NLWJC - Kagan

DPC - Box 032 - Folder 012

Immigration - Deportation Rules [5]

Immigration — Deportation

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK

FROM: SAMUEL BERGER
BRUCE REED
JOHN HILLEY

SUBJECT: Legislative Options on Immigration Law

Purpose

To adopt a legislative strategy to address some of the harshest provisions of the immigration law.

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.

cc: Vice President
Chief of Staff

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 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 vast 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.

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 -- by 1996, immigration judges were granting it to roughly 75% of applicants. In addition, some in Congress wanted to eliminate the possibility of an amnesty-like program for Central Americans. At the same time, it is likely that 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 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.

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. However, this will be criticized by some Members of Congress.

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.

RECOMMENDATION

File / Immigration - Suspension of 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 the President's trip to Central America, he stated that he 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 1991 settlement in a major class action lawsuit (known as *ABC*), Salvadoran and Guatemalan asylum-seekers who came to the U.S. in the 1980s were protected from deportation until their asylum claims could be

cc: Vice President
Chief of Staff

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 number 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 changes 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 unaware of the full impact of the changes, particularly on long-standing *de facto* residents such as *ABC* members.

Legislative Strategy Options

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

This option could affect up to 38,000 individuals (Central Americans and others) 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. Indeed, many of the *ABC* members were not in proceedings as of April 1 (and therefore will be affected by the cap and the new suspension rules), or were put in proceedings early on and would be affected by retroactive application of the "stop-time" rule. The 40,000 Nicaraguans also would not be helped because of the stop-time rule. (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 could benefit up to 90,000 individuals of all nationalities -- essentially those helped by option 1 plus Nicaraguans and others affected by retroactive application of the "stop-time" rule. It is premised on the view that the law should not be applied retroactively and 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 *ABC* class members who were 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.

This is the broadest option and is expected to benefit roughly 119,000 individuals of all nationalities -- those covered by option 2 plus *ABC* members who were not in proceedings as of April 1. In essence, this option would hold *ABC* members harmless, treating them as if 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, even proposing this option could jeopardize the chances of options 1 or 2.

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

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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 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.

Immigration — Deportation

NOTE FOR ELENA KAGAN/LEANNE SHIMABUKURO

FROM : ROB MALLEY

Subject: Administrative Steps on Suspension of Deportation

At the meeting today, the advocates strongly urged us to consider administrative, as opposed to legislative, steps. The most important ones they propose are:

1. **That the AG reverse the *NJB* decision** -- which held that the rule on accrual of time for suspension purposes applied retroactively. As you know, 5 of the 7 BIA judges on the *NJB* panel dissented from the majority opinion, and some federal courts also have disagreed with *NJB*.

I have raised this with DoJ and INS in the past, and have been told that OLC's view is that the advocates' position is not defensible. OLC has so advised the AG. Of course, the White House could request that this be reviewed, and could inform DoJ of its preferred policy outcome, but this is hardly likely to yield a different result.

2. **That DoJ and INS interpret the cap provision to apply to the total number of adjustment granted per year, not the number of suspensions/cancellations of removal.** Aliens who are granted suspension would be placed on a waiting list and permitted to remain here legally until a number is available for adjustment in a subsequent fiscal year.

My recollection on this one is that INS/GC thought this was not the preferred interpretation, albeit a defensible one. At the same time, DoJ/INS strongly believed that adopting that approach would be viewed on the Hill (i.e., by Smith) as an end-run around the cap. In litigation on this issue, DoJ has opposed the advocates' view.

The WH could ask Justice whether ~~it~~ the advocates' approach is defensible and, if it is, could request that it be adopted. However, without the other fixes that we would like (regarding NJB and the retroactive application of the hardhsip standards for ABC class members), this would be of limited value.

3. **That DoJ interpret the ABC agreement to guarantee that suspension claims of class members would be adjudicated under the old rules.** ABC class members would be subject to 7 year, more lenient standard, regardless of when they were put in proceedings.

? Need This Differently

I have not discussed this with DoJ or INS at all, and therefore do not know whether the settlement can be so read. However, DoJ has taken the firm position that the settlement only had to do with asylum, not with suspension -- which gives us some clue as to where they would come out.

Immigration-deportation issue

6-3-97 Immigration Mtg

2. lots of concern among advocates don't unveil for time being?

1. Effort on 245i? Not much yet. Have to do INS regs - lottery to solve sup prob.

~~deportation option~~

3. Admin steps

a. Cap - only apply to adjustments? next to impossible.
OLC decision upcoming.

b. NSB - apply it prospectively only?
OLC - thing that would have helped - they were unwilling to say deportable.

Still wouldn't completely take care of APRC?

c. Interim - temp halt any IVs of APRC class members?

4. Legislation

a. DOJ - love to do 3. But concerned w/ what's doable.
DOJ - let Hip - doing it.
Policy rec - 3.
JM - start w/ the hi mark.

JM stakeholder

poss
If no admin → go to 3.

If admin poss →
[Leg Alt would like to do admin.] then take admin steps?
or does it back here?

JM - don't do neg - that will foreclose admin option → admin action may be best you can hope for.

Immigrati - -
deportati -

NOTE TO: ELENA KAGAN

FROM: ROB MALLEY

SUBJECT: Temporary Hold on Deportations

STATUS OF LITIGATION: District court Judge King issued a TRO barring the deportation of Nicaraguans and other immigrants affected by changes in the law governing suspension of deportation. He heard oral argument on PI, but has not yet ruled. TRO expired last night, and Judge asked INS to exercise its discretion and hold off on deportations in interim.

WHAT WE WOULD LIKE INS TO DO: NSC staff position is that INS should announce that it is temporarily holding off on the deportation of immigrants who would be eligible for suspension of deportation but for the retroactive application of a provision in the new immigration law modifying how one calculates length of physical presence in the US. (This provision was interpreted to apply retroactively by the Board of Immigration Appeals in its *NJB* decision -- announcement would be that INS is holding off on deportation of persons who would qualify but for NJB).

RATIONALE: Two possible rationales: (1) that, as a matter of discretion, INS is deferring to Judge's request that it hold off deportations pending decision on PI; or (2) that the Administration is engaged in consultations with Congress on possible modifications to the immigration bill, including on *NJB* issue and that, pending the outcome of those consultations, it will defer deporting any person who would be eligible for suspension but for *NJB*. NSC staff prefers latter.

PRECEDENT: Several weeks ago, Administration announced that it would work with Congress to address problems posed by imposition of 4,000 annual cap on suspensions of deportation. It simultaneously announced that, pending the outcome of congressional consultations, no person eligible for suspension but for the cap would be issued an order of removal. Since we have now added *NJB* to issues we are exploring with the Hill, this decision simply would extend prior step.

Immigration — deportation —

Newt Gingrich
Sixth District
Georgia

(202) 225-0600

Office of the Speaker
United States House of Representatives
Washington, DC 20515

June 6, 1997

The Honorable Janet Reno
Attorney General of the United States
Department of Justice
Constitution Avenue and Tenth Street, NW
Washington, D.C. 20530

Dear Attorney General Reno:

I would like to respectfully request that you extend for another year the Nicaraguan Review Program, which is due to expire on June 12, 1997.

As you are aware, many Nicaraguans fled their homeland and Sandinista tyranny, only to arrive in the United States to be confronted by bureaucratic indecision. In many instances, these cases have been pending for close to twelve years. Despite the challenges they have faced, the Nicaraguan community has greatly contributed to the economic and cultural growth and prosperity of South Florida.

Extension of the Nicaraguan Review Program for an additional year is the only just and proper action at this time. It would allow those who have been unable to apply to have their cases reopened and reviewed in a fair and just manner.

As you make your final decision, please keep in mind the many families who have so much at stake, as well as the tremendous contributions this community has made to our society. I thank you in advance for your consideration of this most important matter.

Sincerely,

Newt Gingrich

67028 PASS TO: Lee Anne

Immigration - deportation

Gingrich and Nicaraguans

Background: Rep. Gingrich reportedly wrote to AG Reno on behalf of thousands of Nicaraguans who are here illegally and are subject to deportation. During the Reagan Administration, AG Meese ordered that these deportation of illegal Nicaraguans be suspended, and that order was in effect rescinded some years ago (during the Clinton Administration). However, during an interim period, INS has continued to permit Nicaraguans here illegally to obtain work authorization, but this will end this month. At the same time, the new immigration law makes it much harder for these illegal Nicaraguans -- as well as all illegals -- to make hardship applications to stay in the U.S.

The President has expressed concern about changes in the law that make these hardship applications harder to file for a range of people (beyond Nicaraguans); thus -- *without focusing on Nicaraguans per se* -- we should note that Gingrich's sentiments are similar to our own.

Points:

- We have not seen the Gingrich letter, but will study it carefully.
- We have seen the Speaker's comments, and -- as the President has indicated -- we very much share the Speaker's concerns about harsh aspects of the recently enacted immigration law that could have serious humanitarian implications for families here.
- Thus, we were encouraged by the Speaker's sentiments, and hope that they can form the basis for an Executive-Congressional dialogue that looks at ways to ameliorate these harsh measures without undermining immigration control.

Immigration - deportation

Date: Sun, 8 Jun 1997 17:22:57 -0400 (EDT)
From: John Trasvina <trasvina@usdoj.gov>
To: trasvina@justice.usdoj.gov

Sunday June 8 2:42 PM EDT

Gingrich Offers Support to U.S. Nicaraguans

By Patricia Zengerle

MIAMI (Reuter) - House Speaker Newt Gingrich says he's sent a letter to Attorney General Janet Reno asking her to extend for a year a special program protecting the immigration status of Nicaraguans in the United States.

"It is totally wrong to punish innocent people," he said at a meeting on immigration and other issues with Miami-area political and community leaders. The letter to Reno was dated June 6 and distributed on Saturday.

The meeting was attended by most of Miami's leading Republicans, among them Reps. Ileana Ros-Lehtinen and Lincoln Diaz-Balart and Jeb Bush, the son of former President George Bush and a narrow loser in Florida's gubernatorial election in 1994.

Many members of Miami's Latin American community, traditionally dominated by staunchly Republican Cuban-Americans, have questioned recently what they see as the Republican Party's hostility to newcomers.

In particular, some have protested plans to make English the official U.S. language, eliminate government benefits to legal immigrants and allow deportation of tens of thousands of Central Americans who came to the United States during the civil wars of the 1980s.

An estimated 40,000 Nicaraguans living in the Miami area are at risk of being kicked out of the United States under the tough new immigration rules.

The Miami Nicaraguans have filed suit against the government, saying they are taxpaying workers who should not be deported to a country that remains unstable by a government that offered them asylum. Immigrant advocates have argued many of them fled their homeland at the behest of the Reagan and Bush administrations as a form of protest of the ruling leftist Sandinistas.

During the meeting, Gingrich said he opposed forcing new laws retroactively on immigrants already in the United States, although he said he favored making changes that would affect new immigrants, including development of a private insurance system for legal residents.

"It's one thing to say about the future, let's set ground rules we all understand," he said.

After the meeting, immigrant activists gave Gingrich's remarks reserved approval. Haydee Marin, Nicaraguan human rights ambassador to the United Nations, said she was pleased he had made a commitment to immigrants from Nicaragua in public.

"I am pleased that he has spoken in a public forum," she said. "The letter and the promise that he will ... (support) legislation, for me that's really good," she said.

During the meeting, Gingrich also said he supported plans to turn the former Homestead Air Force base into a commercial airport, expressed support for measures to preserve the nearby Everglades, and said he favored including funding for the Caribbean Basin Initiative in the budget now making its way through Washington.

Immigration — deportation

RECOMMENDED POSITIONS

- **Extension of 245(i) Adjustment of Status:** INA Section 245(i) permits those seeking lawful permanent residence to adjust their status in the United States without the need for consular processing. Section 245(i) is set to sunset on September 30, 1997. We urge the Administration to vigorously support extending 245(i). Section 245(i) also generates much needed revenue for the INS. People who are eligible to adjust under this section are otherwise entitled to become permanent residents. Extending this program frees up consular officers overseas to provide better service to Americans abroad.

- **Urge Attorney General Reno to Vacate the BIA Decision in Matter of NJB:** Under this decision, the BIA held that Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act ("the Act") applies retroactively. Under this decision, thousands and thousands of persons, including members of ABC, TPS and the Nicaraguan Review Program, are now ineligible to seek suspension of deportation as they no longer qualify under the Act. The administration should urge the Attorney General to vacate the *NJB* decision. The BIA was clearly divided in its decision, with a bare majority agreeing on the retroactive application of the provision. A reasonable interpretation of the law supports a reading that those with Orders to Show Cause issued prior to April 1, 1997 should proceed under the old law.

- **The 4,000 Cap Should not Limit the Number of Suspension Grants per year:** The INS can interpret that the 4,000 cap only applies to the number of adjustments permitted per year, not to the number of suspensions. Therefore, as with asylum grants and subsequent adjustments, immigration judges can grant an unlimited number of suspensions per year. However, only 4,000 of those persons with such grants can adjust in any given year. The additional number of people would be placed on a waiting list as is done with those granted asylum. The language in the Act addressing the 4,000 cap supports such an interpretation.

- **Bars to Admissibility:** Those persons here under color of law, including but not limited to those members of ABC, the Nicaraguan Review Program, Temporary Protected Status, should not be considered to be unlawfully present in the United States for purposes of the bars to admissibility contained in the Act. Further, should such persons be subject to the bars, they should be presumptively eligible for waivers under a theory of extreme hardship. These individuals fled conditions of war and persecution and have made their lives in the United States. They and their families would suffer extreme hardship were they required to remain outside the United States for three or ten years as is required under the bars.

Is it clear to you exactly what admin changes they want?

Yes

Immigration —
suspension of
deportation

MEMORANDUM
May 22, 1997
OPTIONS FOR AVOIDING MASS REPATRIATION AND DEPORTATION OF CENTRAL AMERICANS AND MINIMIZING HARDSHIPS TO ABC CLASS MEMBERS

This memorandum addresses issues specific to Salvadoran and Guatemalan nationals who are members to the class in the lawsuit *American Baptist Churches et al v. Thornberg* (the ABC class). The proposed policy solutions may also be relevant to issues concerning other nationalities.

I. Background

The INS commenced asylum interviews for the ABC class on April 7, 1997. Sadly, when the litigation was settled, neither the attorneys for the ABC class nor the attorneys for the US government anticipated the severe limitations on relief contained in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("the Act").

Prior to the new Act, most class members who were not granted asylum would have a significant possibility of obtaining residency by a grant of suspension of deportation. Suspension is a remedy that an Immigration Judge can grant in immigration proceedings and which results in a grant of permanent residency. To qualify, an applicant must prove: (1) seven years of residency; (2) good moral character; and (3) that deportation would result in extreme hardship to the applicant or to his US citizen or permanent resident family members.

The majority of ABC class members not only have seven years in this country but have also established strong ties to family, friends, and work in the United States. In sum, thousands in the class expected to legalize by grants of suspension in immigration court.

The new immigration act eliminates suspension of deportation for all aliens placed in proceedings on or after April 1, 1997. Instead of suspension, the Act creates a new remedy called "cancellation of removal." Like suspension, it empowers an immigration judge to grant permanent residency. But its requirements are nearly impossible to meet. These requirements include: (1) ten years of residency; (2) good moral character; and (3) that a US citizen or lawful permanent resident parent, spouse or child of the applicant will suffer extreme and exceptional hardship. The hardship to the applicant is no longer relevant!

Many ABC class members are members of families where the entire family applied for asylum. Thus, in many cases no member of the family can meet the requirement of having a legalized family member. Furthermore, a significant number of applicants are young adults orphaned or abandoned in the war. These young adults, regardless of their achievements here and the traumas they have overcome, cannot qualify for relief since they have no citizen or permanent resident qualifying family members. Finally, many ABC applicants entered the United States between 1988 and 1990, and thus will not have ten year's residence when their cases enter the court.

The new Act contains other restrictions as well. The first concerns limitations on accruing years of residency to qualify for suspension or cancellation of removal. The new Act provides in Section 309(c)(5) that an applicant stops accruing the requisite seven or ten years when the applicant is served with a Notice to Appear, the document which commences immigration proceedings and which replaces the former Order to Show Cause ("OSC").

When the INS denies asylum to an ABC class member, the INS will then serve the applicant with a Notice to Appear, which charges deportability and notifies the applicant of a court date. However, a substantial percentage of ABC class members were previously in immigration proceedings and have old OSCs. These individuals will almost certainly be ineligible for suspension or cancellation because under the Board of Immigration Appeal's NJB decision, their old OSC could stop them from accruing the requisite time in this country. For instance, an individual who entered this country in 1983 seeking asylum and who was denied asylum (wrongly) that year by the INS will have an OSC dated 1983. If this individual is now denied asylum at his ABC interview and placed in deportation proceedings, then, instead of being credited for 14 years of residency, the NJB decision would credit only the years he lived here up to 1983.

About twenty-five percent of ABC class members were already in proceedings and thus have old OSCs issued before the accrual of seven years. These individuals could all be deemed ineligible for relief. In addition, nearly all Salvadoran ABC class members had OSCs issued to them in 1992, as a condition of obtaining Temporary Protective Status. Thus, a huge percentage of the class with old OSCs would be barred from applying for suspension or cancellation.

Finally, the new Act contains a provision that the INS contends limits grants of suspension or cancellation of removal to 4,000 per fiscal year. In February 1997, the chief immigration judge ordered all immigration judges to stop granting suspension because the 4,000 limit was nearly reached. The language in the Act does not make clear what happens to other suspension/cancellation applicants once the 4,000 limit is reached. Advocates for immigrants hope that the INS will decide that once the limit is reached, the judges can still grant suspension with the understanding that the grant recipient must wait to adjust status until there are sufficient numbers available in a subsequent fiscal year. The INS could enact regulations specifying that an alien granted suspension in one fiscal year be granted temporary legal status and placed on a waiting list for adjustment whenever a visa number is available. That approach is entirely consistent with the wording of the statue.

II. SUGGESTED ADMINISTRATIVE STRATEGIES TO PROTECT THE ABC CLASS

A. Halt ABC Asylum Interviews.

There should be an immediate halt to ABC asylum interviews while the Administration considers its options. Interviews began in early April and are continuing. The scheduling of interviews is causing confusion and fear, resulting in individuals failing to appear if they do not receive or do not understand the interview notices, and foreclosing the Administration from changing the procedures or standards governing the asylum interview process. There is no bar to deferring ABC interviews while the Administration and Congress consider various options.

B. Grant TPS Status.

Salvadorans and Guatemalans in the US should be given TPS under INA § 244 (or some similar status that provides them with employment authorization and prohibits their deportation) while the Administration considers a longer term solution.

C. Interpret the ABC Agreement to Guarantee Class Members the Right to Seek Suspension of Deportation in Immigration Court.

1. The INS can and should interpret the ABC agreement to guarantee class members the right to seek suspension without regard to the recent changes in the law. ABC class members should be allowed to apply for suspension under the standards in effect when the settlement was formally approved in 1991. In responding to a Petition for Rulemaking submitted by advocates of the class, the Justice Department reassured class members in 1996 that they could seek suspension in immigration court. In reliance on this promise, class members did not file suit in federal court against the INS to compel it to expedite ABC interviews prior to the effective date of the new Act. In view of this promise and other equitable factors, ABC class members should not be subject to the provisions concerning suspension of deportation or cancellation of removal contained in the new Act.

2. The Justice Department should adopt a regulation that allows suspension-of-deportation and cancellation-of-removal applications to be adjudicated administratively by the INS. Currently, only immigration Judges can adjudicate suspension applications. As a result, aliens must be placed into deportation or removal proceedings to apply. That unnecessarily burdens the immigration courts and delays the process. Cases that can be granted by the INS could be diverted from the courts. The jurisdiction of the immigration Judges would be preserved for aliens whose cases are denied administratively or who did not apply to the INS. (This is analogous to the existing procedures governing asylum applications).

D. The Attorney General Should Resolve Suspension and Cancellation Issues Under the New Act In a Just Manner Consistent With the President's Statements.

1. The OSC Issue.

The Attorney General should order that the NJB decision does not apply to ABC class members. Alternatively, the Attorney General should reverse BIA and find that § 309(c)(5) applies only to Notices to Appear issued after April 1, 1997, and to Orders To Show Cause issued before April 1, 1997, but not served until after April 1, 1997. This interpretation gives full meaning to all of the terms of the new Act.

2. The 4,000 Cap.

The INS' interpretation that Section 309(c)(7) imposes a 4,000 per year cap on suspension and cancellation of removal will be a severe obstacle for ABC class members. Like other provisions of the

new law, it should not be applied retroactively to ABC class members. In addition, the Attorney General should interpret the statute as imposing only a limit on granting adjustment of status, not on granting suspension. Aliens who are granted suspension should be placed on a "wait list" and permitted to remain here legally with work authorization until a number is available for adjustment in a subsequent fiscal year. The Attorney General should also rule that the 4,000 limit does not apply to cases commenced prior to April 1, 1997.

E. The INS Should Apply Specific Hardship Standards for ABC Class Members Applying for Suspension.

The INS should adopt standards to implement the eligibility criteria for suspension of deportation under the pre-1996 law. ABC class members who establish 7 years of residence should be deemed to satisfy the "extreme hardship" and good moral character requirements for suspension unless they have been convicted of disqualifying criminal offenses. The unique circumstances of class members and their long-standing ties to the United States should cause the Attorney General to issue regulations or guidelines that class members who otherwise qualify for suspension will satisfy the extreme hardship test. This will allow expeditious adjudication of suspension claims without unduly burdening the immigration court.

In the event that ABC class members are required to establish eligibility under the new cancellation of removal provision of the new Act, the Attorney General should issue regulations or guidelines that the US citizen or lawful permanent resident family member of an ABC class member will suffer extreme and exceptional hardship from the class member's removal.

F. The INS Should Adopt a Policy of Following Matter of Chen in Adjudicating ABC Class Members Asylum Claims.

In Matter of Chen, the Board of Immigration Appeals found that past persecution alone can be sufficient to establish an asylum claim based on the degree of persecution and humanitarian concerns. Under Matter of Chen, once an applicant establishes past persecution, a presumption arises that there is a threat of future persecution. The INS can rebut this presumption by demonstrating a change in country conditions. The INS should train its officers that the history of the ABC class is a compelling humanitarian concern that warrants grants of asylum based on past persecution, even when there is no showing of a current threat of persecution.

G. Through Regulations, INS Should Institute a Policy Similar to What it Previously Did Under the Nicaraguan Review Program for Beneficiaries of Approved Visa Petitions.

1. The policy should be to provide temporary legal status to ABC class members who are the beneficiaries of approved visa petitions who are waiting for current priority dates. This regulation would protect Central America from economic and political instability, and help unify families already in the United States.

2. The INS should adopt a rule or policy that class members' presence in the US does not constitute "unlawful" presence within the meaning of the new 3 & 10 year bars under § 212(a)(9). Absent such a policy, a class member who is denied asylum may be deemed to have been here unlawfully for many years and thereby be barred from the US fro three or ten years even if he or she has developed an independent basis for obtaining legal status.

3. If an ABC member does not become subject to these bars (i.e. if adjustment program not continued), then he or she should be considered presumptively eligible for the waiver under extreme hardship. It would be extreme hardship for ABC members to return home for that period of time given that most fled their countries years and years ago to avoid or flee from actual persecution. All ties they have are now in this country.

H. The INS Should Adopt a Policy or Rule That It Will Stipulate to Reopen the Deportation Order of Any Class Member Who Is Eligible for Adjustment of Status.

Many class members are eligible for immigrant visas independent of their ABC status. These individuals should be allowed to obtain their permanent resident status through "adjustment of status" without having to leave the US. For those who are subject to deportation orders, adjustment is possible only if their case is first "reopened." Such reopening has been needlessly opposed by the INS.

Immigration -
Suspension & deportation -

NOTE TO: ELENA KAGAN
ALAN KRECZKO/JOHN SPARKS
ROB WEINER

FROM: ROB MALLEY

SUBJECT: Immigration Options

I have given some more thought to the "administrative steps" issues in light of our meeting with Seth Waxman. I understand DoJ's reluctance to revisit legal positions it has taken in court. This is particularly true in the case of the interpretation of the bar where, in DoJ's view, the advocates' position is highly questionable.

My proposal at this point would be as follows:

1. **On *NJB*, seek to reverse course, assuming WH Counsel agrees that the advocates' position is credible.**

As you know, my own view is that it is -- the relevant statutory provision is thoroughly inconsistent as to retroactivity, and neither DoJ's nor the advocates fully makes sense of it. The choice is then between two partially satisfactory interpretations, both of which I believe to be defensible.

2. **If we do reverse course on *NJB*, make sure that INS considers the roughly 150,000 TPS Salvadorans to be "in proceedings" so that they can benefit from the pre-April 1 standards.**

This is a category of aliens whose precise status is unclear. While they were served with orders to show cause (OSC), the OSCs were never formally filed with the courts -- the step that is usually viewed as beginning the proceedings. I understand from INS that no decision has been made. It would be critically important to consider the TPS Salvadorans to be in proceedings in order to process their cases under the more lenient pre-April 1 suspension standards.

This still would leave out a number of *ABC* class members (mainly Guatemalans) who were not in proceedings prior to April 1. We should ask DoJ whether it would be <u>permissible</u> under the law to consider that an alien's filing of an affirmative asylum claim puts him or her "in proceedings." (More narrowly, DoJ might issue a regulation pursuant to which *ABC* class members will be considered in proceedings by virtue of their affirmative asylum claim).

3. **On the cap, do not try to revisit our legal position; instead, issue a regulation pursuant to which immigration judges**

would issue "conditional grants of suspension/cancellation" to aliens who would qualify but for the cap, and then suspend/cancel and adjust over the subsequent fiscal years at a rate of no more than 4,000 per year.

My impression is that (while WH Counsel still is reviewing the question) it might be difficult to take the position urged by the advocates -- namely that the cap on the numbers of "suspensions and adjustments" can be read to apply to adjustments only, leaving INS free to grant as many suspensions as it wants. First, we already have taken a contrary position in the 7th Circuit; second, DoJ feels that the advocates' position is extremely weak.

The solution I propose is to stick to our current reading of the statute, and only grant 4,000 suspensions and adjustments per year. At the same time, people eligible for suspension but for the cap would be granted conditional suspensions and placed n a waiting list. Individuals with conditional grants would be granted employment authorization and protection against deportation/removal.

Of course, this would be as controversial with Lamar Smith and others on the Hill and decision-makers will have to weigh the political pros and cons. But at least it would get over the current legal hurdle.

I have raised this informally with INS, and they will be looking into whether they have the authority to issue conditional grants of suspension. I believe they do -- in fact, it is my understanding that INS is contemplating using precisely this scheme in the short term to deal with its backlog of cases for FY 97.

Immigration — Suspension of Deportation —

DRAFT 5/16/97

Introduction

Many Salvadorans, Guatemalans, and Nicaraguans who fled their countries during the mid to late 1980s were afforded some type of temporary status in the United States for many years. In all cases the status was, by its terms, temporary and not intended to guarantee or lead to permanent residency, nor was it intended to guarantee that those covered would remain in the United States long enough to meet the seven-year residency requirement for suspension of deportation. However, as a practical matter many of these people established strong ties to the United States during their residency here and held the expectation that they might qualify to apply for suspension of deportation before their deportation was enforced.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter IIRIRA) severely restricts the availability of suspension of deportation by extending the length of time required in the United States, increasing the hardship requirement, and placing a limit on the number of cases that can be granted each year. These changes, as discussed below, render the option of suspension of deportation unavailable for most of the Guatemalans, Salvadorans, and Nicaraguans who came to the United States in the 1980s -- a matter which is of major concern to countries in the region. In his recent trip, the President pledged to consult with Congress on this issue. Below is a brief history of these cases and options for Congressional action.

Background

During the mid to late 1980s, in response to civil war and wide-spread political persecution in Central America, large numbers of civilians from Guatemala, El Salvador and Nicaragua fled to the United States, most entering illegally at the Southwest border. Many of these individuals were *bona fide* refugees, others fled general conditions of civil unrest or came for economic reasons. Some were apprehended by the Immigration and Naturalization Service (INS); some who were not apprehended came forward and affirmatively applied for asylum; and others have resided unidentified in the United States. The cases of those known to the INS were handled through a variety of means. In addition to the Salvadorans, Guatemalans, and Nicaraguans who have resided in the United States under a form of temporary status, there are many others from these countries residing in the United States who were never under such status. These include illegal residents who were not apprehended and never came forward to identify themselves, and many who entered the United States illegally during the 1990s.

Nicaraguans

The Nicaraguans' affirmative asylum claims were largely heard and resolved by the INS. Those denied asylum were placed in deportation proceedings before the Executive Office for Immigration Review (EOIR), where most renewed their claims for asylum. Those Nicaraguans apprehended by the INS were also placed in proceedings, and many of those also filed asylum claims with EOIR. In July 1987, the Nicaraguan Review Program was established under Attorney General Meese. Under this program, approximately 30,000 Nicaraguans in proceedings (or who already had a deportation order) were entitled to a special Department of Justice (DOJ) review of their asylum application, if it had been denied, prior to being deported. During this review period, which lasted until June 1995, most of the Nicaraguans in proceedings were

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protected from deportation and were entitled to work authorization. When the program ended in June 1995, as a special transitional measure, Nicaraguans with a final order of deportation were informed that they could continue their work authorization if they filed with EOIR a *prima facie* valid motion to reopen their proceedings to apply for suspension of deportation. They would meet this test if they had seven years physical presence in the United States and had no serious criminal records.

As of April 1, 1997, approximately 38,000 Nicaraguans were in deportation or exclusion proceedings. This includes 16,400 Nicaraguans who had final orders of deportation as of July 1, 1996. It is not known how many of these Nicaraguans were those who fled their country in the mid to late 1980s.

Guatemalans and Salvadorans

There was considerable controversy regarding the treatment and status of Salvadorans and Guatemalans during the 1980s. A major class action law suit, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*), was filed against the United States government in 1985, alleging discriminatory treatment of Guatemalans and Salvadorans in asylum adjudication, both by the INS and by EOIR. The DOJ settled the case in 1991, entitling class members to special asylum adjudication procedures which were only fully put into place as of April 7, 1997, for the bulk of the class. Pursuant to the settlement, the vast majority of *ABC* class members have been protected from deportation until their asylum claims are decided, and have been entitled to apply for work authorization. The *ABC* class is specifically defined by nationality and date of entry to the United States: Guatemalans who entered on before October 1, 1990, and Salvadorans who entered on or before September 19, 1990.

Estimated *ABC* class: 240,000, includes:
190,000 Salvadorans
50,000 Guatemalans
(The class includes 25,000 class members in proceedings prior to April 1, 1997; nationality unknown)

Another important note is that as an exceptional act of Congress, as part of the 1990 Immigration Act, Congress authorized Temporary Protected Status (TPS) for Salvadorans then in the United States (approximately 190,000 registered), temporarily suspending their return to their war torn country. TPS was in effect through June 30, 1992, and through the vehicle of Deferred Enforced Departure, protection was extended by both the Bush and Clinton administrations until December 31, 1994. Virtually all Salvadorans protected under TPS were also *ABC* class members.

ABC class members have had asylum applications pending in the asylum backlog for many years, pending the termination of TPS and DED for Salvadorans and while the Administration's priority was reforming the asylum program and handling recently filed cases first. It is expected that only a small percentage of the *ABC* class members will now be eligible for asylum because of changes in their countries. Until recent changes in the Immigration and Nationality Act, many expected that they might have the chance to apply for suspension of deportation under pre-

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IIRIRA law. This was not part of the settlement agreement, but the expectation arose from the suspension provisions of the pre-IIRIRA Immigration and Nationality Act.

Changes in the New Law and Congressional Intent

The recent changes to the immigration law dramatically restricted the discretionary relief of suspension of deportation, now called cancellation of removal. The Conference Committee's report on the IIRIRA stated that these changes were made because suspension of deportation was being applied too widely and not as an extraordinary remedy in extreme cases, as it was originally intended. Immigration Judges had been granting suspension at a 50% rate, then the rate went to about 75% after the decision by the Board of Immigration Appeals (BIA) *in Matter of O-J-O*, Int. Dec. 3280 (BIA 1996).

However, it is likely that many in Congress may not have been aware of the consequences of some of the changes to the suspension provisions and the impact they would have on long-standing *de facto* residents. In particular, many may not have been aware of the provisions which severely limited any transitional measures for the *ABC* class and those already in proceedings before the April 1, 1997, effective date of the IIRIRA. For others in Congress, even the extreme changes were deliberate, specifically aimed at eliminating the possibility of an amnesty-like program for Central Americans who came illegally to the United States in the 1980s, and at further restricting relief for illegal immigrants. For these members of Congress, there will be strong resistance to any modification of the new laws.

1. **Raised Standard for Hardship and Length of Time in the United States**

   The new cancellation of removal provisions, which apply only to people placed in proceedings after April 1, 1997, limit relief to individuals who have been physically present in the United States for a period of ten, as opposed to seven, years. The hardship standard was raised so that the individual must now demonstrate that removal would result in "exceptional and extremely unusual hardship," as opposed to extreme hardship. Further, this hardship must be to the individual's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; a showing of extreme hardship to the individual himself or herself no longer suffices.

2. **Created a Cap on the Number who Can Be Granted Relief**

   Congress also sought to limit the number of individuals who could be granted either suspension of deportation or cancellation of removal, by limiting to 4,000 the number of cases that may be approved per year. Previously, there was no limit on the number of individuals who could be granted suspension of deportation. The cap was adopted as a compromise to avoid eliminating suspension altogether. It was set considerably higher than available figures (2,500 grants in FY 1994), but the members trying to preserve suspension did not attend to the likely effect of the *ABC* caseload and other factors causing a steady upward trend (3,750 grants in FY 95, and 7,500 in FY 96).

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By mid-February 1997, the 4,000 cap for fiscal year 1997 was nearly exhausted. In light of the need to address the transitional issues raised by the new cap, the Attorney General has decided not to deport before September 30, 1997, those who would qualify for suspension of deportation but for the cap, pending negotiations with Congress. In this context, the INS and the DOJ have initiated discussions on the Hill concerning possible legislation exempting from the cap transitional cases (those in proceedings prior to April 1, 1997). The DOJ will soon issue a regulation implementing the cap by means of a lottery among the pool of persons who would otherwise have received suspension. Winners will receive lawful permanent resident status; those not selected will receive a deportation order.

3. **Established Rule to Stop Time in the United States from Accruing after Initiation of Proceedings**

Formerly, individuals could continue to accrue time toward the seven years throughout the course of proceedings and appeals. To eliminate the incentive for prolonging immigration proceedings, Congress created a rule providing that the time necessary for purposes of cancellation of removal must have accrued before initiation of removal proceedings. The Administration supported this rule for prospective application, but the conference committee bill, in a poorly drafted provision, made the stop-time rule retroactive. The poor drafting has led to continuing litigation, but the BIA ruled that it is fully retroactive. *Matter of N-J-B*, Int. Dec. 3309 (BIA 1997). The retroactive application of the stop-time rule has significant consequences for the approximately 38,000 Nicaraguans who, prior to April 1, 1997, were placed in proceedings or had a final order of deportation issued and the 25,000 *ABC* class members who were placed in proceedings prior to April 1, 1997.

(10 y-s)

Effect of the New Law and Options for Congressional Action

Although suspension of deportation was always a discretionary form of relief, and by no means a guarantee for any individual, the new standards combined with the cap and the retroactive application of the stop-time rule dramatically limit this form of relief. As a result, approximately 280,000 Central Americans may eventually be subject to deportation -- of those only a small percentage will be eligible for asylum or cancellation of removal. The Central American governments are concerned that this threatens the stability and security of the region. Central American governments are very concerned about not only the loss of remittances, which comprise a significant percentage of their revenue, but also their ability to reintegrate this population into their developing economies and post-war societies.

During his recent trip, President Clinton pledged to consult with Congress regarding ways to soften the harsh consequences of the new law for this population. Set forth below are the major options for Congressional action.

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1. Lift or Modify Cap for Cases in Proceedings prior to April 1, 1997

The most modest option is to eliminate or modify the 4,000 cap for individuals who were placed in proceedings prior to April 1, 1997. The DOJ is already working with staff from the House and Senate immigration subcommittees towards a legislative modification of the cap. Our preferred modification would be to move the effective date of the cap from October 1, 1996, to April 1, 1997, and make the cap applicable only to removal cases filed *after* April 1, 1997. With such modification, the thousands of cases already in the pipeline before April 1 that meet the suspension criteria could be granted suspension without the number of grants being limited by the cap.

Staff for Rep. Lamar Smith, Chairman of the House Immigration Subcommittee, are interested in our proposal to modify the cap but only if we agree to: (1) offsetting legal immigration numbers to compensate for the increased number of suspension grants that would result and (2) codifying the BIA's *N-J-B* decision. However, staff for Senator Abraham, Chairman of the Senate Immigration Subcommittee, strongly oppose an offset to legal immigration. We are caught in the middle. In addition, there needs to be a decision on how such an offset should be structured, if we eventually have to make such a recommendation. Other offices on the Hill that support lifting the cap or making other adjustments for Salvadorans, Nicaraguans, and others prefer not to support an offset. However, they have not offered any realistic legislative alternative to smooth enactment of a lifting or delaying of the cap. We expect this may change once the Department publishes in the Federal Register the proposal to implement the cap.

Effect: Lifting the 4,000 yearly cap could affect a relatively small number of individuals; it is roughly estimated that from between 19,000 to 38,000 individuals who were placed in proceedings prior to April 1, 1997, would be granted suspension of deportation if there were no cap applicable to them. (We do not know how many of these are Central Americans, but we believe a strong majority consists of Central Americans and Mexicans.) This option alone would do nothing to help the approximately 215,000 *ABC* class members who have not been placed in proceedings, because they would still be required to meet the new ten-year and heightened hardship requirements and would be subject to the 4,000 yearly cap. Nor would it assist those Nicaraguans and *ABC* class members already in proceedings by April 1, 1997, who cannot meet the physical presence requirement due to retroactive application of the stop-time rule.

Pros: This affords important relief to at least 19,000 individuals, while avoiding a nationality-specific remedy. Also, because it is a modest proposal and keeps unchanged the substantive limits to suspension, it may be acceptable, as a transitional mechanism, to the harshest critics on the Hill.

Cons: Because this option, taken alone, would affect a relatively small number of individuals, it would not address the concerns of the Central American governments or most of the Guatemalans, Nicaraguans, and Salvadorans who have been living in the United States.

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2. Reverse the Retroactive Effect of the Stop-Time Provision and Lift or Modify Cap for Cases in Proceedings prior to April 1, 1997

A legislative reversal of the BIA holding in *Matter of N-J-B* could enable a number of those who were placed in proceedings prior to April 1, 1997, to be eligible for suspension of deportation. Although the BIA decision could be overturned on appeal in federal court, we discuss here the possibility of legislation providing that the stop-time provision is not to be applied retroactively to cases already in proceedings prior to April 1, 1997.

Effect: It is estimated that the number of individuals already in proceedings by April 1, 1997, who would be granted suspension of deportation if *Matter of N-J-B* were overruled would be 38,000 to 76,000. This number includes all nationalities. With regard to Central Americans, this change would largely assist those Nicaraguans who were placed in proceedings prior to April 1, 1997. However, it would potentially affect only a small percentage of the *ABC* class (25,000), since the bulk of the class, approximately 215,000 individuals, has not yet been placed in removal proceedings.

Pros: This avoids a nationality-specific remedy. It would have a significant impact on the availability of suspension for Nicaraguans who came to the United States in the mid 1980s and were placed in proceedings prior to April 1, 1997.

Cons: This would have relatively little effect on availability of suspension of deportation to the *ABC* class, which is of great concern to the governments of Guatemala and El Salvador. This option is also likely to meet with strong opposition from the principal backers of the IIRIRA in Congress, and the proposal could undercut the chance to gain their support for a version of option one.

3. Apply pre-April 1, 1997, Suspension Standards to *ABC* Class Members, Lift or Modify the 4,000 Cap for *ABC* Class Members and Individuals in Proceedings prior to April 1, 1997, and Reverse the Retroactive Application of the Stop-Time Rule for Individuals in Proceedings prior to April 1, 1997

Individuals in proceedings prior to April 1, 1997, are already subject to the substantive requirements for suspension of deportation under the INA, before it was amended by the IIRIRA. This option would extend the application of the previous suspension requirements to the entire *ABC* class.

Effect: Unlike the options above, this option gives all 240,000 *ABC* class members a chance to apply for suspension under the old rules. This does not mean that all 240,000 will qualify; we expect about 50% to apply, allowing for no-shows and those who obtain other forms of relief, and 75% of those to succeed, yielding approximately 90,000 who will obtain lawful permanent resident status. Depending on how quickly the asylum office and EOIR caseload is handled, which we estimate would be from 3 to 5 years, this would amount to an average of 18,000 to 30,000 suspension grants to *ABC* class members per year. Taking into account those not in the *ABC* class who would also

benefit from this option, we estimate that this option could result in grants of suspension of deportation to roughly 119,000 individuals.

Pros: This option would significantly benefit members of the *ABC* class, whose expectation has been, until recently, that they might eventually be able to apply for suspension of deportation should asylum be denied. It would additionally benefit the Nicaraguans who have been residing in the United States since the mid to late 1980s and who were placed in deportation proceedings prior to April 1, 1997. As such, it would go far to foster stability and security in Central America and address the concerns of the governments of Guatemala and El Salvador regarding integration of this population into their developing economics and post-war societies.

It has been argued by *ABC* class counsel and special interest groups that special treatment for the *ABC* class is justified by these individuals' special legal status under the settlement agreement, which was viewed by them as a remedy for past mistreatment. Such treatment arguably also recognizes the exceptional circumstances faced by these individuals, as demonstrated by Congress in granting TPS, and their long standing status in the community.

Cons: Applying pre-April 1st suspension requirements to the *ABC* class singles out two nationalities for special treatment and cuts against Congress's intentions in granting TPS -- by definition a temporary form of protection. In addition, critics will argue that there is no basis to afford *ABC* class members special treatment in terms of suspension, because the settlement focused solely on class members' asylum adjudications. Class members' expectations about suspension were arguably no different from persons of other nationalities living for a long period in the United States illegally. There were also many non-*ABC* cases in the asylum backlog similarly affected by the new law. Other groups are likely to make the case that they are special in some way and ask for the same treatment as *ABC* class members. Finally, critics will portray this position as an amnesty and will use it to call into question the Administration's commitment to serious enforcement of immigration laws. Without the Administration's complete commitment to fighting for it, even proposing this option, would jeopardize the success of either option number one or two, as it could cause the principle supporters of the IIRIRA in Congress to harden their position on any potential changes to the law.

4. **No Change in Standard, but Eliminate or Modify the Cap for All Cases Regardless of Date Proceedings Initiated**

Effect: Assuming there is no change in the cancellation of removal rules, some proportion of *ABC* class members and Nicaraguans will meet the requirements for either suspension or cancellation. Either they will have been placed in proceedings prior to April 1, 1997, and meet the requirements of the old suspension of deportation law, or they will meet the requirements of the new cancellation law because they will have been in the United States continuously for ten years, show good moral character, and demonstrate the requisite hardship to relatives who are United States citizens or lawful permanent residents. Approximately 25% of the *ABC* class members entered in 1987 or

earlier, meeting the threshold qualification (ten-year physical presence) of the new cancellation rules. This number will increase over the course of processing the *ABC* cases, especially if we adjudicate cases on a first in, first out basis. However, this change would not benefit a significant number of *ABC* class members and Nicaraguans who cannot meet the cancellation standards or are precluded from meeting the suspension residency requirement because of the retroactive application of the stop-time provision.

Pros: Elimination or modification of the quantitative cap on what are qualitative decisions would be a positive step toward fairly providing relief and bringing the cap more in line with the numbers of individuals who may qualify for suspension of deportation or cancellation of removal. This option is more equitable than the lottery system described above.

Cons: This option would not significantly help *ABC* class members and Nicaraguans. In addition, Congress intentionally included the cap with the goal of restricting the number of people who will have this relief available to them. The Administration would face opposition to this proposal and would have to explain why the 4,000 number is too low, especially when stricter cancellation standards were designed to limit the number of grants. Like option number three, proposing this option could also jeopardize the success of either option number one or two, as it could cause the principal supporters of the IIRIRA in Congress to harden their position on any potential changes to the law. It will heighten suspicion that the DOJ will not enforce the new tighter rules as Congress intended.

Possible Offset against Legal Immigration

In preliminary discussions on the Hill regarding transitional approaches for implementing the new law, one proposal has been to have an enlarged cap offset by the legal immigration number. This approach could be seen to conflict with the Administration's often stated principle of favoring legal immigrants over those without legal status, including those who overstayed their legal status.

While the INS has not decided how it would want to see such an offset structured, if we eventually have to make such a recommendation, one method would be to reduce or eliminate the diversity visa program. Under this program, 55,000 immigration slots per year are awarded on a lottery basis to nationals of countries considered under-represented in the legal immigration stream. This provision, enacted in 1990, is largely used by Irish, Poles, other Europeans, Africans, and Japanese. In contrast to other legal immigration categories, beneficiaries of the diversity program need not have any family ties in the United States or an offer of employment. The diversity program lacks the domestic constituency of the family reunification and employer-sponsored visas. However it must be stressed that even if we could obtain an agreement with Immigration Subcommittee leadership on a particular offset, it is likely that other parts of the legal immigration could be re-opened by other Members and Senators. That is why Chairman Abraham and others are strongly opposed to starting down this road.

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There are also problems if unused employment-based visas are used. Slots taken from this category would otherwise be made available to the preference category for spouses and unmarried children of lawful permanent residents, thereby slowing progress of those on the waiting list, already facing over three years' wait.

Based on current estimates, the options discussed above would require annual legal immigration offsets as follows:

Option 1:	19,000 - 38,000; average over 5 years: 3,800 - 7,600 per year
Option 2:	38,000 - 76,000; average over 5 years: 7,600 - 15,200 per year
Option 3:	119,000; average over 5 years: 23,800 per year
Option 4:	Difficult to estimate

Resolving whether we enter into adjustments on legal immigration, even if limited to the diversity visa program, and presenting and passing whatever legislative changes are sought necessitate active White House involvement along the lines of the final days of the 1996 bill, if they are to be successful.

Immigration —
Deportation — ~~Get NJB~~

5-22-97 Immigration groups

Malley chaired - read what POTUS said in C.A.

Proposal: Admin solns - except for 245(i), which demands leg fix

Overview: 245(i) - interaction w/ — :
p. have to choose b/w [leaving] + [staying but giving up ability to change status]
Latino commun. interp'ing what POTUS said as promise.

USCatholic Cardinals deeply interested. 90+% Catholic

Detail: 245(i): If not extended, hardship for fams; also p. go underground.
Doesn't provide ben; just rule of where p. apply for that ben.
P.R. will to extend!

ABC case: Implementing leg in harshest way poss - should be ameliorating harsh aspects!
Asylum process can't any longer address status — need
sig'd 2 changes - std ↑d / 10 not 7 / Retroactive applic
of provision on stop-time (92-96 especially taken away)
↳ NJB decision
If ∅ changes, there will be mass deports.
Other probs - 4000 cap.
* || Need presump - any ABC cl. who satisfies extreme hardship req.

Whole slew of provisions being applied retroactively - not only ones discussed here today.
Everything boils down to ? of retroactivity - not changing rules

on people - This is framework for what we're asking you to do.

If ZVSi not extended, huge lines in September. Make April look like Q.

Stop ATBC Asylum IVs

Immigration - deportation

Interim Decision #3309

Before: Board En Banc: DUNNE, Vice-Chairman; HEILMAN, HOLMES, HURWITZ, FILPPU, COLE, and MATHON, Board Members. Dissenting Opinions: GUENDELSBERGER, Board Member, joined by SCHMIDT, Chairman; VILLAGELIU, Board Member; ROSENBERG, Board Member; VACCA, Board Member.

HEILMAN, Board Member:

The respondent has timely appealed from that portion of the Immigration Judge's decision denying her applications for asylum, withholding of deportation, and suspension of deportation. The appeal will be dismissed.

I. CONTINUOUS PHYSICAL PRESENCE AND THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

With respect to the respondent's claim for suspension of deportation, the record reflects that the respondent arrived in the United States on August 5, 1987, and that the Order to Show Cause and Notice of Hearing (Form I-221) was served on August 27, 1993, less than 7 years later. The Immigration Judge's denial of suspension of deportation was based solely on the respondent's failure to prove the requisite extreme hardship to herself. Subsequently, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"), was enacted on September 30, 1996. In light of this legislation, we must decide whether the respondent still has the 7 years of continuous physical presence necessary to be eligible for suspension of deportation. In other words, we must determine whether, and if so to what extent, the requirements of the transitional rule for aliens in proceedings, which is set forth in the IIRIRA, apply to the pending appeal of the denial of this respondent's application for suspension of deportation.

By enacting the IIRIRA, Congress replaced the former suspension of deportation relief with the new cancellation of removal. With these amendments, Congress clearly intended to limit the categories of undocumented aliens eligible for such relief and to limit the circumstances under which any relief may be granted. The general effective date for implementing the IIRIRA amendments established under section 309(a) of the IIRIRA, 110 Stat. at ____, is April 1,

1997. Aliens placed in removal proceedings on or after this date face generally higher standards to qualify for cancellation of removal: a longer physical presence requirement; a more stringent standard of hardship; and omission of consideration of hardship to the aliens themselves. See Section 240A(b) of the Act (to be codified at 8 U.S.C. § 1250a(b)). Section 240A(d) also provides special rules regarding termination and interruption of continuous physical presence, with the result that aliens seeking this relief will face more stringent continuous physical presence requirements.[2]

II. THE GENERAL EFFECTIVE DATE UNDER SECTION 309(a) AND THE TRANSITION RULE UNDER SECTION 309(c)

While establishing a general rule for the effective date of the IIRIRA, the language utilized in section 309(a) of the IIRIRA indicates that exceptions to the general effective date provision exist in this section and elsewhere. More specifically, the general rule for effective date provisions established in section 309(a) is as follows:

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[2] Section 240A(d) of the Act provides in pertinent part as follows:

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

> Except as otherwise provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on [April 1, 1997] (in this title referred to as the "title III-A effective date"). (Emphasis added.)

Thus, section 309(a) of IIRIRA refers to the existence in section 309 of exceptions to the general effective date of April 1, 1997. Similarly, section 309(c)(1) also refers to the existence of exceptions to its general rule that the title III-A amendments do not apply to aliens already in exclusion or deportation proceedings before April 1, 1997.[3] Moreover, as will be further discussed below, these exceptions to the section 309(a)(1) general rule are not limited to transition rules having effect on April 1, 1997, but also include transition rules having an earlier effective date.

Section 309(c)(1) is the general rule that the title III-A amendments do not apply to aliens already in proceedings. As originally enacted (i.e., with the "in proceedings as of the title III-A effective date" language), it was clear that this rule was the general rule to apply beginning April 1, 1997, because one would not know whether an alien was in proceedings "as of" that date until April 1, 1997, arrived. This reading of section 309(c)(1) was made somewhat less clear when a technical amendment revised the "as of" language to "before"[4] -- because one can determine whether an alien

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[3] Section 309(c)(1) of the IIRIRA provides:

> TRANSITION FOR ALIENS IN PROCEEDINGS.--
>
> (1) GENERAL RULE THAT NEW RULES DO NOT APPLY.--Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date--
>
> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

[4] Congress passed a technical correction amending section 309(c)(1) of the IIRIRA on October 11, 1996. Extension of Stay in the United

(continued...)

is in proceedings "before" April 1, 1997, without waiting until that date. Obviously all of the cases presently before the Immigration Judges and this Board fall into this category. However, reading section 309(c) in its entirety, we conclude that the section 309(c)(1) general rule is still directed to aliens in proceedings on April 1, 1997.

Although there may be other reasons to reach this conclusion, the most persuasive arises from the language of section 309(c)(3). That paragraph allows the Attorney General, "[i]n the case described in paragraph (1)," to reinitiate certain proceedings under the IIRIRA. The Attorney General could not do this (reinitiate these cases) until the effective date of the IIRIRA. Given this fact and the nature of the reference in paragraph (3) to paragraph (1), we are satisfied that the general rule in paragraph (1) still focuses on the transition to take place on April 1, 1997. This reading of the general rule is supported by the Joint Explanatory Statement of the Committee of Conference, which states: "Subsection (c) [of section 309] provides for the transition to new procedures in the case of an alien already in exclusion or deportation proceedings on the effective date." H.R. Rep. No. 104-2202, § 309, available in 1996 WL 563320 and 142 Cong. Rec. H10,841-02 (emphasis added) ("Joint Explanatory Statement").

Reaching this conclusion regarding the scope of section 309(c)(1), however, does not in itself resolve the question before us because subsection (c)(1) provides that its general rule is "[s]ubject to the succeeding paragraphs of this subsection." And, the succeeding paragraphs include not only rules that come into effect on April 1, 1997, but other transition rules that came into effect before that date. For example, it is inarguable that section 309(c)(4) is clearly a transition provision that comes into effect prior to April 1, 1997. Thus, one cannot simply point to the fact that the section 309(c)(1) general rule pertains to what happens on the title III-A effective date because the provision is subject to exceptions, some of which are intended "to accelerate the implementation of certain of the reforms in title III." See 142 Cong. Rec. H12,293-01 (daily ed. Oct. 4, 1996) (comments of Rep. Smith).

Accordingly, the question before us is whether the exception created in section 309(c)(5) is a transition rule only having effect

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[4](...continued)
Stats for Nurses Act, Pub. L. No. 104-302, 110 Stat. 3656 (1996).

on April 1, 1997 (as is the case, for example, with sections 309(c)(2) and (3)) or whether section 309(c)(5) is a transition rule with an earlier effective date (as is the case, for example, with section 309(c)(4)) and is intended to accelerate the implementation of a title III reform.

Section 309(c)(5) provides:

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

We find that the natural reading of the language of section 309(c)(5) of the IIRIRA is that it is a provision akin to section 309(c)(4), a transition rule intended to accelerate @ title III reform. Section 309(c)(5) creates an exception to the general effective date with regard to suspension of deportation for aliens with pending deportation proceedings and establishes a transition rule to be applied to such pending cases. Section 309(c)(5), which is specifically captioned as the "Transition Rule With Regard to Suspension of Deportation," incorporates paragraphs (1) and (2) of section 240A(d) of the Act relating to continuous residence or physical presence and provides that these paragraphs "shall apply to notices to appear issued before, on, or after the date of the enactment" of (the) IIRIRA. In our view, particularly given the additional limitation on suspension of deportation enacted in section 309(c)(7) of the IIRIRA,[5] it would take a somewhat strained reading of this language to conclude that it was not intended to have immediate effect.

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[5] Section 309(c)(7) of the IIRIRA states:

> LIMITATION ON SUSPENSION OF DEPORTATION.--The Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

We do not disagree with any interpretation of the IIRIRA insofar as it recognizes the general effective date found in section 309(a) of the IIRIRA for these amendments as April 1, 1997. See Astrero v. INS, No. 95-70557, 1996 WL 738828 (9th Cir. Dec. 30, 1996).[6] Nevertheless, in specifically mandating that the new rules in sections 240A(d)(1) and (2) of the Act apply to "notices to appear issued before, on, or after the date of enactment," section 309(c)(5) carves out an exception to the general effective date. [Emphasis added.] It further requires application of the new rules regarding termination and interruption of continuous physical presence of sections 240A(d)(1) and (2) (which are not otherwise generally effective) to aliens with pending deportation proceedings from the September 30, 1996, enactment date.

In the instant case, the respondent was served with an Order to Show Cause initiating deportation proceedings on August 27, 1993, before the IIRIRA's enactment on September 30, 1996, and deportation proceedings are still pending. Thus, we must consider the effect, if any, on her suspension application of sections 240A(d)(1) and (2), as triggered by section 309(c)(5) of the IIRIRA. In this case, we find that there is no issue arising as to interruption of continuous physical presence in the United States. However, the provision of section 240A(d)(1) of the Act, which required termination of continuous physical presence with the service of a notice to appear, is not so readily resolved.

III. INTERPRETATION OF "NOTICE TO APPEAR" IN SECTION 309(c)(5) OF THE IIRIRA

We do not find the general effective date of section 240A of the Act, which is established in section 309(a) of the IIRIRA, dispositive of the issue before us. Because the provisions of section 240A(d)(1) and (2) are incorporated into section 309(c)(5) of the IIRIRA, it is the effective date of section 309(c)(5), a

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[6] We observe that in Astrero, the United States Court of Appeals for the Ninth Circuit did not deal with the language of section 309(c)(1) as amended by the technical amendment. In addition, the court's discussion reads as though section 309(c) of the IIRIRA only creates transition rules to come into effect on the general effective date of April 1, 1997, and does not acknowledge in its opinion that the exceptions to section 309(c) include transition rules that have an earlier effective date.

transition rule of the IIRIRA, which we consider determinative. Moreover, we note that section 309(c)(5) is not simply a rule accelerating the effective date of paragraphs (1) and (2) of section 240A(d) of the Act; rather, it is a substantive transition rule with regard to suspension of deportation that applies the "special rules" enacted in sections 240A(d)(1) and (2) to notices to appear issued before, on, or after the date of enactment of the IIRIRA.

Section 240A(d)(1) of the Act provides, in pertinent part, that any period of continuous residence or physical presence in the United States will be "deemed to end when the alien is served a notice to appear under section 239(a)." Section 240A(d)(1) of the Act. Section 309(c)(5) of the IIRIRA applies this provision to "notices to appear" issued on, before, or after the date of enactment. We must thus determine whether the IIRIRA term, "notice to appear," utilized in section 309(c)(5), refers to a specific document or is a more general term applicable to other documents which "initiate" proceedings. For an alien to be currently in deportation proceedings and thus trigger application of this transitional rule, the alien necessarily must have been served with an Order to Show Cause, constituting written notice of such proceedings. See section 242B of the Act, 8 U.S.C. § 1252b (1994). Up to the present time, all respondents (this respondent included) have been served with a document informally described as an "Order to Show Cause," but formally titled an "Order to Show Cause and Notice of Hearing" (Form I-221). This multi-page document orders a respondent to "appear for a hearing before an Immigration Judge" to answer allegations and charges of deportability.

At the time deportation proceedings were initiated against this respondent, there was no specific document known as a "Notice to Appear." This term was first used in section 304 of the IIRIRA (creating the new section 239(a)(1) of the Act, to be codified at 8 U.S.C. § 1229(a)(1)), which provides that initiation of proceedings for removal of an alien on or after April 1, 1997, begins with service of "written notice (in this section referred to as a 'notice to appear')" and specifies the information to be included in such notice.

We find upon consideration of the statutory language and legislative history that an "Order to Show Cause and Notice of Hearing" and a "notice to appear" are synonymous terms as used in section 309(c)(5). We thus consider that service of an Order to Show Cause operates to terminate an alien's period of continuous physical presence. We find in this case that such service occurred

prior to the respondent's acquisition of 7 years' continuous physical presence in the United States. She is therefore unable to satisfy the physical presence requirement for eligibility for suspension of deportation. Consequently, we need not consider whether she has met the other statutory eligibility requirements for suspension of deportation or whether such relief would be warranted in the exercise of discretion.

In reaching this conclusion, we have taken a number of factors into account. We note initially that if we found the term "notice to appear" to encompass only documents identified specifically using that exact term, it would relate to removal proceedings initiated after the date of enactment of the IIRIRA or to proceedings converted under section 309(c)(2). Such an interpretation would render superfluous the language of section 309(c)(5) establishing implementation of changes pertaining to physical presence for those in deportation proceedings during the transitional period between the September 30, 1996, enactment date and the April 1, 1997, general effective date. This conclusion necessarily follows from the fact that no "notice to appear" could have existed to be issued "before" or "on" the date of enactment of the IIRIRA. Moreover, an alien made subject to the new IIRIRA procedures under the provisions of sections 309(c)(2) or (3) would no longer have an application for suspension of deportation pending, which is the subject of the section 309(c)(5) transitional rule. It is a basic rule of statutory construction that no provision of law should be construed as rendering a word or clause surplusage. See Kungys v. United States, 485 U.S. 759 (1988); Colautti v. Franklin, 439 U.S. 379 (1979); Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961).

We also note that the Joint Explanatory Statement of the Committee of Conference, accompanying the Conference Report on H.R. 2202, makes clear that the rules under new sections 240A(d)(1) and (2) were intended to "apply to any notice to appear (including an Order to Show Cause under current section 242A) issued after the date of enactment." See Joint Explanatory Statement, supra, § 309 (emphasis added).[7]

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[7] The "issued after the date of enactment" language in the Joint Explanatory Statement conflicts with the ultimately enacted language of section 309(c)(5). This was the language of the engrossed House bill that was before the Conference Committee that was revised, apparently at the 11th hour, to include the "before, on, or" phrase,

(continued...)

It also follows that in order for the section 309(c)(5) exception to the transitional rule in question to have any independent meaning at all, it must apply to aliens served with an Order to Show Cause prior to the date of enactment and not otherwise converted under subsections (c)(2) or (c)(3). A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). In this case, we find it sufficient to note that section 309(c)(5) of the IIRIRA expressly pertains to suspension of deportation for aliens in proceedings during the transitional period between the date of enactment and the general effective date of April 1, 1997. This section provides that the restrictions on physical presence be implemented prior to other restrictions. See Matter of De La Cruz, 20 I&N Dec. 346, 350 (BIA 1991). We find the language of section 309(c)(5) of the IIRIRA, reflecting application to notices to appear "before, on, or after the enactment" of IIRIRA, to constitute a directive or express command from Congress that it intended this provision to apply to pending cases initiated prior to the date of enactment. See Landgraf v. USI Film Products, Inc., 511 U.S. 244 (1994). In addition, we emphasize that fundamental principles of statutory construction mandate our reliance on the plain meaning of the statute. We are required in our analysis to ensure a consistent and harmonious interpretation of the particular section and the statute as a whole.

We can discern no substantive difference in the contents of the Order to Show Cause and its successor document, the Notice to Appear, that would militate in favor of a contrary interpretation. Moreover, we are not persuaded that principles of statutory construction require us to conclude that the reference to a "notice to appear under section 239(a)" in section 240A(d)(1) of the Act (emphasis added) should be read to restrict or qualify the description of the term "notice to appear" in section 309(c)(5). Instead, we consider that the cited reference to section 239(a) does no more than identify the section of the Act in which the "notice to appear" was initially described. This language in section 240A(d) would restrict its application to proceedings initiated with a notice to appear under section 239(a) if the substantive section 309(c)(5) transitional rule had not been enacted. But, the

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[9](...continued)
which greatly expanded the scope of section 309(c)(5).

transitional rule, regarding suspension of deportation gives this section 240A(d)(1) "special rule" broader application.

IV. LEGISLATIVE HISTORY

In view of the extent to which the dissent has focused on certain aspects of legislative history to buttress its arguments regarding the effect of section 309(c)(5) of the IIRIRA, we include a few additional observations about the legislation and congressional intent. In making these observations, we do not suggest that we find reliance on the legislative history necessary due to the presence of statutory ambiguity. Rather, we merely wish to illustrate that our interpretation of the plain meaning of the legislation is supported by the legislative history. Similarly, given that our construction of the legislation is based upon the natural reading or plain meaning of the statute, we decline to comment on every aspect of the dissent's reading of the specific legislative history it cites. However, in so doing, we do not intend to suggest that we accept the dissent's characterization or reading of the legislative history cited.

We do observe, however, that the IIRIRA resulted from the reconciliation by the Conference Committee of differing House and Senate bills on immigration reform. Both engrossed bills before the Conference Committee contained restrictions on accruing residence or presence in the United States for suspension of deportation purposes. In our view, the restrictions in both bills would have resulted in immediately effective reforms. The relevant amendments in the Senate Bill would have taken effect "on the date of enactment" and would have applied "to all aliens upon whom an order to show cause is served on or after the date of enactment of the Act." See 142 Cong. Rec. S4196-03, § 150(d) (daily ed. Apr. 25, 1996), available in 1996 WL 199908. The relevant provision in the House bill would have applied the restrictions "to notices to appear issued after the date of enactment of the Act." 142 Cong. Rec. H2378-05, § 309(c)(5) (daily ed. Mar. 19, 1996), available in 1996 WL 120181. And, the Conference Report made clear this provision would 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), § 309 (1996), available in 1996 WL 168955 (emphasis added); see also Joint Explanatory Statement, supra, § 309. While the scope of this reform was vastly expanded by the last minute inclusion of the "before, on, or" language into section 309(c)(5) of the House bill (to which the

Senate receded), we do not see how the addition of this more restrictive language could be viewed as intending to transform the character of section 309(c)(5) into a transitional rule that was not intended to have immediate effect.

Moreover, we point out that the immigration reforms in question were motivated by a desire to remove the incentive for aliens to prolong their cases by ending the accrual of time in residence for suspension of deportation when deportation proceedings were commenced. The legislative history reflects that Congress was displeased with the ability of aliens to protract the deportation hearing process and thereby accrue time that could be counted toward satisfaction of the continuous physical presence requirement. See H.R. Rep. No. 104-469(I) (1996), available in 1996 WL 168955, at 390 (noting that "[s]uspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued[,] . . . even after they have been placed in deportation proceedings"). This dissatisfaction evidently led Congress to direct that the accrual of qualifying time would stop with the issuance of the notice to appear. See H.R. Rep. No. 104-879 (1997), available in 1997 WL 9288, at 260 (noting that reforms in the IIRIRA's title III included ending the "accrual of time-in-residence on the date an alien is placed into removal proceedings, thus removing the incentive for aliens to prolong their cases in the hope of remaining in the U.S. long enough to be eligible for relief").

Viewing these two factors in combination reinforces our reading of the statutory language. The 6-month general delayed effective date for the IIRIRA is a significant period during which time can accrue toward eligibility as to some aliens in proceedings on the date of enactment or placed in proceedings shortly thereafter. And, in view of our determination that an Order to Show Cause amounts to a notice to appear, regardless of when it was issued, it is not apparent why Congress would want some aliens to continue to accrue time for eligibility purposes (and others to remain eligible) during a 6-month delayed effective date period, when Congress had already taken the significant step of directing that these particular new rules would apply to old cases. In other words, Congress could not know which aliens might come up for final adjudications during the 6-month delayed effective date. Due to its displeasure with the old rules respecting accrual of time, Congress decided to apply the new rules to previously initiated cases, eliminating the ability of aliens to qualify for relief. Congress evidently saw this particular problem of time accrual to be significant enough to warrant an exception to its general rule that the new law would not

apply to cases initiated under the old law. Given the intent of Congress to correct the problem to this degree, it makes little sense to construe the legislation in a way that would nevertheless perpetuate the very problem Congress sought to correct, even if only for the 6-month delayed effective date period and even if only for the random subset of aliens fortunate enough to obtain some final merits ruling during that period.

In summary, we have examined the legislative history overall and find that on balance our reading of the statutory language of section 309(c)(5) is consistent with the generally restrictive legislative intent -- an intent to terminate immediately the accrual of time-in-residence for suspension eligibility by encompassing aliens in proceedings before the date of the IIRIRA's enactment. We therefore find that under the provisions of section 240A(d)(1) of the Immigration and Nationality Act added by the enactment of the IIRIRA, as applied in the section 309(c)(5) transitional rule, the Order to Show Cause must be deemed to end the period of continuous physical presence on August 27, 1993, the date it was served, prior to this respondent's acquisition of the requisite 7 years. Thus, the respondent in the instant case is unable to satisfy the statutory physical presence requirement now in effect. Because we find the lack of requisite physical presence dispositive in terms of eligibility for suspension, we need not consider whether she has met the other requirements for suspension of deportation eligibility.

V. ASYLUM AND WITHHOLDING OF DEPORTATION

We find no merit in the respondent's assertion on appeal that the Immigration Judge erred in denying her applications for asylum and withholding of deportation because she was persecuted when she, as a teacher in Nicaragua, refused to be forced to indoctrinate students with Marxist ideology. The Immigration Judge's denial of the respondent's persecution claim is well supported by the record. The respondent testified that she worked as a teacher in Nicaragua for 20 years; that the educational system changed completely such that if "one did not participate" with the army one would have a "great problem" which she did not further describe; that she voluntarily resigned from her job because of "pressures"; that she was never detained or threatened by the Sandinistas; and that she feels her "life would end" if she returned to Nicaragua because she has no money or family there. She reported only that before the Sandinistas came to power she was threatened by a "group of young

people" in the street. She made no mention in her testimony of being a member of any organization or group, nor did she refer to having been arrested, interrogated, convicted or sentenced, or imprisoned in her home country. The respondent has not met her burden of proving that she has a well-founded fear of persecution in Nicaragua and a fortiori she has failed to satisfy the higher standard for withholding of deportation based on one of the five statutory grounds of race, religion, nationality, membership in a particular social group, or political opinion. See sections 101(a)(42)(A), 208(a), 243(h) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), 1253(h) (1994); INS v. Elias-Zacarias, 502 U.S. 478 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); INS v. Stevic, 467 U.S. 407 (1984); Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

DISSENTING OPINION: John Guendelsberger, Board Member, in which Paul W. Schmidt, Chairman, joined.

I respectfully dissent.

I. FACTS

The respondent in this case is a 51-year-old single woman from Nicaragua who came to the United States in April 1987 on a tourist visa and remained beyond the period of authorized stay. She was served with an Order to Show Cause in August 1993. At a hearing before an Immigration Judge held on August 17, 1994, the respondent presented claims for asylum and suspension of deportation. The Immigration Judge found that the respondent had satisfied the 7-year physical presence requirement for eligibility for suspension of deportation. He found, however, that although she had health problems involving her kidneys, the condition complained of was not serious enough to amount to extreme hardship for suspension of

deportation. The Immigration Judge also found that the respondent had not shown eligibility for asylum or withholding of deportation.

The respondent filed an appeal of the Immigration Judge's decision on August 26, 1994. In her appeal, the respondent challenges the denial of asylum, withholding of deportation, and suspension of deportation. The only issue raised on appeal concerning suspension of deportation is the question of extreme hardship.

On September 30, 1996, over 2 years after the respondent's appeal, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") was enacted.[1] Although not raised in this case, the Immigration and Naturalization Service has argued in other cases that the provisions of section 240A(d) of the Act (to be codified at 8 U.S.C. § 1250a(d)), which were enacted by the IIRIRA, should be applied retroactively. Notably, the instant case is not one in which the Immigration Judge adjudicated the issue of physical presence after the enactment of the IIRIRA. The Immigration Judge's determination was made in 1994. Thus the actual issues raised on appeal in this case have been eclipsed by a question of applicability of recent legislation to an issue that all parties considered resolved over 2 years ago. This dissent addresses the issue of applicability of the IIRIRA provisions to the instant appeal.

II. ISSUE

The issue in this case is whether section 309(c)(5) of the IIRIRA, 110 Stat. at ____, alters the general effective date provision in section 309(a) for new section 240A(d). All agree that section 309(c)(5) excepts section 240A(d) of the Act from the general rule in section 309(c)(1) that IIRIRA title III-A provisions are inapplicable to cases pending on April 1, 1997. The question is whether section 309(c)(5) applies as of the section 309(a) general effective date, April 1, 1997, or on the date of enactment, September, 30, 1996.

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[1] The IIRIRA was enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, _____ ("IIRIRA") on September 30, 1996.

III. OVERVIEW

The majority reads section 309(c)(5) to counter both the section 309(a) general effective date and the 309(c)(1) general rule of nonapplicability. In reaching this conclusion the majority reasons that Congress generally intended to limit suspension of deportation and that a "natural reading" of section 309(c)(5) calls for a restrictive interpretation. The majority fails to consider the placement and purpose of section 309(c)(5) in the general structure of the section 309 effective date and transition rules and ignores the relevant legislative history. As one of six exceptions to the general rule of nonapplicability in section 309(c)(1), the more "natural reading" of section 309(c)(5) is that it is an exception to the nonapplicability rule contained in section 309(c)(1). When section 309(c)(5) is read with regard to its place in the framework of section 309 and in light of its legislative history, it cannot be applied to any pending cases until after April, 1, 1997, the IIRIRA title III-A effective date.[2]

In this case, the respondent applied for suspension of deportation under the existing eligibility rules, submitted her evidence and met her burden of proof as to 7 years of continuous physical presence in 1994. Now, after having adjudicated the continuous physical presence requirement, the rules have been changed and the Service seeks to relitigate the issue of continuous physical presence. This case falls squarely within the situation described in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 1499 (1994), in which legislation "attaches new legal consequences to events completed before its enactment." Legislation which has such an effect may not be applied retroactively in the absence of a clear statutory directive. Id. Although the directive in section 309(c)(5) clearly alters the general rule of nonapplicability in section 309(c)(1), it does not change the effective date of section 240A(d) or any other provisions of the IIRIRA. Under such circumstances, Landgraf requires that the general effective date, April 1, 1997, control the applicability of new legislation to "events completed before its enactment."

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[2] As pointed out in the dissenting opinion of Board Member Villageliu, even after April 1, 1997, there are certain pending cases which may not be affected by the section 240A(d)(1) directive, i.e., those pending cases which have not been initiated by a "notice to appear under section 239(a)."

IV. THE NEW PROVISIONS OF THE IIRIRA

While this case was pending on appeal, the enactment of the IIRIRA created new provisions which will eventually replace the suspension of deportation provisions in section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a) (1994), with a procedure to be known as cancellation of removal and adjustment of status.[3] See section 304 of the IIRIRA, 110 Stat. at ____. The requirements for cancellation of removal and adjustment of status for nonpermanent residents are patterned after those for suspension of deportation but contain heightened eligibility thresholds.[4]

Section 304 of the IIRIRA contains provisions which will limit the cumulation of time toward the physical presence requirement in the new procedure for cancellation of removal. See sections 240A(d)(1), (2) of the Act. In particular, section 240A(d)(1) provides that "[f]or purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed

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[3] Among other changes, the new law merges exclusion and deportation procedure into a new set of procedures to be known as removal proceedings which will be initiated by a "notice to appear" pursuant to new section 239(a) of the Act (to be codified at 8 U.S.C. § 1229(a)). Suspension of deportation will be gradually phased out under the IIRIRA and replaced with a form of relief from deportation to be known as cancellation of removal and adjustment of status. The provisions for cancellation of removal and adjustment of status do not apply to cases pending as of April 1, 1997, unless the Attorney General elects to exercise one of the two options described in IIRIRA sections 309(c)(2) or (3). See section 309(c)(1) of the IIRIRA.

[4] The requirement for continuous physical presence is increased from 7 years to 10 years; the showing of hardship is elevated from "extreme" to "exceptional and extremely unusual"; and hardship to the alien is eliminated from consideration. Compare section 244(a) of the Act with new section 240A(b)(1).

to end when the alien is served a notice to appear under section 239(a)." (Emphasis added.)[5]

The majority finds that this limitation in section 240A(d)(1) applies to the instant case. The majority reaches its conclusion by focusing upon language in IIRIRA section 309(c)(5) which states:

> Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

If section 309(c)(5) is read in isolation, its "before, on, or after the date of enactment" language may suggest that section 309(c)(5) applies to any case pending after the IIRIRA's September 30, 1996, enactment date. Before jumping to such a conclusion, however, there is a threshold question as to the effective date of section 309(c)(5) itself. This question must be answered by considering the language and place of section 309(c)(5) in the overall structure of the section 309 effective date and transition rules. See K Mart Corp. v. Cartier Inc., 486 U.S. 281, 291 (1989) (holding that construction of language which takes into account the design of the statute as a whole is preferred).

V. STRUCTURAL ANALYSIS OF SECTION 309 OF THE IIRIRA

IIRIRA's section 309 provides a complex framework of effective dates and transition rules. Examination of section 309 reveals two benchmarks concerning the phasing-in of the various provisions of title III-A:

1. The general effective date in section 309(a): April 1, 1997;

2. A general rule of nonapplicability in section 309(c)(1): Even after April 1, 1997, new rules do not apply to cases that were pending on the effective date.

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[5] Section 240A(d)(1) also deems continuous physical presence to have ended upon the commission of specified offenses. Section 240A(d)(2) provides that breaks in physical presence "in excess of 90 days or for any periods in the aggregate exceeding 180 days" will interrupt continuous physical presence.

The majority ignores the significance of the second benchmark in analyzing the language of section 309(c)(5). As explained below, section 309(c)(5) sets forth an exception only to the second benchmark and is inapplicable to any pending cases until the general effective date of the Act.

A. The General Effective Date in Section 309(a).

The general rule for the effective date of IIRIRA sections 301 through 309 is established in section 309(a), as follows:

> Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on [April 1, 1997] (in this title referred to as the "title III-A effective date").

Section 309(a) of the IIRIRA (emphasis added).

This overarching effective date provision in section 309(a) applies to all of the amendments contained in IIRIRA section 304, including the new rules for continuous physical presence in section 240A(d) of the Act.

B. The General Rule of Inapplicability in Section 309(c)(1).

The transition rules for the new IIRIRA provisions are contained in section 309(c). Section 309(c) contains a general rule of inapplicability in paragraph (1) and a number of exceptions to that rule in paragraphs (2) through (7). The general rule of inapplicability in section 309(c)(1) of the IIRIRA provides as follows:

> GENERAL RULE THAT NEW RULES DO NOT APPLY. -- Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997,]--
>
> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings . . . shall continue to be conducted without regard to such amendments.

Section 309(c)(1) of the IIRIRA (emphasis added). Thus the general rule of inapplicability contained in section 309(c)(1) is that any alien in deportation proceedings before April 1, 1997, will continue

to have the benefit of the rules for section 244(a) suspension of deportation even after the April 1, 1997, effective date.

After April 1, 1997, there will be a two-track system of relief from deportation. Aliens in deportation proceedings prior to April 1, 1997, will continue to be eligible for suspension of deportation under the requirements now contained in section 244(a) of the Act. Aliens placed in deportation proceedings after April 1, 1997, will be subject to the elevated eligibility requirements of cancellation of removal and adjustment of status in new section 240A(b). As discussed in Board Member Villageliu's dissent, the Attorney General may, after April 1, 1997, elect to apply the new procedures of IIRIRA title III-A to cases which were initiated prior to April 1, 1997. See section 309(c)(2) of the IIRIRA, which directs that in such circumstances the previously issued Order to Show Cause shall be "valid as if provided under section 239 of such Act."

C. Exceptions to the Section 309(c)(1) General Rule of Inapplicability in Paragraphs (2)-(7).

Paragraphs (2) through (7) of section 309(c) spell out exceptions to the general rule in section 309(c)(1) that the new IIRIRA provisions are inapplicable even after April 1, 1997, to aliens in proceedings before April 1, 1997. Paragraphs (2) and (3) afford the Attorney General the option to elect to proceed under the new cancellation of removal provisions of the IIRIRA in specified cases. Paragraph (4) addresses judicial review of exclusion and deportation proceedings. Paragraph (5) addresses suspension of deportation cases. Paragraph (6) addresses a new exclusion provision as applied to family unity cases. Paragraph (7) refers to ceilings on grants of suspension of deportation in any one fiscal year.

As discussed above, the language of section 309(c)(5) counters the general rule of inapplicability in section 309(c)(1). The heart of the issue in this case is whether section 309(c)(5) also alters the general effective date in section 309(a).

D. The Reach of IIRIRA Section 309(c)(5).

Some of the paragraphs of section 309(c) address events occurring prior to April 1, 1997. Section 309(c)(4), for example, explicitly refers to cases in which "a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this

Act."[6] Other paragraphs, such as (2), (3), and (6), apply only to events occurring after April 1, 1997. The Attorney General option to elect to apply new procedures in paragraph (2) is explicitly limited to cases in which an evidentiary hearing "has not commenced as of the title III-A effective date." Similarly, under paragraph (3), the Attorney General option to initiate new proceedings could not occur before the provisions for these proceedings take effect on April 1, 1997. Likewise, under paragraph (6), the new family unity exception to a new exclusion provision has no applicability until April 1, 1997.

Unlike the paragraphs described above, section 309(c)(5) is ambiguous as to whether it applies from the effective date or the enactment date. We know that section 309(c)(5) counters the general rule of inapplicability in section 309(c)(1) that proceedings underway before April 1, 1997, "shall continue to be conducted without regard to [IIRIRA title III-A] amendments." (Emphasis added.) The critical issue is whether section 309(c)(5) also countermands the section 309(a) general effective date. The majority attributes a double effect to section 309(c)(5) so that it changes not only the section 309(c)(1) general rule of inapplicability, but also the general effective date in section 309(a). The unresolved ambiguity presented by the language of section 309(c)(5) is whether it counters the section 309(a) effective date as well as the section 309(c)(1) rule of inapplicability.

Had Congress intended section 309(c)(5) to alter the general effective date as well as the general transition rule, it could have clearly so directed. See, for example, IIRIRA section 348(b) which, in amending section 212(h) of the Act, provides:

> The amendment made by subsection (a) [A] shall be effective on the date of the enactment of this Act and [B] shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final

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[6] It should be noted that section 309(c)(4) instructs as to the applicability of provisions of the Immigration and Nationality Act in effect prior to passage of the IIRIRA in the case of final orders entered more than 30 days after the date of the enactment of the IIRIRA. Thus, section 309(c)(4) does not modify the effective date of any provisions of the IIRIRA relating to judicial review.

> administrative order in such proceedings has been entered as of such date.

Section 348(b) of the IIRIRA, 110 Stat. at ____ (emphasis added). Clause A of section 348 explicitly states the effective date. Clause B of section 348 specifies which cases are affected on the effective date. Notably, section 309(c)(5) lacks a Clause A specifying an effective date. It contains only the Clause B instruction as to which cases are affected on the general effective date of the Act. Had Congress intended to alter the general effective date in section 309(c)(5), it could have followed the pattern used in section 348, and section 309(c)(5) would have read:

> Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) [A] shall be effective on the date of enactment and [B] shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

Because of the omission of the above-emphasized language from section 309(c)(5), the general effective date of section 309(a) is not countermanded by the language of section 309(c)(5). See also the directives in section 308(d)(2)(D), "effective upon enactment of this Act" and in section 308(d)(5), "[e]ffective as of the date of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996." The omission of such plain language in section 309(c)(5) negates the majority claim that this section alters the general effective date in section 309(a).

The majority claims that the "before, on, or after the date of enactment" clause in section 309(c)(5) would have no purpose were it not meant to alter the general effective date in section 309(a). But in making this statement, the majority overlooks or ignores the directives in sections 309(c)(1)(A) and (B) that none of the new suspension rules shall apply even after the general effective date, April 1, 1997. Thus, section 309(c)(5) is not surplusage. It counters the general rules of sections 309(c)(1)(A) and (B) in cases in which deportation proceedings were commenced before, and remain pending after, April 1, 1997.

For these reasons, section 240A(d) is not effective until April 1, 1997, and section 309(c)(5) does not apply to suspension applications which are considered prior to April 1, 1997.

VI. LEGISLATIVE HISTORY

As originally enacted, the general transition rule in section 309(c)(1) applied "to the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date." (Emphasis added.) Eleven days after the IIRIRA's enactment, a technical amendment struck and replaced the term "as of" with the term "before." See Extension of Stay in the United States for Nurses Act, Pub. L. No. 104-302, § 2, 110 Stat. 3656 (1996).

It was clear under the unamended version of section 309(c)(1), that section 309(c)(5) applied only after April 1, 1997, because one would not know whether an alien was in proceedings "as of" that date until April 1, 1997, arrived. This being so, the majority's position can stand only if the technical amendment, enacted on October 11, 1997, was meant to bring forward the section 309(c)(5) effective date from April 1, 1997, to the date of enactment of the IIRIRA, September 30, 1996. The majority has failed to demonstrate such an intent and the legislative history indicates otherwise.

The legislative history of the technical amendment strongly suggests that it was not meant to alter the April 1, 1997, effective date for section 309(c)(5) established in the IIRIRA. In explaining the technical amendment, Representative Lamar Smith, Chairman of the Subcommittee on Immigration and Claims of the House Judiciary Committee, noted that the "as of the effective date" language in IIRIRA section 309(c)(1) conflicted with the reference in section 309(c)(4) to cases in which final orders were rendered "30 days after the date of the enactment," thus delaying the prohibition of judicial review in such cases until after title III's general effective date. 142 Cong. Rec. H12,293-01 (daily ed. Oct. 4, 1996), available in 1996 WL 565773 (statement of Rep. Smith) (emphasis added).

Representative Smith stressed that it "was the clear intent of the conferees that, as a general matter, the full package of changes made by this part of title III [a]ffect those cases filed in court after the enactment of the new law, leaving cases already pending before the courts to continue under existing law. Id. (emphasis added). After noting that some reforms in title III were to be "accelerate[d]," Representative Smith referred specifically to section 309(c)(4) which "calls for accelerated implementation of some of the reforms made in section 306 regarding judicial review." Id. There is no mention of section 309(c)(5) or changes to rules for suspension of deportation.

not be presumed in the absence of "clear intent" by Congress. Landgraf, 114 S.Ct. at 1497, 1501. As the Court noted, "[C]lear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." Id. at 1501.

A statute has retroactive effect when "the new provision attaches new legal consequences to events completed before its enactment." Id. at 1499. In such a situation, it is not enough to search for a reasonable construction, or a construction consistent with the perceived restrictive goals of the legislation, or with a "natural reading." The application of the new rules in section 240A(d) to this case would alter the determination made months before the enactment of the IIRIRA that the respondent in this case had satisfied the eligibility requirement for continuous physical presence for suspension of deportation.

Here we have clear language setting an effective date on April 1, 1997. Under the ruling in Landgraf, the general effective date in section 309(a) can only be drawn forward by a clear and plain expression of congressional intent to do so. In the absence of clear language advancing the effective date, the general effective date of section 309(a) must be applied.

In addition to the presumption of nonretroactivity, this case involves the question of deportation, an area in which doubts as to the effective date of section 309(c)(5) are to be construed in favor of the alien to take effect on the IIRIRA's general effective date. See INS v. Errico, 385 U.S. 214, 225 (1966) (construing section 241(f) of the Act, 8 U.S.C. § 1251(f) (1966), and indicating that doubts as to the correct construction of the statute should be resolved in the alien's favor even when interpreting provisions related to relief from deportation); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (stating that any doubts regarding the construction of the Act are to be resolved in the alien's favor); Matter of Tiwari, 19 I&N Dec. 875 (BIA 1989).

VIII. THE FEDERAL CIRCUIT COURT DECISIONS

Two federal circuit courts have recently rendered decisions in cases construing the effective date and transition rules of IIRIRA section 309. Both decisions have ruled that broad language altering the section 309(c)(1) rule of nonapplicability of the IIRIRA rules to pending cases did not modify the general effective date provision in section 309(a).

The United States Court of Appeals for the Ninth Circuit has directly addressed the issue presented in this case and held that under section 309(c)(5), section 240A(d) of the Act has no effect until April 1, 1997. Astrero v. INS, No. 95-70557, 1996 WL 738828 (9th Cir. Dec. 30, 1996). The court in Astrero reasoned that the fact that under section 309(c)(5) the "new requirements may apply retroactively to trigger cutoff dates based on notices to appear issued prior to April 1, 1997, does not change the effective date itself." Id. at *2. In other words, section 309(c)(5) is retroactive from the point in time that provision takes effect, i.e., April 1, 1997.

Similarly the United States Court of Appeals for the Seventh Circuit recently addressed the question whether IIRIRA section 306(c), 110 Stat. at ____, changed the effective date provision in section 309(a) as well as the general rule of inapplicability in section 309(c)(1). Lalani v. Perryman, No. 96-2498, 1997 WL 24520 (7th Cir. Jan. 23, 1997).

Lalani involved an appeal from a district court decision upholding a district director's denial of a request for voluntary departure. The issue was whether the IIRIRA's new limit on court review enacted as section 242(g) of the Act (to be codified at 8 U.S.C. § 1252(g)) takes effect on the date of enactment or on the effective date. In regard to applicability of section 242(g), IIRIRA section 306(c) provided that the section should apply "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." (Emphasis added.)

The Immigration and Naturalization Service argued that this language in section 306(c) made section 242(g) immediately applicable from the date of enactment, thus divesting the courts of jurisdiction over certain forms of litigation. The Seventh Circuit rejected the Service reading, and held that section 242(g) takes effect on April 1, 1997, according to the general effective date

provision in section 309(a). In so finding, the court reasoned that the reference to subsection (g) in section 306(c) "is meant only to provide an exception to section 309(c)'s general principle of non-retroactivity, so that when IIRIRA comes into effect on April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections." Lalani v. Perryman, supra, 1997 WL 24520, at *2 (emphasis added).

Notably, Lalani uses the same structural approach to interpreting sections 309(a) and (c) as does the Ninth Circuit Court of Appeals in Astrero. The court in Lalani also relied upon the presumption against advancing the general effective date in the absence of clear language when "the new provision attaches new legal consequences to events completed before its enactment." Landgraf v. USI Film Products, supra, at 1499.

Unfortunately, the majority decision in this case creates a nationwide split in the treatment of applicants for suspension of deportation in pending deportation cases. In the Ninth Circuit, and likely in the Seventh Circuit, the courts have recognized that section 309(c)(5) cannot be interpreted to take effect prior to April 1, 1997. Without better reasons than those expressed in the majority decision, this Board should not reach a result which imposes an earlier effective date in other jurisdictions nationwide.

IX. CONCLUSION

For the reasons stated above, the provisions of IIRIRA section 240A(d) should not apply to the continuous physical presence determination in this case. This Board should, therefore, review the issue of extreme hardship raised on appeal.*

John Guendelsberger
Board Member

* I agree with the views expressed in the dissents of Board Members Villageliu and Rosenberg.

DISSENTING OPINION: Gustavo D. Villageliu, Board Member

I respectfully dissent. While I fully agree with the dissent of Board Member Guendelsberger, as to the statutory scheme of section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA") and its effective date, I write separately to emphasize two points on which I disagree with the majority's conclusions.

One, the 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. Two, 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 section 239(a) of the Immigration and Nationality Act (to be codified at 8 U.S.C. § 1229(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" without adopting an overbroad interpretation inconsistent with the statutory language and its legislative history. Section 309(c)(2) of the IIRIRA specifies that the notice of hearing issued pursuant to section 235 or 242 of the Act, 8 U.S.C. §§ 1225 or 1252 (1994), shall be valid as if provided under section 239.

I. SECTION 240A(d)(1) DOES NOT INTERRUPT CONTINUOUS PHYSICAL PRESENCE IN ALL PENDING CASES

Section 240A(d)(1) of the Act (to be codified at 8 U.S.C. § 1250a(d)(1)) does not mandate that all notices to appear interrupt continuous physical presence. It specifically limits its application to cases where a notice to appear under section 239(a), placing the alien in removal proceedings has been issued. The pertinent language of section 240A(d)(1) of the Act, as enacted by the IIRIRA states: "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 section 239(a) . . . ." (Emphasis added.) The majority unconvincingly violates the first rule of statutory construction that legislative intent should be ascertained from the

plain meaning of the statute, by dismissing these crucial last three words, which clearly limit the class of aliens to which it applies. See INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

In addition, the majority opinion violates the rule of statutory construction that no provision of law should be construed so as to render a word or clause surplusage. Kungys v. United States, 485 U.S. 759 (1988). It is also inconsistent with protecting settled expectations when new provisions attach new legal consequences to past events, as a safeguard against unfairness in retroactivity, and with the rules for interpreting immigration statutes consistently invoked by the Supreme Court and this Board, as pointed out in the dissent of Board Member Rosenberg. Landgraf v. USI Film Products, Inc., 511 U.S. 244 (1994); INS v. Errico, 385 U.S. 214, 225 (1966); Barber v. Gonzales, 347 U.S. 637, 642-43 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); accord INS v. Cardoza-Fonseca, supra, at 449, and cases cited therein.

Applying the well-settled rules of statutory construction, expressio unius est exclusio alterius and ejusdem generis, to the statutory language, which states that all notices to appear are subject to the rules prescribed in section 240A(d)(1) of the Act, means that only a notice to appear under section 239(a) automatically interrupts physical presence, and by implication other notices to appear do not, unless the Attorney General chooses to exercise the option provided under section 309(c)(2) of the IIRIRA. See Matter of Lazarte, Interim Decision 3264 (BIA 1996); Matter of Beltran, 20 I&N Dec. 521 (BIA 1992); 2A N. Singer, Sutherland Statutory Construction §§ 47.17, 47.23 (4th ed. 1985). This limited interpretation would be consistent with the language of sections 309(c)(2) and (3) of the IIRIRA, which allows the Attorney General to treat a notice of hearing under sections 235 or 242 as if under section 239 after a 30-day notice to the alien, or to terminate proceedings and proceed instead under the new procedures. Section 309(c)(2) specifically states that "[i]f the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239." Note, however, that the option under section 309(c)(2) is limited to cases where an evidentiary hearing has not commenced before its effective date. Similarly, the Attorney General's option to terminate proceedings under section 309(c)(3) and proceed under the new standards is limited to cases in which there has been no final administrative decision. Neither limitation makes sense under the majority's ruling.

II. SECTION 309(c)(5) IS ONLY A JURISDICTIONAL PROVISION WHICH PRESCRIBES THAT CONTINUOUS PHYSICAL PRESENCE MAY BE INTERRUPTED

The majority's reliance on the language of section 309(c)(5) of the IIRIRA for its overbroad interpretation of the interruption of continuous physical presence rules prescribed under section 240A(d)(1) of the Act is similarly unconvincing. Section 309(c)(5) is a jurisdictional provision, directing to the rules for interrupting physical presence and precluding jurisdictional challenges to their potential retroactivity. All that section 309(c)(5) prescribes is that an Order to Show Cause may interrupt continuous physical presence under section 240A(d)(1). Section 309(c)(5) of the IIRIRA states:

> Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

The key passage to the majority's opinion is that "in order for the section 309(c)(5) exception to the transitional rule to have any independant meaning at all, it must apply to aliens served with an Order to Show Cause prior to the date of enactment" and therefore, the retroactive interruption of physical presence applies automatically to all cases. That is simply not true, and assumes that section 309(c)(5) is an exception to the transitional rules. It is also an incomplete syllogism that ignores the fact that the language of sections 240A(d)(1) and (2) of the Act describe a limited class of aliens whose continuous residence or physical presence is deemed to be interrupted. It does not interrupt continuous physical presence in all cases.

No one disputes that the section 240A(d)(1) rules are applicable to Orders to Show Cause issued before enactment of the Act. Our dispute is as to what the "rules" command, and their effective date. I also do not dispute that the section 240A(d)(1) rules may effect substantive changes regarding eligibility for relief in cases pending before the April 1, 1997, effective date of the IIRIRA. My argument is, instead, that such substantive changes take place when the alien is placed in removal proceedings, and seeks cancellation of such removal. That is what the statute mandates and the legislative history reflects.

Section 309(d)(5) of the IIRIRA, as enacted, does not state that the interruption of continuous physical presence applies to all cases, as it easily could have and once did, as discussed below. Instead, it states that the rules in sections 240A(d)(1) and (2), as to whose physical presence is interrupted, applies to all cases. It directs us to section 240A(d)(1) of the Act and thereby precludes jurisdictional challenges by aliens who lose their eligibility for suspension of deportation in removal proceedings and challenge its ex post facto application. The Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-2202, available in 1996 WL 563320 and 142 Cong. Rec. H10,841-02 ("Joint Explanatory Statement"), on section 309 of the IIRIRA, while discussing the Attorney General's discretionary election to apply the new proceedings, specifically stated that although the IIRIRA's amendments did not apply to pending cases, its language was meant to retain jurisdiction over aliens served with notices of hearing and Orders to Show Cause.

If an alien is placed in deportation proceedings pursuant to an Order to Show Cause before the IIRIRA takes effect, and is subsequently given a notice under section 309(c)(2) that the Attorney General intends to treat his Order to Show Cause as a notice to appear under section 239(a) of the Act, then he is subject to the interruption of continuous physical presence mandated by section 240A(d)(1). This limited class of aliens for whom the Attorney General exercises the section 309(c)(2) option is clearly made up of "alien(s) served with a notice to appear (treated as if) under section 239(a)." Therefore, it is not true that section 309(c)(5) has no meaning unless we adopt the overbroad majority ruling in this case. As explained in Board Member Guendelsberger's dissent, the exceptions to the April 1, 1997, effective date of the IIRIRA in sections 309(c)(2), et seq., are meant to address the rules applicable to cases pending on April 1, 1997, not September 30, 1996, unless another provision of the IIRIRA specifically directs otherwise. Astrero v. INS, No. 95-70557, 1996 WL 738828 (9th Cir. Dec. 30, 1996); accord Lalani v. Perryman, No. 96-2498, 1997 WL 24520 (7th Cir. Jan. 23, 1997); Rodriguez v. Wallis, No. 96-3518 (S.D. Fla. Jan. 29, 1997).

A section 239(a) notice to appear initiates removal proceedings and interrupts continuous physical presence pursuant to section 240A(d)(1) for purposes of cancellation of removal. Similarly, a properly exercised Notice of Election under section 309(c)(2) subjects a deportable alien to removal procedures, which the index to IIRIRA at title III, subsection A, specifies are sections 239, et

seq., of the Act.[1] In removal procedures, the formerly deportable alien is subject to the section 240A(d)(1) interruption of continuous physical presence because section 309(c)(5) specifies that such rules apply to notices to appear issued before, on or after enactment of the IIRIRA. The Order to Show Cause is deemed a notice to appear under section 239(a) because the Attorney General has elected to proceed against him pursuant to section 239, et seq., the language of section 240A(d)(1) limits such an interruption to aliens against whom a notice to appear under section 239(a) has been issued, and section 309(c)(2) specifies that the Order to Show Cause has the same jurisdictional effect as a notice under section 239.

III. LEGISLATIVE HISTORY

The legislative history of the IIRIRA is consistent with the above interpretation and inconsistent with the majority's interpretation. It reflects that the interruption of continuous physical presence was initially introduced as applicable to removal proceedings, through section 240A(d)(1), and to suspension of deportation applications through section 309(c)(5) as part of the transitional rules for pending cases. Section 309(c)(5) then stated, "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 the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act . . . ." HR 2202, § 309, available in Congressional Quarterly's Washington Alert and Westlaw, at 1995 CQ US HR 2202 (Aug. 4, 1995).

The bill was subsequently reported on March 4, 1996, favorably by the House Judiciary Committee with identical language in section 240A(d)(1), but section 309(c)(5) had been amended to apply the section 240A(d)(1) rules to suspension of deportation applications

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[1] The Supreme Court has ruled that the title of a statute or section can aid in resolving an ambiguity in the legislation's text. INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 189 (1991); Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989); FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959); cf. 2A Singer, supra, §§ 47.01, 47.03, 47.14.

where the notice to appear was issued after enactment of the Act. The Committee Report, H.R. Rep. No. 104-469(I) (1996), available in 1996 WL 168955, at 470, specifically stated that the "continuous physical presence terminates on the date a person is served a notice to appear for a removal proceeding," id. § 304 (emphasis added), and also stated that the rules of section 240A(d)(1) applied "as a criterion for eligibility for cancellation of removal" to "any notice to appear (including an Order to Show Cause under current section 242A) issued after the date of enactment of this Act." Id. § 309 (emphasis added).

On March 7 and 8, 1996, the bill was withdrawn from several committees and reported from several other committees with amendments. The bill was reported to the entire House on March 8, 1996, had identical language in section 240(d)(1), limiting its application to cases where a section 239(a) notice to appear had been issued and section 309(c)(5) retained the language about the applicability to suspension of deportation applications in its heading, but deleted the operative language that the interruption of continuous physical presence upon issuance of an Order to Show Cause applied to section 244(a) applications. It therefore now meant that suspension of deportation applicants were subject to the section 240A(d)(1) rules which, as discussed above, interrupted continuous physical presence only if a notice to appear under section 239(a) placing the alien in removal proceedings was issued. This was the bill passed by the House of Representatives on March 21, 1996, after other amendments on the House floor. See HR 2202, available in Congressional Quarterly's Washington Alert and Westlaw at 1996 CQ US HR 2202 (engrossed Mar. 21, 1996).

The bill was placed in the calendar of the United States Senate on April 15, 1996, after its introduction by Senator Orrin Hatch of Utah as S. 1664 on April 10, 1996. See S 1664, available in Congressional Quarterly's Washington Alert and Westlaw at 1996 CQ US S 1664 (reported in Senate Apr. 10, 1996). A critical difference in this bill is that section 244 of the Immigration and Nationality Act of 1952, as amended, would be replaced by section 150(b) of that bill providing a new section 244 entitled "Cancellation of Deportation; Adjustment of Status; Voluntary Departure." Section § 150(b) of that bill provided that continued physical presence was deemed to end when an Order to Show Cause was issued. Id. § 150(b). However, section 150(d) of the bill, entitled "Effective Dates," limited its application by stating that the "amendments made by subsection (b) shall take effect on the date of the enactment of this Act, and shall apply to all applications for relief under

section 244 of the Immigration and Nationality Act (8 U.S.C. 1254), except that, for purposes of determining the periods of continued residence or continuous physical presence, the amendments made by subsection (b) shall apply to all aliens upon whom an order to show cause is served on or after the date of the enactment of this Act." Id. at § 150(d).

On May 2, 1996, the Senate passed S. 1664 as an insert to H.R. 2202 and sent it to the House of Representatives for concurrence. On May 20, 1996, the House refused to concur in the Senate amendments and the bill was referred to the Conference Committee. On September 25, 1996, the House agreed to the Conference Committee Report on the language of the IIRIRA. On September 28, and 30, 1996, the House of Representatives and the Senate, respectively, agreed to the language of the IIRIRA, as finally enacted, and it was signed by the President into law as part of the fiscal year 1997 spending measure for the federal government that same day.

In short, the language of the IIRIRA, as finally enacted, retained the "notice to appear under section 239(a)" language of section 240A(d)(1); deleted the operative language applying the interruption of continuous physical presence in section 244(a) applications in the original section H.R. 2202, section 309(c)(5), and S 1664, section 244(a)(2)(A); rejected the language in the Senate bill limiting the interruption of continuous physical presence to cases initiated after the enactment of the IIRIRA; and added the "before, on, or after" language to section 309(c)(5). Consequently, it is clear that, pursuant to sections 240A(d)(1) and 309(c)(5), the interruption of continuous physical presence applies to all cancellation of removal applications, regardless of how and when they were initiated, and does not apply to suspension of deportation cases remaining in deportation proceedings. The applicability to suspension of deportation applications was deleted and the section 239(a) limitation was retained.

The interpretation above is further supported by the Joint Explanatory Statement. It explains that "[s]ection 240A(d) provides that the period of continuous residence or 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)." Joint Explanatory Statement, supra, § 240A(d). The very next paragraph further explains that the section 240A(e) limitation on the number of grants per fiscal year applies to both cancellation of removal and suspension of deportation. Id. § 240A(e). This specificity indicates that Congress was knowingly referring to both forms of

relief distinctively and refutes the majority's assertion that an Order to Show Cause and a notice to appear under section 239(a) were synonymous terms with no substantive difference. The legislative history states that the rules under section 240A(d)(1) regarding continuing physical presence applied as a criterion of eligibility for cancellation of removal. Id. § 309. It also states that the reforms end "the accrual of time-in- residence on the date an alien is placed into removal proceedings." H.R. Rep. No. 104-879 (1997), available in 1997 WL 9288. Finally, the committee specified, when discussing the purpose of section 309(c), that it was intended to retain jurisdiction over cases pending when the IIRIRA was enacted, further suggesting its jurisdictional nature that did not effect substantive changes on eligibility for relief absent a specific directive to that effect elsewhere in IIRIRA. Joint Explanatory Statement, supra, § 309.

The majority's contention that its "natural reading" of the statutory language is consistent with the legislative intent "to terminate immediately the accrual of time for suspension eligibility" is illogical. Such an immediate termination of accrual time is more consistent with a prospective application of the interruption of physical presence rule. Similarly, the majority's argument that the immigration reforms were motivated by a desire to remove the incentive for aliens to prolong their cases by ending the accrual of time for suspension is also more consistent with a prospective application. How can you dissuade someone from doing something already done?

The majority's assertion that the reconciliation effected by Conference Committee was between two bills prescribing the interruption of continuous physical presence in suspension cases begs the question. Section 309(c)(5) of the House bill, H.R. 2202, as passed on March 8, 1996, had already deleted the operative language interrupting physical in determining eligibility for suspension of deportation, and the interruption was described only as applicable as a criterion for cancellation of removal. The recession by the Senate to the language of section 309 in the House bill thereby eliminated the last remaining operative language which would apply the interruption of physical presence in suspension of deportation determinations.

Sections 309(c)(1)(A) and (B) of the IIRIRA explicitly state that regarding aliens already in proceedings as of its effective date (April 1, 1997), its provisions do not apply and the proceedings shall continue to be conducted without regard to such amendments,

except as to the limited classes of cases described in subsection (c). This language further suggests that as to aliens already in proceedings the provisions should be construed narrowly in accordance with the traditional rules of statutory interpretation. I do not question the power of our government to repeal the rights of aliens whose applications to remain here are pending. However, such a repeal must be clearly expressed in the statute and not discerned from irrelevant implications inconsistent with the statutory language and its legislative history. Matter of Grinberg, 20 I&N Dec. 911, 912-13 (BIA 1994), and cases cited therein; 1A Singer, supra, §§ 23.09, 23.10.

If the words "under section 239(a)" were mistaken surplusage they could have easily been deleted when Congress corrected section 309(c)(1) in the Extension of Stay in the United States for Nurses Act, Pub. L. No. 104-302, 110 Stat. 3656 (1996).[2] Congress did not, and we should not by administrative fiat effectively deprive eligible aliens of their rights to be heard on their suspension

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[2] Instead, Representative Lamar Smith, Chairman of the Subcommittee on Immigration and Claims of the House Judiciary Committee, and the lead author of the IIRIRA, reaffirmed the Joint Explanatory Statement as an accurate reflection of the views of the House of Representatives and Senate conferees as to the interpretation of the IIRIRA section 309 transitional rules. See 142 Cong. Rec. H12293-01 (daily ed. Oct. 4, 1996), available in 1996 WL 565773; cf. 2A Singer, supra, § 48.14.

applications by imposing the inapplicable interruption rule. The majority takes the curious position that it need not rely on the language of the statute nor its legislative history, and that it cannot accept the reasoning of all the courts that have interpreted the IIRIRA since it was enacted.[3] I dissent from such an unduly expansive view of our authority under 8 C.F.R. § 3.1(d) (1996).

Gustavo D. Villageliu
Board Member

DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully dissent.

I join the well-reasoned dissents of my colleagues John Guendelsberger and Gustavo Villageliu, each of whom thoughtfully and correctly interprets the statutory language and legislative history to favor treating section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ____ ("IIRIRA"), as a prospective rule of transition, applicable only after April 1, 1997, in appropriate cases. As their opinions articulate, principles of statutory interpretation and controlling law warrant our reaching a conclusion other than the one adopted by the majority in this closely split decision.

Although the majority may seek to cloak its argument within the premise that the language interpreted here is plain, obviously it is

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[3] The majority uses the deleted operative language of the original section 309(c)(5) introduced on August 4, 1995, as evidence of legislative intent that the interruption of continuous physical presence applies automatically to all Orders to Show Cause. To the contrary, such deleted text should be treated as evidence that Congress did not intend its applicability. 2A Singer, supra, §§ 48.04, 48.18.

Jordan v. De George, 341 U.S. 223 (1951) (equating deportation with a sentence to life in exile); Ng Fung Ho v. White, 259 U.S. 276 (1922) (describing deportation as akin to the loss of property or life or all that makes life worth living).

Given these harsh consequences, when faced with a choice between two readings of a deportation-related provision, the courts and, until now, this Board have relied upon the sound principle that we resolve doubts in statutory construction in favor of the alien. INS v. Cardoza-Fonseca, supra; Barber v. Gonzales, 347 U.S. 637, 642 (1954); Fong Haw Tan v. Phelan, supra, at 10; INS v. Errico, 385 U.S. 214 (1966); Matter of Tiwari, 19 I&N Dec. 875, 881 (BIA 1989).

Congress has not legislated away the long-accepted canon of construction that ambiguities in deportation statutes are to be construed in favor of the alien. And this is not an invitation to do so, as any such attempt would be likely to clash with the due process clause of the Fifth Amendment of the United States Constitution. This critical canon also is known as the "rule of lenity." As a practical matter, it means that in deportation matters, when the law is less than clear, the benefit of the doubt goes to the noncitizen.

My colleagues in the majority, whom I am certain are well aware of this canon, nonetheless have chosen to overlook it in favor of acceding to what they apparently view as the harsh, anti-alien legislative intent of the statute, mandating and supporting their conclusion. I do not suggest that they harbor any ill will towards noncitizens. I simply am forced to conclude that in their opinion today, they communicate the message that, after the IIRIRA, the benefit of the doubt has been turned 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.

I dissent from such an interpretation.

Lory D. Rosenberg
Board Member

not. Theoretically, when the language is plain, we are to give effect to the intent of Congress by giving the words used their ordinary meaning. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984); Matter of Shaar, Interim Decision 3290 (BIA 1996) (stating that when statutory language is plain that is the end of the inquiry).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra, teaches that when Congress has not spoken plainly, and in that way ended the inquiry, legislative history may be determinative. Id. at 843-44. It is also true that even in determining the plain meaning of the words in a statute, and thereby the intent of Congress, we may look to legislative history. INS v. Cardoza-Fonseca, 481 U.S. 421 (1987).

In either case, reliance on legislative history does not mean that an agency can properly rely on statements that may have been made by individual legislators to the media or even offered as individual points of view on the floor of Congress. What may have been intended by one supporter of an enactment may not at all be the reason which prompted the vote of another supporter. Certainly, consideration of legislative intent does not mean giving weight to what an individual adjudicator may perceive as being Congress' intent.

Furthermore, we conduct our interpretation of statutory language mindful of the canons of construction. To my knowledge, Congress has not yet overridden the holdings of many venerable Justices of the Supreme Court who have noted that deportation is a harsh result, similar to exile. Bridges v. Wixon, 326 U.S. 135, 154 (1945) (stating that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom"); see also Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) (recognizing that deportation is the equivalent of banishment);

File: Immigration – Deportation Rules

March 12, 1997

MEMORANDUM FOR THE VICE PRESIDENT

FROM: **Stephen Warnath**

Subject: **Immigration Update**

NEW DEPORTATION RULES: Beginning April 1st, the federal government will be able to deport people easier and faster. On that date, new deportation rules in the immigration bill that the President signed last fall go into effect. This is causing growing anxiety -- fueled by rumor and misinformation -- in many communities in California and elsewhere of INS enforcement sweeps and mass deportations. Because many families in these communities are a mix of citizen, legal immigrant and undocumented, there are fears that families soon may be split by the deportation of a father or mother, husband or wife, son or daughter.

In sum, the new law streamlines the deportation process and makes it much more difficult to obtain relief from deportation due to hardship. Even some who satisfy the higher hardship standard to qualify for waiver or "suspension" of deportation may be deported because Congress imposed an annual cap of 4,000 -- a level that almost has been reached already this year.
In addition to increasing the likelihood of deportation for illegal immigrants, the law adds to the list of crimes for which a legal immigrant may be deported. The rules for obtaining asylum also will change. Beginning April 1st, a person will lose his or her right to claim asylum -- regardless of the validity of the claim of fear of persecution -- if the claim is not filed within one year. Due to the rigor of the new standards, some individuals are turning themselves in at INS offices now in hopes of having the pre-April 1st rules applied to them.

Recently, newspaper articles began reporting about some legal immigrants who lead productive, law-abiding lives while quietly raising their families who will face deportation because they engaged in an isolated and relatively minor violation of the law long ago. This is basically correct. There is no sugarcoating the effect of the new law; It will increase and accelerate cases of deportation and it will cause some hardship.

ADMINISTRATION POLICY: It continues to be the Administration's policy to seek to remove from the United States those who should be deported. This Administration removed record numbers of criminal and other deportable aliens last year. At the same time, we recognize that cases of extreme personal hardship do exist and these cases must be treated fairly and equitably under the new law. The Administration is reviewing the implications of the 4,000 annual cap on hardship waivers. The Department of Justice has sought to reassure communities that there will not be enforcement sweeps or mass deportations as a result of changes in the law.

Immigration – deportation

S-12 Suspension of Deportation

New Law

Each request tightening of suspension

1. Changed std
   10 yrs (not 7)
   exceptional + extremely unusual hardship (not just extreme)
   hardship must be to others – lawful permanent/citizen family member
2. Took effect April 1 – proceedings started after that
   Time period (10 yrs) before proceedings begin. "cooling rule"
   not supported 2 charging doc
3. (2) became retroactive – even applying to cases in pipeline
4. Cap – 4,000 per year – effective April 1.
   This yr – going to be big year.
   5 mos into FY-4000 already (3999)
   For this fiscal year – 9,400 projection
   [Overall total is 35,000 would be complying 5 yrs (clearing pre-April 1st caseload) under (7-yr rule)
   After April 1st – clear 10 yrs.

Not clear how cts will rule. ??

all new being held in abeyance

Asked for #s

Leg Efforts

DOS/INS – talking w/ Smith staff / Abraham/ also Watts Kennedy
Cong Hispanic caucus

2 prongs to our discussion
NSTB – put into statute – no of yrs cts to knock out
Offset – in some part of legal Immig.

TT Thinks it's crazy - reopening legal imms -
Also - screening legals to ~~prevent~~ illegals.
None of our allies willing to support effort
(except poss TKennedy)
Candidate for effort? "diversity visas" - by lottery
to "unrepresented" countries - 55,000
(Europe/Asia/Africa)

Abraham - returns to consider efforts.

Administrative Response

Rep - what happens if no leg change
4000 - not just agreeing to adjustments (advocates wanted this)
First come/First serve - lousy.
Cond. grants of suspension - Then monthly or quarterly lotteries.
For this year - basically wind up. Put them into next yr's quota + then have lottery.
Hope - This will bring ability to get things fixed.

Alternative fixes

1. New law would apply only to new immigrants.
2. Special status - ABC /w/ Nicaraguans
judicial Salv/Guat
DDM says: This isn't so special.
Bad to do on basis of nationality?
3. Get rid of NTB rule - existing rule not retroactive -
4. Eliminate the cap.

#3
Initiation_who projects

Tweaking the cap.

5. Eliminating cap for pre-April 1 cases. or other transitional phase > This is only thing DOT feels it can do.

Immigration - deportation

Leanne A. Shimabukuro 05/16/97 04:43:02 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP, Jose Cerda III/OPD/EOP
Subject: suspension of deportation

1. I'm faxing over a draft of the INS/DOJ informal options memo. DOJ is sending over a version with more legislative input later today. I'll fax that as soon as I get it.

2. We should try to meet briefly with Rob Malley on Monday to discuss how we want to revise the options memo. At the meeting, we should decide a timeframe revising the memo and at what point we want to call our first working group meeting. I've already received input from both Rob and Steve about who we should invite.

3. Rob has received a meeting request on the suspension issue by some outside groups and immigration lawyers. He wanted to run it by us to see if we wanted to be in on it or he should hold them off entirely for now. He did tell them that if we met at all, we would just be listening to their concerns, not commenting on the Administration's policy. He would like to hear from us ASAP on whether to hold such a meeting.

4. I have a better understanding of the litigation on suspension that was in the papers the other day. Main issue: how INS is counting immigrants' length of residency in the US to determine whether they are able to meet the 7-year residency threshold for the hardship exception. Let's discuss this at greater length.

5. Have a good weekend!

Immigration — deportations

Clinton's trip leaves promises to keep

But he can't do it without Congress

By Warren P. Strobel
THE WASHINGTON TIMES

A1

BRIDGETOWN, Barbados — President Clinton promised more banana sales for worried Caribbean countries. He promised jittery Central American countries fewer U.S. deportations of immigrants. He promised more trade pacts, more cooperation and more respect.

But Mr. Clinton, who today wraps up a weeklong swing through Latin America and the Caribbean, won't know until he gets back to Washington and deals with Congress whether his policy toward the region is more than just promises.

The president and his delegation, who visited Mexico, Costa Rica and Barbados, were full of soothing words designed to assuage resentments among Washington's southern neighbors that range from anger over unilateral U.S. actions to bruised feelings of neglect.

see **TRIP**, *page A18*

TRIP

From page A1

Here in the Caribbean, for example, its small island economies have been badly hurt by the 1993 North American Free Trade Agreement (NAFTA), which gives Mexican and Canadian products preferred access to the huge U.S. market.

At a meeting with 15 Carribean leaders Saturday, the president announced that he will seek legislation from Congress that will eliminate tariffs on a range of Caribbean products, at a cost of $2.3 billion to the U.S. Treasury.

It was less than the full "NAFTA parity" that his hosts wanted, and Mr. Clinton, challenged by a reporter, acknowledged that he was simply making a promise. "I think that everyone understands, and I made it clear in our meetings, that all I could do was ask the Congress for its support," he said.

One of the Caribbean's chief exports is apparel, and U.S. manufacturers may put up a stiff fight against giving foreign products easier access to American stores.

"It's not going to be a simple issue, but he made a very strong statement that he's going to pursue it," said White House spokesman David Johnson.

On a diplomatic and symbolic level, Mr. Clinton's trip appears to have been a success. Simply by appearing in places where presidents rarely tread, he sent a strong signal of U.S. engagement to regions worried about Washington's attention span.

The Carribean summit was the first in the region ever attended by a U.S. president. His summit Thursday in San Jose, Costa Rica, with the leaders of Central America and the Dominican Republic was the first such meeting since the Johnson administration. No president had stopped in Mexico City, where Mr. Clinton began his trip, since Jimmy Carter.

Local news media have covered the president and first lady Hillary Rodham Clinton like royalty, breathlessly reporting their every word and action. Costa Rican television covered virtually his entire visit live until the moment Air Force One departed San Jose airport and disappeared into the clouds.

Yesterday, Mr. Clinton was nowhere to be seen. The president, who has appeared tired and stiff during much of the trip, spent the day holed up in the 22-acre oceanfront estate of a wealthy British couple, Sir Anthony and Lady Bamford, who offered it to the first couple while they were away.

The president, still nursing a bum knee, did not leave the mansion, called Heron Bay, with its acres of blooming trees, and a pool and stone cabana guarded by statues carved into cherubs.

On Saturday, Jamaican Prime Minister P.J. Patterson, whose views are often at odds with Washington's, seemed grateful for Mr. Clinton's presence at the summit.

"In the closest of families, difficulties are bound to arise," he said, adding that to resolve them "they must have the capacity from time to time to meet within the bosom of the family."

Like the declarations he and his counterparts signed earlier in Mexico City and San Jose, the document Mr. Clinton and the Caribbean leaders agreed to Thursday is mostly a pledge of future intent.

The United States agreed to try to resolve the banana dispute, which involves a successful U.S. appeal to the World Trade Organization against a European Union system of licensing that favors Carribean bananas. Washington doesn't oppose preferential treatment for the Caribbeans, but argued that the EU system amounted to quotas on the United States and Central America.

If that dispute will require future talks with the Europeans, many of Mr. Clinton's promises on immigration — the subject on which regional leaders were the most emotional — will require negotiations with Congress.

In San Jose, Mr. Clinton announced that he will delay implementation of a provision in the new immigration law that could have the effect of forcing nearly 300,000 Central American immigrants from the 1980s back home. That gives him until Oct. 1 to persuade Congress to change the provision.

At one point Saturday, the president argued that he could avoid what leaders here fear most — mass deportations — without lawmakers' assent. "I don't agree we need congressional cooperation there, although I believe it's consistent with what Congress intended when they passed the law," he said.

But Mr. Clinton will need Congress' approval to negotiate new free-trade agreements, as he promised to do in an address in Mexico City. The issue of giving the president "fast-track" negotiating authority already is caught up in jostling among his own party for the Democratic presidential nomination in the year 2000.

With little money and uncertain support at home for grand initiatives, Mr. Clinton this week doled out a series of small policy announcements, just like he did on the campaign trail last year.

For Mexico, it was $6 million to help train a new, and hopefully less corrupt, corps of drug agents. For Central America, it was the establishment of a regional center to professionalize the nations' police forces. For the Caribbean, it was surplus aircraft and Coast Guard cutters to help catch narcotics traffickers.

The Washington Times
MONDAY, MAY 12, 1997

Leanne/EK — Huh? — BR