenting opinions. The dissents agreed with each other's opinions, but wrote separately to emphasize different points.[9]

BIA Member Villageliu, joined by the other dissenters, wrote that the interruption of continuous physical presence applies to all cancellation of removal applications, regardless of how and when they were initiated, but does not apply to suspension of deportation cases remaining in deportation proceedings. The dissent looked to the legislative history, where Congress included but

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seven years after their entry into the United States. Further, the BIA majority's decision cannot discourage conduct that already occurred. As BIA member, Villageliu, cogently said in dissent: "How can you dissuade someone from doing something already done?" (P.A. at 36).

[9]Member Guendelsberger, joined by Chairman Schmidt and the other dissenters, wrote that § 309(c)(5) did not apply until April 1, 1997.

then deleted language applying the interruption of physical presence to deportation cases.

Member Villageliu wrote:

> [T]he interruption of continuous physical presence applies only when an alien is placed in removal proceedings and seeks cancellation of such removal under the new procedures. The language "notice to appear issued before, on, and after enactment" relied upon by the majority is merely a jurisdictional provision precluding jurisdictional challenges when an alien is placed under the new removal procedures by either the notice initiating such removal proceedings under § 239(a)... or the notice that the Attorney General has elected to convert a previously issued Order to Show Cause into a notice to appear in removal proceedings. The latter option gives sufficient meaning to the language "before enactment" [under 309(c)(5)] without adopting an over broad interpretation inconsistent with the statutory language and its legislative history.

(P.A. at 29).

## ARGUMENT

## I. THIS COURT NEED NOT DEFER TO THE BIA MAJORITY'S INTERPRETATION OF THESE NEW SECTIONS OF THE INA

### A. The BIA Is Not Entitled To Deference Because It Conducted Pure Statutory Construction, For Which This Court Is At Least Equally Qualified

It can be expected that the INS will argue that this Court must defer to the BIA's interpretation of the statute, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). However, *Chevron* never mandates blind deference, and most certainly does not require deference in this case.

Here, the BIA performed pure statutory construction. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987), citing *Chevron*, 467 U.S. at 844 ("The question whether Congress intended the two standards to be identical is a pure

question of statutory construction for the courts to decide.")

To answer the question in this case, the BIA did not need to employ any of its expertise. *See Barrett v. Adams Fruit Co.*, 867 F.2d 1305, 1307 (11th Cir. 1989); *see also Batanic v. INS*, 12 F.3d 662, 665, n.4 (7th Cir. 1993), citing *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534, 115 L. Ed.2d 604 (1991) (deference is more appropriate where agency is applying its expertise).

Without implying disrespect, the task of statutory construction is one for which this Court is better suited than the BIA. In *Cardoza-Fonseca*, the Court distinguished between situations where the BIA decides a "narrow legal question" from cases where it applies a legal standard to a particular set of facts. 480 U.S. at 448.

This Court has not hesitated to reverse the BIA when its decisions on legal questions or construction of the INA has been in error or is unreasonable. *Acosta-Montero v. INS*, 62 F.3d 1347, 1349 (11th Cir. 1995) (rejecting BIA's ruling that lawful permanent resident loses that status upon issuance of final BIA decision and thus cannot move to reopen to apply for § 212(c) relief); *see also, Melian v. INS*, 987 F.2d 1521, 1524, 1525 n.6 (11th Cir. 1993) (parsing meaning of "lawful domicile" to determine if BIA interpretation was correct; declining to accede to BIA interpretation as inconsistent with the language and policy of the INA.)

It is in matters of applying standards to individual fact-determinative situations, rather than "narrow legal questions," where the BIA's expertise should be respected. *Perlera-Escobar v. EOIR*, 894 F.2d 1292 (11th Cir. 1990) is a good example of this distinction. In that case, this Court deferred to the BIA determination that particular conduct was "on account of political opinion." The BIA had applied its fact-specific construction of the standard and this Court found that the BIA's determination was reasonable. This Court did not defer to the BIA's determination of a "narrow

legal question." [10] By contrast, what the BIA decided in *N-J-B-* was a purely legal question. Hence, this Court should not apply a heightened degree of deference.

Even where this Court has considered a mixed question of law and fact, it has been willing to overrule the BIA when its conclusions have been wrong. *Bigby v. U.S. INS*, 21 F.3d 1059, 1061 (11th Cir. 1994) (BIA erred in finding that Fifth Amendment privilege against self-incrimination had not been properly invoked by *Bigby*).

Further, this is not an instance where Congress explicitly or implicitly delegated authority to the agency to "elucidate a specific provision of the statute by regulation." *Cardoza-Fonseca*, 480 U.S. at 445; *Chevron*, 467 U.S. at 844. *Cf. Perlera-Escobar*, 894 F.2d at 1296.[11] Where Congress does so delegate, the Court may not substitute its own construction for a reasonable interpretation made by the agency.

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[10]Moreover, *Perlera-Escobar* was an asylum case. This Court expressly noted that in that context, the reasons for giving deference to agency decisions apply with even greater force because INS officials must exercise especially sensitive political functions that implicate questions of foreign relations. 894 F.2d at 1297, n.3. Here, of course, the legal issue concerns suspension of deportation, which does not carry the same foreign relations concerns.

[11]Compare new INA § 235(b)(1)(B)(iii)(III) (Attorney General shall provide by regulation for a prompt review by immigration judge of credible fear finding); § 235(b)(1)(C) (Attorney General shall provide by regulation for prompt review of expedited removal order); § 240B(e) (Attorney General may by regulation limit eligibility for voluntary departure for classes of aliens).

### B. The BIA Decision Is Not Entitled To Deference Because The Majority Violated Numerous Canons Of Statutory Construction

The BIA majority violated several basic principles that govern statutory interpretation:

1. No statute may be read so as to render any word or phrase surplusage. *Kungys v. United States*, 485 U.S. 759 (1988); *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955); and statutory sections must be construed harmoniously so as to give effect to each section. *COIT Independent Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989). The BIA majority violated these principles when it interpreted the phrase "notice to appear under section 239(a)." The majority held that the words "under section 239(a)" had no substantive meaning. That is, the phrase did not restrict or qualify the term "notice to appear." (P.A. at 8-12). *See also*, dissent of Member Villageliu, criticizing majority for construing the statute so as to render a work or clause surplusage. (P.A. at 30, 37).

2. The legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183 (1984); *INS v. Ardestani*, 520 U.S. 129 (1991). The BIA majority violated this canon of statutory construction when it refused to give the word "under" its ordinary meaning. (P.A. at 8-12).

3. Different words or phrases used in the same statute have different meanings. *Cardoza-Fonseca*, 480 U.S. at 432. The BIA majority violated this principle when it failed to recognize that only notices to appear served under § 239(a) interrupt physical presence. It also ignored this canon when it failed to note the distinction between notices to appear that are "served," and notices to appear that are "issued." (P.A. at 8-12); *see also* dissent of Member Villageliu (P.A. at 30).

4. In view of the harsh consequences of deportation, ambiguities are to be construed in

favor of the alien. *Cardoza-Fonseca*, 480 U.S. at 449, citing *INS v. Errico*, 385 U.S. 214, 225 (1966) and other cases. Board Member Rosenberg in dissent faulted the majority for "turning the benefit of the doubt ... on its head. Like Alice in *Through the Looking Glass*, what was the benefit of the doubt now has become the doubt that any alien should receive a benefit." (P.A. at 40).

In this case, the BIA majority disregarded each of these canons of statutory construction. Consequently, its decision is not entitled to deference by this Court.

### C. The BIA Decision Is Not Entitled To Deference Because It Contradicts The Agency's Own Regulations And Two Other Recent BIA Decisions

As the Supreme Court said in *Cardoza-Fonseca*, an additional reason for rejecting the BIA's request for heightened deference is the inconsistency of the positions it has taken. 480 U.S. at 446, n. 30. In recent cases, this Court has reversed the BIA when it acted inconsistently or drew arbitrary distinctions between similarly situated groups of people. *Acosta-Montero*, 62 F.3d at 1350; *Yeung v. INS*, 61 F3d 833, 340 (11th Cir. 1995). *See also Batanic*, 12 F.3d at 666, citing *Pauley v. Bethenergy Mines*, 111 S.Ct. at 2535 ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"); *U.S. Mosaic v. NLRB*, 935 F.2d 1249, 1256 n. 7 (11th Cir. 1991) (Agency inconsistency on a matter of statutory interpretation, if not well articulated, would almost epitomize arbitrary agency action).

In *Yeung*, this Court found that the BIA's distinction between two groups of lawful permanent residents was arbitrary. The BIA had said that the petitioner in *Yeung* could not apply for a § 212(c) waiver because he had not left the United States and reentered, while a similarly situated person who had left and reentered could apply for that relief. The BIA's application of the statute, the Court held, violated Yeung's Fifth Amendment right to equal protection and due process. 76 F.3d at 339.

Similarly, in *Acosta-Montero*, 62 F.3d at 1350, this Court's holding was largely motivated by the BIA's inconsistency. The Court faulted the BIA because it forbade reopening of deportation cases in situations where its regulation authorized reopening.

Here, the BIA majority's reasoning was internally contradictory and inconsistent. The BIA majority acknowledged that until IIRIRA, the INA did not refer to "Notice to Appear." *N-J-B-* (P.A. at 9). The majority also conceded that previously, deportation proceedings were commenced with an "Order to Show Cause." Nevertheless, the majority went on to base its holding on its quixotic conclusion that "Order to Show Cause" and "Notice to Appear" are "synonymous terms." (P.A. at 9).

At the same time, regulations promulgated by the Executive Office for Immigration Review, which includes the BIA, distinguish between those terms. 8 CFR 3.13 identifies an "Order to Show Cause" as the charging document issued before the IIRIRA took effect on April 1, 1997. The regulation goes on to identify a "Notice to Appear" as the charging document in cases initiated after April 1, 1997.

The agency cannot have it both ways. Just as in *Acosta-Montero*, where the agency interprets the law one way in its regulations and the opposite way in its practice, its contrary positions are entitled to minimal deference under *Chevron*.

Further, the BIA majority's holding and reasoning in *N-J-B-* departed radically from the holding and reasoning of two other recent BIA precedent decisions. In *In re Soriano*, Int. Dec. #3289 (A.G. 1997, BIA 1996), the BIA refused to apply an amendment made by another recent piece of immigration legislation to cases pending on enactment date.[12]

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[12]The Attorney General reversed the Board's *Soriano* decision on February 21, 1997. The

That legislation was the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the AEDPA). Section 440(d) of the AEDPA limited the classes of people who could qualify for a waiver of deportation under then-section 212(c). In its *Soriano* decision, the BIA followed *Landgraf* and held that Congress' silence about § 440(d)'s effective date did not indicate an intent that the amendment bar pending applications for relief from deportation. *Soriano* (July 18, 1996 decision of BIA, slip op. at 5.

The BIA said, "another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage." *Id.*

In *In re Fuentes*, Int. Dec. #3318 (BIA 1997), a unanimous BIA followed canons of statutory construction that it disregarded in the *N-J-B-* case. Specifically, the BIA held that because § 440(d) of the AEDPA limited the waiver in "deportation" cases, the limitation did not apply to "exclusion" cases. As is proper, in *Fuentes*, the BIA reached its decision by refusing to rewrite the statute to reflect what it thought Congress might have meant; by giving the statutory words their ordinary meanings; by acknowledging that the legislative purpose is expressed by the ordinary meaning of the words used; and by recognizing that its task is to apply the statute as written.

The BIA majority's decision in *N-J-B-* was internally inconsistent. It contradicted recently-promulgated regulations of the same agency. It contradicted two other recent precedent decisions interpreting the other major recent piece of immigration legislation. For these reasons, this Court

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fact remains, however, that the BIA's own decisions in these cases were inconsistent. The *Soriano* reversal could not have influenced the BIA's opinion in *N-J-B-* because *N-J-B-* was issued on February 20, the day before the Attorney General issued her *Soriano* opinion.

need not and should not defer to the BIA majority's decision.

## II. A PRIOR-ISSUED ORDER TO SHOW CAUSE TERMINATES PHYSICAL PRESENCE ONLY IF THE ORDER TO SHOW CAUSE WAS ISSUED BUT NOT SERVED BEFORE SEPTEMBER 30, 1996 AND ONLY IF THE ATTORNEY GENERAL APPLIES THE NEW LAW TO A PENDING CASE

### A. If Read Together, The Relevant Statutory Sections Can Be Made Consistent And Operative

Petitioner submits that there is a correct interpretation of §§ 240A(d)(1) and 309(c)(5) that gives effect to all the words and phrases, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and that is consonant with Congressional intent and the overall scheme of the IIRIRA. This interpretation is consistent with the opinion of the dissenters in *N-J-B-*, but refines their analysis.

The relevant sections of the statute can be read together to provide a sensible meaning and to give effect to all the words and phrases. First, § 240A(d)(1) terminates the period of continuous physical presence necessary for suspension "*when* the alien is *served* a notice to appear under § 239(a)." (emphasis added). Second, 309(c)(5) states that INA § 240A(d) "shall apply to notices to appear *issued* before, on, or after the date of enactment of this Act [September 30, 1997]." (emphasis added). Third, §§ 309(c)(2) and 309(c)(3) say that when the Attorney General elects to apply the new law to old cases, old Orders to Show Cause are effectively converted into the new Notice to Appear under 239(a).

Reading these statutes together and giving effect to all phrases, Petitioner submits that the prior-issued Order to Show Cause would terminate a suspension applicant's physical presence only when and if the Attorney General elected to apply the new law to him under § 309(c)(2) or § 309(c)(3), and actually or constructively served him with a notice to appear under § 239. This could

only have occurred on or after April 1, 1997, because neither § 240A(d)(1) nor § 309 took effect until April 1, 1997.

In other words, if the Attorney General invokes § 309(c)(2) or (c)(3) to apply the IIRIRA amendments to a pending case, the Order to Show Cause is effectively converted into a § 239(a) Notice to Appear. Sections 309(c)(5) and 240A(d)(1) are effective if the Order to Show Cause was issued before September 30, 1996 but not served on the alien until after that date.

If the Attorney General invokes §§ 309(c)(2) or 309(c)(3), the prior-issued Order to Show Cause would be a served as a Notice to Appear. This service, then, would trigger the physical presence cut-off of § 240A(d)(1).

Because § 309(c)(2) and (3) did not go into effect until April 1, 1997, the Attorney General could not invoke them until that date.[13] Necessarily then, no prior-issued Order to Show Cause could be converted into a § 239(a) Notice to Appear before that date. To Petitioner's knowledge, the Attorney General has not invoked §§ 309(c)(2) or (3) in any case. *See* 8 CFR §§ 240.16; 240.30; 240.40; 240.55 (Interim regulations, March 6, 1997). And because Petitioner's Order to Show Cause was both filed and issued under prior law, §§ 240A(d)(1) and 309(c)(5) do not cut off her accrual of physical presence.

This interpretation not only gives meaning to all the language in both statutes, but it also gives meaning to § 309(c)(5), as its title suggests, as a transition rule. Under the new law, a person served with a notice to appear has his physical presence terminated at that point. Petitioner's interpretation provides consistency in the law by ensuring that all persons who are actually (§

[13]Similarly, § 240A(d)(1) did not go into effect until April 1, 1997.

309(c)(3)) or constructively (§ 309(c)(2)) served with notices to apear and placed in removal proceedings would get no greater benefits than those persons independently placed in removal proceedings after April 1, 1997.

In effect, the interpretation equalizes all removal proceedings so that all persons in removal proceedings would be treated the same. In contrast, the majority's interpretation creates irrational differences between suspension applicants by rewarding those who have evaded INS over those who have requested service of an order to show cause so they could apply for suspension. The correct construction of the statute does not create different classes of applicants, but rather, unifies all persons subject to removal proceedings by holding that the provision terminating physical presence through service of a notice to appear will be applied to all persons in removal, whether served originally after April 1, 1997, or served under the transition rules of § 309(c)(2) and (c)(3).

As more fully explained below, this interpretation is also supported by a textual and historical reading of the statute in its full context. It is faithful to all the words and phrases of the IIRIRA, unlike the BIA majority's opinion in *N-J-B-*.

**B. An Order To Show Cause Is Not A Notice To Appear Under § 239(a)**

The plain language of the first phrase of § 240A(d)(1) terminates an alien's physical presence only upon "service of a notice to appear under § 239(a)." Although the word "under" has several meanings, "the most natural" in this context is "subject to" or "governed" by § 239(a). *Ardestani v. INS*, 520 U.S. 129, 135 (1991). *See also St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (interpreting the word "under" to mean "subject to" or "by reason of the authority of"). As explained above in the discussion of statutory background, an Order to Show Cause under the law in effect until April 1, 1997 was a significantly different instrument from the current Notice to Appear. Especially before June 1992, but even after that date, Orders to Show Cause were not

required to include the amount of information and number of specific warnings that § 239(a) mandates for Notices to Appear. The IIRIRA's "unqualified reference to a specific statutory provision mandating specific procedural protections is more than a general indication of the types of [charging documents] that [INA § 240A(d)(1)] was intended to cover." *Ardestani*, 502 U.S. at 136.

Had Congress intended for the initiation of deportation proceedings with any charging document to terminate an alien's physical presence, it would have said so. In fact, in the IIRIRA, Congress demonstrated that it knew the difference between a Notice to Appear and documents that were issued under prior law. In § 309(c)(2), the statute permits the Attorney General to elect to apply the new law to pending cases. If the Attorney General does make such an election, the statute says:

> The notice of hearing provided to the alien under § 235 or 242(a) [under pre-IIRIRA INA] shall be valid as if provided under § 239 of such Act (as amended by this subtitled).

That Congress included this language demonstrates two things: first: that Congress intended there to be a difference between the new Notice to Appear under § 239(a) and the old charging documents. *Cardoza-Fonseca*, 480 U.S. at 432 (courts must presume that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

Second, Congress' inclusion of this language demonstrates that the Attorney General's election to apply the new law to old cases converts an old order to show cause or notice of hearing (issued in exclusion cases under prior INA § 235 or under 242(a) in deportation cases) into a notice to appear under *new* § 239(a).

The latter point is crucial to Petitioner's interpretation of the statute.[14] As discussed more fully above, § 309(c)(5)'s "before" language is given effect when and if the Attorney General converts an old proceeding into a new one. In that event, an old Order to Show Cause effectively becomes a new Notice to Appear. In that event, §§ 309(c)(5) and 240A(d)(1) operate, and the person's physical presence is terminated, as of the issuance of the old OSC.

Further, § 308(g)(1) of the IIRIRA made numerous conforming amendments to the statute. Among other things, § 308(g) rendered many terms and sections of the prior INA interchangeable with those in the present Act. However, Congress did not make § 239(a) interchangeable with § 242(a) or 242B of the prior INA.

Consistent with Congress' directives in the new INA §§ 239(a) and 240A, the agency's implementing regulations distinguish between proceedings begun before April 1, 1997 and those begun on or after April 1, 1997. 8 CFR §§ 240.16, 240.30, 240.40, 240.55(Interim Regulations, issued Mar. 6, 1997).

Significantly, in implementing regulations, the agency itself has observed the distinction between Notices to Appear and Orders to Show Cause. 8 CFR §§ 3.13; 239.1(a). And the BIA majority itself acknowledged that the term Notice to Appear did not exist in the INA until the IIRIRA added § 239(a). *N-J-B-* (P.A. at 9). Before that time, the majority conceded, respondents were served with an "Order to Show Cause." *Id.*

**C. Section 240A(d)(1) Refers to A Notice to Appear Under 239(a), Not Just**

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[14]This is also the interpretation of the statute outlined by BIA dissenting member Villageliu, who was joined by members Guendelsberger and Rosenberg..

**to A "Generic" Notice to Appear**

The BIA majority attempted to obscure the fact that § 240A(d)(1) terminates the period of physical presence when an alien is served with a "notice to appear under § 239(a)." The majority said the words under § 239(a) "do no more than identify the section of the Act in which the 'notice to appear' was initially described." (P.A. at 11).

The majority's treatment of the phrase "under § 239(a)" renders that clause surplusage, violating one of the cardinal principles of statutory interpretation. As the dissent points out in *N-J-B-*, if the words "under § 239(a)" were mistaken surplusage they easily could have been deleted when Congress corrected § 309(c)(1) in the Extension of Stay in the United States for Nurses Act, Pub. L. No. 104-302, 110 Stat. 3656 (1996). (P.A. at 30).

The BIA majority is not authorized to read words that Congress included out of a statute. Congress included the phrase "under § 239(a)" in the statute and did not delete it when it amended this section of the IIRIRA. Congress is presumed to have meant what it said. *Cardoza-Fonseca*, 480 U.S. at 432. The phrase "under § 239(a)" must be given effect. Therefore, § 240A(d)(1) cannot refer to any charging document other than a Notice to Appear issued under § 239(a).

**D. "Service" of A Notice To Appear Is Not "Issuance" Of A Notice To Appear**

The majority's decision also disregards the fact that 309(c)(5) says that the physical presence cut-off is triggered when a Notice to Appear under 239(a) is "issued," not "served." In contrast, § 240A(d)(1) uses the word"served" with a notice to appear under § 239(a). The Court is obligated to give meaning to the different language. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992). *See also Williamson v. Commissioner, IRS*, 974 F.2d 1525, 1531 (9th Cir. 1992) (Court is not at liberty to impose upon a statute a construction that renders parts of its language nugatory).

INS regulations currently and historically have recognized the difference between issuance of charging documents (such as an Order to Show Cause or Notice to Appear) and the service of that document on the Respondent. Compare 8 CFR §§ 3.13, 3.32 (defining service) with §§ 242.1, 242.2(c)(2), (discussing who may issue an Order to Show Cause and when it may be issued) concerning pre-IIRIRA regulations. Compare also, 8 CFR § 3.13 with §§ 239.1, 239.2(a) for post-IIRIRA regulations (Interim regulations issued March 6, 1997).

This Court recognized the distinction between issuance of an order to show cause and service of an order to show cause in *Ballbe v. INS*, 886 F.2d 306 (11th Cir. 1898), *cert. denied* 495 U.S. 929 (1990), *overruled on other grounds Jaramillo v. INS*, 1 F.3d 1149 (11th Cir. 1993) (en banc).

That the statute says "issued" in § 309(c)(5) and "served" in § 240A(d)(1) demonstrates that Congress intended the transition rule to apply only to cases where INS had issued an Order to Show Cause before September 30, 1996, but had not served it prior to that date. This gives effect to the "before" language of § 309(c)(5). In other words, the accrual of physical presence is terminated for people in a removal proceeding "under § 239(a)" where the INS had "issued" the Order to Show Cause before September 30, 1996. Thus, the transition rule would apply to those circumstances where the Attorney General elects to put someone in a removal proceeding "under 239(a)" pursuant to the transition rules at 309(c)(2) or 309(c)(3). This interpretation gives meaning to both the language in 309(c)(5) regarding issuance "before" September 30, 1996, as well as the language in INA 240A(d)(1) requiring "service" of a Notice to Appear "under §239(a)."

## III. IIRIRA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT THAT ONLY SERVICE OF A NOTICE TO APPEAR "UNDER SECTION 239(a)" ENDS PHYSICAL PRESENCE

"The `strong presumption' that the plain language of the statute expresses congressional

intent is rebutted only in `rare and exceptional circumstances," *Rubin v. U.S.*, 449 U.S. 424, 430 (1981), when a contrary legislative intent is clearly expressed. *INS v. Cardoza-Fonseca*, 480 U.S. at 432, n.12." *Ardestani*, 502 U.S. at 136-37. This is not one of those rare circumstances. Here, the legislative history is in complete accord with the plain language that the special rule ends physical presence upon service of only a notice to appear "under section 239(a)," not an order to show cause. The texts of §§ 240A(d)(1) and 309(c)(5) were the result of a compromise carefully crafted by Congress regarding under what situations physical presence would be terminated in cases commenced prior to April 1, 1997. The legislative history establishes that opposing legislative factions compromised their differing positions and agreed that while enumerated crimes and prolonged absences would end physical presence, service of an order to show cause would not, unless the Attorney General converts deportation proceedings to removal proceedings under § 309(c)(2).

IIRIRA resulted from reconciliation of H.R. 2022 and S. 1662 in Conference Committee. Its Joint Explanatory Statement declared that the "Senate recedes to House section 309." 104 Cong. Rec. at 10,898. Therefore, the starting point for analyzing IIRIRA's legislative history should be H.R. 2022. When H.R. 2022 was introduced into the House on August 5, 1995, § 309(c)(5) provided:

> 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 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 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).

H.R. 2022, § 309(c)(5), *available in* Westlaw, at 1995 CQ US HR 2022 (Aug. 4, 1995).

This initial version of § 309(c)(5) provided a clear rule that a suspension of deportation applicant's physical presence ended upon service of an order to show cause. At this point, the transitional rule did not reference § 240A(d), and therefore § 240A(d) applied only to cancellation of removal applicants.

However, in a House Judiciary Committee markup session, an amendment to § 309(c)(5) proposed by Representative Howard Berman was adopted by voice vote. H.R. Rep. No. 104-469(I) (Mar. 4, 1996), *available at* WL 168955, *520-521. This amendment established the text of § 309(c)(5) as posed by the full House:

> 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 ... physical presence) shall apply to notices to appear issued after the date of the enactment of this Act.

*Id.*; H.R. 2022, § 309(c)(5), *available in* Westlaw, at 1996 CQ US HR 2022 (Mar. 21, 1996). The amendment intentionally deleted the operative language that service of an order to show cause ends physical presence. In addition, the amended text now referenced § 240A(d), applying these special rules to both cancellation of removal and suspension of deportation applications. The House Judiciary Committee Report on H.R. 2022 confirms that the Berman amendment's intended effect upon § 309(c)(5):

> *The rules under new section 240A(d)(1) and (2)* regarding continuous physical presence in the United States as a criterion for eligibility for cancellation of removal 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(I), *available at* 1996 WL 168955, *647-648 (emphasis added). The amended § 309(c)(5) was later adopted by the Conference Commitee and enacted into law. Accordingly, it is not suprising that the Conference Committee's Joint Explanatory Statement adopted word-for-word the House Report's interpretation of § 309(c)(5). H.R. Conf. Rep. No. 104-

828, *available in* 104 Cong. Reg. at 10899.[15]

The legislative compromise which resulted in § 309(c)(5)'s final text discarded the originally proposed text under which service of an order to show cause would have ended physical presence, substituting language that applies the § 240A(d) special rules in all cases commenced prior to April 1, 1997. Those special rules terminate physical presence only in certain situations, as explained by the Conference Committee's Joint Explanatory Statement:

> The period of continuous ...physical presence ends *when an alien is served a notice to appear under section 239(a) (for the commencement of removal proceedings under section 240)*, or when the alien is convicted of an offense that renders the alien deportable from the United States, whichever is earliest. A period of continuous physical presence [also] is broken if the alien has departed from the United States for any period of 90 days, or for periods in the aggregate exceeding 180 days.

H.R. Conf. Rep. No. 104-828, 104 Cong. Rec. at 10,896. (emphasis added). The special rules' legislative history is clear: physical presence ends upon service of only a "notice to appear under

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[15]The Berman amendment also deleted § 309(c)(5)'s reference to "an application for suspension of deportation which is filed *before, on, or* after the date of the enactment," narrowing its scope to cover only cases commenced by "notices to appear issued *after* the date of the enactment." (emphasis added). The "before, on, or" language was subsequently revived in the Conference Committee, "apparently at the 11th hour," although it was not reflected in the Joint Explanatory Statement. *N-J-B-* (P.A. at 10, n.7). This revival did not counteract the other intent of the Berman amendment, which was to delete from § 309(c)(5) the operative language that service of an order to show cause ends physical presence and to substitute language that the § 240A(d) special rules should be applied instead. The final language simply meant that § 240A(d) should be applied in all cases, even where commenced "before, on, or after" IIRIRA's enactment date.

section 239(a)," commencing removal proceedings, not an order to show cause commencing deportation proceedings. *See* H.R. Rep. No. 104-469(I), *available at* WL 168955, *470 ("The time period for continuous physical presence terminates on the date a person is served a *notice to appear for a removal proceeding*") (emphasis added); H.R. Rep. No. 104-879 (Jan. 2, 1997), *available at* 1997 WL 9288, *260 (Under § 240A(d)(1), physical presence ends "on the date an alien is placed into *removal proceedings*") (emphasis added). This is consistent with § 309(c)(2), under which the Attorney General may convert deportation proceedings to removal proceedings, in which case § 309(c)(5) applies the special rules to end physical presence upon service of an order to show cause.

The legislative history thus reveals the error of the *N-J-B-* majority's conclusion that the proviso "under section 239(a)" was not intended by Congress to have specific effect. (P.A. at 11). Ignoring the legislative history, the majority instead focused on the language in § 309(c)(5), which originally would have terminated physical presence upon service of an order to show cause, but which was later discarded. (P.A. at 38, n.3) (Board Member Villalegiu, dissenting). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. at 442-43.

Furthermore, if "under section 239(a)" were mistaken surplusage, Congress could have easily deleted it when technical corrections to § 309(c) were made in the Extension of Stay in the United States for Nurses Act, Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996). Congress did not. Instead, Representative Lamar Smith, Chairman of the Subcommittee on Immigration and Claims of the House Judiciary Committee, reaffirmed the Conference Committee's Joint Explanatory Statement to be an accurate interpretation of § 309(c). 142 Cong. Rec. H12293-01 (daily ed. Oct. 4, 1996), *available in* 1996 WL 565773. *See N-J-B-* (P.A. at 37) (Board Member Villalegiu,

dissenting); *cf.* 2A N. Singer, *Sutherland Statutory Construction*, § 48.14 (4th ed. 1985).

The *N-J-B-* majority's disregard of the specific legislative history of § 309(c)(5) appears to be an attempt to dispose of pending suspension of deportation applications "by administrative fiat." (P.A. at 37) (Board Member Villageliu, dissenting). The majority erroneously justifies its interpretation that service of the order to show cause ends physical presence by referring to the general purpose of § 240A(d)(1), removal of the incentive for aliens to use frivolous tactics to delay proceedings in order to accrue time needed to qualify for relief. (P.A. at 13). The majority ignored that such purpose cannot be furthered in proceedings commenced prior to IIRIRA's enactment. "How can you dissuade someone from doing something already done?" (P.A. at 26) (Board Member Villalegiu, dissenting). Moreover, the *N-J-B-* majority ignores the fact that deportation proceedings have often been delayed due to no fault of the alien. *See, e.g., Matter of L-O-G-*, Int. Dec. #3281 (BIA 1996) (acknowledging that INS took no final action in Nicaraguan nationals' deportation cases between 1987 and 1995); *American Baptist Church, et al. v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) (staying deportation proceedings for years pending readjudication of Salvadoran and Guatemalan's asylum applications based on claim that such applications were denied due to systematic INS bias); *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995) (INS is "notorious for delay"). Congress must be presumed to have been aware of these cases when they enacted IIRIRA, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Carrion*, 456 U.S. 353, 382 n.66 (1982), and should not be presumed to have intended § 309(c)(5) to be interpreted so broadly as to eliminate the right of aliens to apply for suspension of deportation where they played no role in delaying their cases.[16] Moreover,

[16]Of course, in a case where an alien has used delay tactics, an immigration judge or the BIA may deny suspension of deportation as a matter of discretion. *INS v. Rios-Pineda*, 471 U.S.

this Court should not choose such an interpretation of § 309(c)(5) because "the plain language of the statute ... constrains [it] to do otherwise." *Ardestani*, 502 U.S. at 138 (rejecting the argument that "a functional interpretation of EAJA is necessary to further the legislative goals underlying the statute").

## IV. BECAUSE CONGRESS DID NOT CLEARLY INDICATE THAT THESE AMENDMENTS SHOULD APPLY RETROACTIVELY, THE COURT SHOULD ONLY APPLY THEM PROSPECTIVELY

### A. There Is A Presumption Against Retroactive Application Of New Statutes That Affect Substantive Rights

*Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 483 (1994) outlined a two-part procedure for determining the temporal reach of a statute. First, the court examines the statute to see if the text "manifests an intent" that it should be applied to cases that arose before its enactment. *Id.* at 1492. There must be an "unambiguous directive" or an "express command" from Congress that it intended retroactive application. *Id.* at 1496, 1505.

If there is no such unambiguous directive, in the second step, the court must determine whether the new statute would in fact have genuine retroactive effect. *Id.* at 1498-99, 1505. The statute would have genuine retroactive effect if it "attaches new legal consequences to events completed before its enactment." *Id.* at 1499. A genuinely retroactive statute "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." *Id.* at 1505.

The conclusion that a particular rule or law operates retroactively "comes at the end of a

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445 (1985).

process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 1499. "[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.*

If the statute would have retroactive effect, then the court applies the traditional presumption against retroactive effect of new statutes. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 1500. For these reasons, requiring that the statute express Congress's clear intent that it should apply retroactively assures that Congress itself affirmatively considered the potential unfairness of retroactive application. *Id.*

The Supreme Court also said in *Landgraf* that the presumption against retroactivity counterbalances, "The Legislature's unmatched powers ... to sweep away settled expectations suddenly and without individualized considerations," sometimes as a means of retribution against unpopular groups or individuals. 114 S.Ct. at 1497.

Where a section of a statute does not have an express effective date, the *Landgraf* analysis has particular application. In those situations, Congress has not spoken clearly – has not spoken at all – to indicate when the statute should apply and whether the new statute should apply to cases that arose before its enactment. New statutes that have negative consequences have genuine retroactive effect, and under *Landgraf* there is a presumption that they are not to be applied to pending cases.

Retroactive application of § 240A(d)(1)'s physical presence cut-off in this case would undeniably have negative consequences. Petitioner applied for suspension of deportation when she was statutorily eligible for that relief. When the immigration judge denied her application, Petitioner

had a reasonable expectation that the BIA would review the merits of the judge's decision de novo. *Charlesworth v. U.S.INS*, 966 F.2d 1323, 1325 (9th Cir. 1992); *Hazzard v. INS*, 951 F.2d 435, 440 n.4 (1st Cir. 1991).[17]

Statutes will not be applied retroactively where doing so would work a manifest injustice. *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). In Petitioner's case, and in the cases of the many thousands of people similarly situated, retroactive application of the 240A(d)(1) cut-off of physical presence would indeed constitute manifest injustice. This Court must hold that the BIA erred in giving retroactive effect to § 240A(d)(1).[18]

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[17]Petitioner was not alone in this expectation, of course. Many thousands of people are affected by the BIA's *N-J-B-* decision. Tens of thousands are included in the proposed class in the case pending in the district court. *Tefel v. Reno*, *supra* (P.A. at 83-84). Petitioner is a named plaintiff in that case. Many of the people affected by the *N-J-B-* decision were granted suspension of deportation by the immigration judge but their cases were appealed by the INS and were pending at the BIA. (P.A. at 65). Those individuals undeniably have suffered negative consequences from the BIA's retroactive application of the new law. (P.A. at 63-68).

[18]The government may cite *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997), to argue that this Court already permitted retroactive application of a new immigration law to pending cases. However, in *Boston-Bollers* this Court considered a distinct legal issue from that presented here. In that case, this Court held that applying § 440(a)(10) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to petitions for review pending on the date of AEDPA's passage was not a retroactive application affecting substantive rights. Rather, this Court said, it is a prospective application of a jurisdiction-eliminating statute. *Id.* Those statutes are typically treated

## V. RETROACTIVE APPLICATION OF IIRIRA § 309(c)(5) DEPRIVES PETITIONER OF HER DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION

Courts should strive to avoid an unconstitutional result. *Webster v. Doe*, 486 U.S. 592 (1988). Retroactive application of § 309(c)(5) violates Petitioner's rights to equal protection and due process.[19] The equal protection guarantees of the due process clause of the Fifth Amendment have

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differently.

In contrast, §§ 309(c)(4) and 240A(d)(1) *do* affect the substantive right to petition for suspension of deportation. *Cf. Hincapie-Nieto v. INS*, 92 F.3d 27, 30 n.2 (2d Cir. 1996) (suggesting that AEDPA § 440(d), limiting applications for § 212(c) waiver of deportation does implicate a substantive right and hence might not be applicable retroactively).

[19]The constitutional claims briefly and incompletely discussed here are part of the *Tefel v. Reno* case in the District Court. (P.A. at 61-126). These constitutional claims can only be appropriately reviewed on a full factual record that is being developed in the District Court. The record of proceedings in this Court cannot provide the record necessary to establish the due process, equal protection and estoppel claims advanced in the District Court. For example, Plaintiffs have developed a factual record in the District Court concerning the property and liberty interests that were created by the Defendants (Respondents here) in Plaintiffs' applications for suspension. Similarly, Ms. Baldizon and other Plaintiffs have developed a factual record describing the irrational distinction that the Respondents have drawn in their interpretation of *N-J-B-*. That record will be presented to the District Court at the June 12, 1997 oral argument. (P.A. at 125-26).

been violated as a result of the distinctions drawn retroactively between Petitioner and others seeking suspension of deportation. The federal courts have long recognized that any immigration scheme which establishes unjustifiable, "wholly irrational" distinctions in the treatment of deportable persons violates equal protection and cannot stand. *Yeung, supra; Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1979).

Under the *N-J-B-* decision, persons who came forward to the INS and who were placed in deportation proceedings before they had been physically present for seven years, who had their hearing after seven years and were granted suspension of deportation, are punished by now being retroactively denied the right to seek suspension of deportation. Conversely, someone who evaded INS successfully for seven years is still eligible for suspension of deportation under the *N-J-B-* decision. Such a person remains eligible for suspension of deportation even if she has been physically present for less time than a person whose presence is retroactively terminated by operation of *N-J-B-*.

A scheme that rewards persons who did not come forward and denies persons who did come forward the same benefits, is irrational and violates equal protection. Similarly, a scheme that turns on whether and when someone is served with a charging document is irrational and violates equal protection.

The retroactive application of 309(c)(5) to bar persons completely from even applying for suspension of deportation violates due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 420 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Here, as in *Logan* and *Mullane*, the interpretation of a statute has the effect of barring completely a person's access to the courts irrespective of the merits of their claims.

Deportable aliens such as Petitioner have long been recognized as having full due process

rights. *Bridges v. Wixon*, 326 U.S. 135 (1945); *Ibrahim v. U.S. I.N.S.*, 821 F.2d 1547, 1550 (11th Cir. 1987). Petitioner paid fees to the government for her suspension application. She therefore has a property interest in obtaining a hearing on her application. The statute authorizing suspension of deportation, former INA section 244(a)(1), further creates a property and liberty interest. The BIA majority's *N-J-B-* decision violates due process insofar as it retroactively deprives Petitioner of property and liberty interests without due process. *Logan, supra* and *Mullane, supra. See also Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Matthews v. Eldridge*, 424 U.S. 319 (1976).

## VI. PETITIONER WAS DENIED DUE PROCESS BECAUSE THE BIA DID NOT NOTIFY HER COUNSEL OF THE PENDING CONSIDERATION OF THE §§ 240A(d)(1) AND 309(c)(5) ISSUES

As the record reflects, before issuing the decision in *N-J-B-*, the BIA requested amicus briefs from the American Immigration Lawyers Association and from the Federation for American Immigration Reform. Among other things, the BIA asked those organizations to brief the issue of the effect of sections 240A(d)(1) and 309(c)(5). Worse, the BIA accepted ex parte briefing on these important issues from the INS's Office of Appellate Counsel.

The BIA did not, however, notify Petitioner's counsel that it was considering applying these new statutes in her case. Counsel only learned of the BIA's deliberations when he received the BIA's decision in this case.

The BIA's failure to give Petitioner's counsel the opportunity to address these issues before making its decision, while requesting that briefs be submitted by other organizations, and while permitting the INS to submit a brief, constitutes a denial of Petitioner's right to counsel and due process.

The right to counsel in deportation proceedings does not arise out of the Sixth Amendment --

which pertains only to criminal proceedings -- but is guaranteed by the Fifth Amendment right to due process. *See Montilla v. INS*, 926 F.2d 162, 168 (2d Cir. 1991) (violation of right to counsel does not require further showing of prejudice); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985) (due process guarantees right to counsel of choice).

Both the INA and applicable regulations protect the right to counsel. INA section 292 states:[20]

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

*See also* former 8 CFR § 242.10 and 292.5.

Petitioner was prejudiced by the failure of the BIA to give her the opportunity to submit a brief before it rendered its decision in *N-J-B-*. No brief submitted to the BIA presented the statutory construction interpretation Petitioner articulates herein. (R.84-123). Thus, the BIA did not have the benefit of this interpretation when it considered the issues resolved in *N-J-B-*.

Although Petitioner was prejudiced by the BIA's failure to notify her counsel or permit her to file a brief before deciding *N-J-B-*, she submits that proof of prejudice is not required here. Federal courts have held that where an individual has been deprived of the right to counsel, there is no need to make a separate showing of prejudice. *Montilla*, 926 F.2d at 168; *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7th Cir. 1975).

Similarly, in *Partible v. INS*, 600 F.2d 1094 (5th Cir. 1979), a case with precedential value

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[20]The number of this statute section was not changed by the IIRIRA. Nor was the substance of the statute changed.

in the Eleventh Circuit, the court held that the alien's waiver of counsel was not knowingly and intelligently made. The court said the right to counsel was violated where important matters were not adequately explored at the original deportation hearing because of the lack of counsel. *See also Yiu Fong Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969).

These cases stand for the proposition that the right to counsel is fundamental in immigration proceedings. In this case, it was a *per se* violation of due process for the BIA to arrive at a decision in this important case without permitting counsel for Petitioner to address the issues.

## VII. THE BIA ABUSED ITS DISCRETION BY FAILING TO ADEQUATELY CONSIDER PETITIONER'S ASYLUM APPLICATION

The BIA disposed of Petitioner's asylum application in one summary paragraph. (P.A. at 14-15). It very briefly summarized some of her testimony and the evidence and then swiftly dismissed her claims.

The BIA neglected to mention or show consideration of the persecution that Petitioner and her family members suffered in Nicaragua. Petitioner testified that she was forced to teach children Sandinista propaganda in contradiction to her political and personal beliefs. Because she refused to follow the Sandinista educational system, she was constantly subjected to Sandinista scrutiny and harassment. She was repeatedly pressured and threatened to join the Sandinista movement. The BIA dismissed this testimony summarily. (P.A. at 15).

Further, Petitioner testified that her children were continuously persecuted by the Sandinistas because they chose to participate in anti-Sandinista activities. They were denied admission to college based upon their political beliefs. The BIA completely failed to address the persecution directed to Petitioner's children.

The BIA abuses its discretion where it fails to provide an adequate explanation for its

decision or fails to show adequate consideration of the factors it considered. *Rodriguez-Matamoros v. INS*, 86 F.3d 158 (9th Cir. 1996); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994). In *Rodriguez-Matamoros* the court remanded a denial of asylum to a Nicaraguan woman who had been persecuted by the Sandinistas. The court faulted the BIA for not sufficiently setting forth the factors it considered or the basis for its decision. The court agreed with the BIA that, in light of changed political conditions in Nicaragua, the petitioner did not have a well-founded fear of future persecution. Nevertheless, the past persecution might make her eligible for asylum.

Similarly here, Petitioner's past persecution qualifies her for asylum. The BIA abused its discretion in dismissing her appeal without giving it adequate consideration and without demonstrating to this Court the factors it did consider. The denial of asylum must be reversed.

## CONCLUSION

WHEREFORE, based on the foregoing, Ms. Baldizon prays this Court reverse the BIA's order and remand this matter to the BIA with directions that it consider Ms. Baldizon's case based upon its merits and issue a decision in conformity with this court's ruling.

Respectfully submitted,

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By: _____
IRA J. KURZBAN, ESQ.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was Federal Expressed to: Nelda C. Reyna, Esq. and Philemina McNeill Jones, Esq., Attorneys for Respondents, Office of

Immigration – deportation –

# DISCUSSION MEMORANDUM

**Background**

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) severely restricts the availability of suspension of deportation in three ways:

(1) it extends the length of time immigrants must have resided in the U.S. to be eligible for suspension from seven to ten years and requires a greater showing of hardship. These rules apply to persons placed in removal proceedings after April 1, 1997;

(2) it sets a 4,000 annual cap on the total number of suspensions that can be granted, regardless of the number of individuals found eligible for suspension. Previously, there was no ceiling;

(3) it requires immigrants to meet the 7 (now 10) year residency prong before being placed in removal proceedings. (Prior to the IIRIRA, time would accrue throughout the course of proceedings.) This "stop-time" rule applies retroactively to individuals who were placed in proceedings prior to April 1, 1997.

The combination of these changes will dramatically reduce the number of immigrants currently in the U.S. who will be eligible for suspension. During your trip to Central American, you stated that you would work with Congress to seek to alleviate the harshest consequences of the law.

**Persons Affected by the Law**

While the suspension provisions of the IIRIRA will affect all nationalities, its consequences will be most acutely felt by the large number of Central Americans who entered the U.S. illegally in the mid/late 1980s in response to civil war and large-scale political persecution.

Nicaraguans: Approximately 40,000 Nicaraguans currently are in deportation proceedings. The Reagan Administration protected most of them from deportation during the pendency of a special DoJ review of their asylum applications. That program ended in June 1995 and the last available form of relief for Nicaraguans is to apply for suspension of deportation. Because of the way their cases were handled, Nicaraguans will be most severely affected by the retroactive application of the "stop-time" rule.

Guatemalans and Salvadorans: As a result of a settlement in a major class action lawsuit (known as *ABC*) that was reached in 1991, Salvadoran and Guatemalan asylum-seekers who came to the U.S. in the 1980s were protected from deportation until their

cc: Vice President
Chief of Staff

asylum claims could be decided under special adjudication procedures. Congress and the Executive branch also protected Salvadorans from deportation through various programs that expired in 1994. The *ABC* class is comprised of roughly 190,000 Salvadorans and 50,000 Guatemalans.

Because INS only fully put in place its special asylum procedures on April 7, 1997, and because *ABC* members did not press for rapid asylum hearings (believing that they were accruing time for purposes of suspension), a majority of them still have pending asylum applications and have yet to seek suspension of deportation. As a result, and barring a legislative change, they will be subject to the IIRIRA's stricter rules. Others were placed in proceedings before the accrual of seven years, and therefore will be barred by the "stop-time" rule.

***In short, absent legislative fixes, approximately 280,000 Central Americans may eventually be subject to deportation.*** This could lead to serious disruptions to families in the U.S. and threaten the stability of Central American nations that rely heavily on remittances from immigrants and whose labor markets could not absorb a large number of returnees.

**Congressional Sentiment**

The legal modifications appear to have been motivated by the feeling that suspension was granted too generously. In addition, some in Congress wanted to eliminate the possibility of an amnesty-like program for Central Americans. At the same time, many Members were not aware of the full impact of these changes, particularly on long-standing *de facto* residents such as the *ABC* members.

**Legislative Strategy Options**

Option 1: Lift Cap for Cases in Proceedings Prior to April 1.

***This option would affect between 19,000 to 38,000 individuals who would be granted suspension absent the cap.*** However, it would not address the core concerns of the immigrant community or of Central American governments because it would not assist about 215,000 *ABC* members not in proceedings as of April 1 (and therefore affected by the cap and the new suspension rules), nor would it help the 40,000 Nicaraguans affected by retroactive application of the "stop-time" rule. This is the most modest option which DoJ already is discussing with Members of Congress. In the meantime, DoJ has put a hold until September 30 on deportations of people who would have qualified but for the cap.

Option 2: Lift Cap for Cases in Proceedings Prior to April 1 and Reverse Retroactive Application of the "Stop-Time" Rule.

***This option would benefit between 38,000 and 76,000 individuals*** -- essentially those helped by option 1 plus Nicaraguans and others affected by retroactive application of the "stop-time" rule. It could be justified as a fair transitional measure as the Administration moves toward full implementation of the law. However, it would be criticized from both sides: it would not help approximately 215,000 *ABC* class members not in proceedings as of April 1, and is likely to be strongly opposed by the principal congressional backers of the IIRIRA. Absent high-level White House efforts, proposing this could undermine our chances on option 1.

Option 3: Lift Cap for *ABC* Members and Individuals in Proceedings Prior to April 1; Reverse Retroactive Application of the "Stop-Time" Rule for Cases in Proceedings Prior to April 1; and Apply pre-April 1 Suspension Standards to *ABC* Members.

narrower than above?

***This is the broadest option and is expected to benefit roughly 119,000 individuals*** -- those covered by option 2 plus *ABC* members who would have qualified had there been no change in the law. This is the only option that addresses the bulk of the Central Americans' and immigrant community's concerns. Special treatment of *ABC* class members can be justified by their unique circumstances, which includes their long presence in the U.S. under temporary legal status and the fact that their asylum cases were delayed while INS put in place special asylum procedures -- as a result of which they are being barred from suspension because of legislation passed 6 years after the settlement agreement with DoJ. The Administration also could point out that these are transitional measures, and that full implementation of the immigration law will soon follow.

However, this option is likely to generate strong opposition from Members of Congress who will liken it to an amnesty and question the Administration's resolve to seriously enforce the immigration law. Moreover, it might be criticized for singling out for special treatment Salvadorans and Guatemalans. Absent high-level White House intervention along the lines of the final days of debate on the 1996 bill, even proposing this option could jeopardize the chances of options 1 or 2.

**Related Issues**

Two additional issues need to be resolved based on your decision on the foregoing options:

Issue #1: Whether to temporarily stop deporting individuals who would qualify for suspension under the option you select.

This would avoid the deportation of immigrants who may otherwise qualify were we to reach agreement with Congress. At the same time, the hold would not prejudge the outcome of our negotiations with Congress as deportations could resume if and when necessary.

Issue #2: Whether to agree, in negotiations with the Congress, to offset any increase in the number of suspension grants with a reduction in legal immigration numbers.

While not our preferred option, some Members of Congress might condition their agreement on an offset. With roughly 900,000 legal immigrants admitted per year, even the most generous option (#3) would entail reducing that number by only slightly over 10% or, if spread over several years, a fraction thereof.

However, any such option could be seen to conflict with the Administration's principle of favoring legal immigrants over those without legal status. In addition, several Members -- including Senator Abraham -- strongly oppose an offset, which they fear might re-open debate on other legal immigration issues.

**Administrative Options**

Immigration advocates are pressing us to take administrative steps instead of/in addition to legislative ones.

Step #1: Temporarily Halt *ABC* Asylum Interviews

Pursuant to the settlement, INS began conducting new asylum interviews of *ABC* members in April 1997. Interviews are resulting in large numbers of denials and placement of aliens in deportation proceedings -- thereby cutting off the accrual of time for suspension/cancellation purposes. Advocates seek an immediate, temporary halt to interviews as the Administration considers its options, arguing that the INS waited 6 years to schedule the interviews, only to hold them when they will cause most harm to the aliens as a result of the new "stop time" rule. However, a halt will be viewed by some Members as inconsistent with INS' commitment to move forward with interviews.

Step #2: Re-interpret the Cap Provision

Advocates argue that the IIRIRA can reasonably be read to impose a 4,000 cap on the number of adjustments of status granted annually, not on the number of suspensions. They ask that aliens granted suspension be placed on a wait list and permitted to remain in the U.S. legally until a number is available for

adjustment of status in a subsequent fiscal year. While this arguably is a defensible interpretation of the law, it risks being viewed by some Members as an end-run around the cap.

Step #3: Reverse the decision applying the stop-time rule retroactively

Advocates are urging the Attorney General to reverse the Board of Immigration Appeals decision (known as *NJB*) holding that the stop-time rule applies retroactively. They argue that *NJB* was a 7-5 split decision by the Board and that a reversal would be legally justified. However, OLC has reviewed this issue and does not believe the advocates' interpretation is defensible.

procedure?

presumptive extreme hardship?