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NACARA: Minotaur or Midas

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NACARA: Minotaur or Midas?

Patrick E. Caldwell

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I. INTRODUCTION

In late 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act (NACARA). The reaction of immigration practitioners was mixed. On the one hand, the statute provided much needed relief to Nicaraguan and Cuban immigrants. On the other, practitioners felt that the Act’s provisions relating to immigrants from other countries did not go far enough in protecting their interests. While the consequences have yet to be determined with any certainty, NACARA can be expected to change forever the landscape of American immigration law. Its impact on certain Central American immigrants, and the disparate treatment of favored groups, will have unintended consequences for all who seek refuge under our banner of liberty.

Part II provides an introduction to the basic framework of immigration law. It is intended to serve as a backdrop for understanding the mechanics of NACARA and may be skimmed by the practitioner who is already familiar with the terrain. Part III begins the treatment of the NACARA statute itself, handling the broad issues related to the statute. Part IV covers Nicaraguans and Cubans under NACARA (Section 202). Part V covers Guatemalans, Salvadorans, and Eastern Europeans under NACARA (Section 203). Part VI provides a summary of the pre-existing status of the law of extreme hardship. Part VII presents one Immigration Judge’s perspective on the uncertainty in the procedures, rules, and standards.

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II. IMMIGRATION BASICS

A. ARRIVAL

For persons unfamiliar with immigration law, the concept of immigration probably invokes two competing images: one, the hopeful, hardworking laborer in a tweed cap "yearning to breath free,"\(^4\) squinting up at the majesty of the Statue of Liberty; and another, in contrast, destitute families burrowing under the border, seeking to make themselves wards of our wealth. The truth lies somewhere in between. In 1997, 140,000 aliens arrived on our shores under employment based visas.\(^5\) Immediate relatives of citizens and immigrants under the "Family Preference System" accounted for another 235,000 and 226,000, respectively.\(^6\) Additionally, the Immigration and Naturalization Service (INS) estimates that an additional 275,000 arrived undocumented, or "illegally."\(^7\) Total immigration amounts to approximately 900,000 new residents per year.\(^8\) The stories of why these people chose to come to the United States vary as much as their numbers. The wealthiest, least taxed, freest country on the globe should not be surprised to find that so many others wish to partake of her riches.

But one hundred thousand reasons for entry fail to provide much guidance on what to do with all these hopeful citizens. While there are some who claim we should let in everyone without qualification,\(^9\) the reality is that we operate under a restricted-entry system. Not everyone who wishes to become a U.S. citizen may do so. In order to contemplate NA-CARA and its likely effects, it is useful to think about aliens as falling into one of four categories: visa holders, asylum candidates, other applicants, and undocumented entrants.

1. VISAS

Visas are probably familiar to anyone who has traveled abroad. They are the primary method by which a government permits entry into its territory.\(^10\) Visas are usually pre-approved before the alien physically enters the territory of the sovereign, and certain classes (e.g., tourist visas) are often routinely granted.\(^11\) In the United States, there are two distinct


\(^{6}\) See id.


\(^{8}\) See id.

\(^{9}\) See, e.g., The National Immigration Forum, supra note 5 (calling for unrestricted immigration). Of course, the other side of this issue is also well represented. See, e.g., The Federation for American Immigration Reform (visited Mar. 31, 2000) <http://www.fairus.org/html/fair.htm> (calling for a temporary moratorium on immigration).

\(^{10}\) See ROBERT C. DIVINE, IMMIGRATION PRACTICE § 7-2, at 67 (1999).

\(^{11}\) See id. at 67.
classes of visa: immigrant and non-immigrant.12

a. Immigrant Visas

Immigrant visas refer to admittance petitions for persons who intend to remain in the United States permanently.13 These visas are further categorized depending on whether the visa is subject to a numerical quota and whether the immigrant is an immediate relative of a U.S. citizen or qualifies for a preferential status.14 If the visa sought is not subject to a numerical quota, the immigrant must be either an immediate relative of a citizen or qualify as a "special immigrant."15 Special immigrants fall into three broad categories: lawful permanent residents returning from a trip abroad, commuter aliens, and specific enumerated classes.16 Of the three, lawful permanent residents make up the majority of this type of visa.17 Commuter aliens are Mexican or Canadian residents who travel into the United States on a daily basis for employment within our borders.18 The enumerated classes comprise diverse groups that Congress has elected to encourage: ministers of recognized religious denominations, graduates of recognized foreign medical schools (meeting certain qualifying criteria), officers and employees (and their immediate families) of certain international organizations, and other specified persons.19

Visas which are subject to numerical limitations are used primarily for family reunification purposes and meeting narrowly defined U.S. labor needs.20 At present, the total number of these visas has been capped at 270,000,21 divided into preference and non-preference visas. Preference visas are distributed in the following order and subject to percentage limitations: unmarried sons or daughters of citizens; spouses and unmarried sons or daughters of lawful permanent residents; members of certain professions (e.g., doctors, lawyers, etc.); married sons or daughters of citizens; siblings of citizens who have reached the age of twenty-one; and, workers (skilled or otherwise) if such work is in demand in the United States.22 Not more than 20,000 visas may come from any one particular country in any year.23 Non-preference visas are limited to the portion of the statutory cap not used by preferred visa entrants.24 Because of the rising number of preference visa applicants, non-preference visas are very

12. See id. § 6-2, at 59, § 7-2, at 67.
13. See id. §§ 13-1 to 13-2, at 399.
14. See id. at 399, 410, 412.
16. See id. § 1151(b).
18. See id.
20. See WEISSBRODT, supra note 17, at 108.
22. See id. § 1153.
23. See id. § 1152(e).
24. See id. § 1152.
rare; since 1978, they have been considered virtually unavailable.\textsuperscript{25} Unless an entrant can prove otherwise, all persons are presumed to be immigrants, subject to a numerical restriction.\textsuperscript{26}

b. Non-immigrant Visas

Non-immigrant visas are issued to persons not desiring to remain permanently in the United States: diplomatic personnel, temporary visitors, crew members, persons covered by trade treaties, students, temporary workers, international organization representatives, fiancées of citizens, and media representatives.\textsuperscript{27} They are not subject to any quantitative restrictions, and far exceed the number of all other types of visas.\textsuperscript{28} In general, non-immigrant visas are issued to certain classes of persons who will be residing in the United States for a limited period of time, usually for work or study.\textsuperscript{29} The formalities can be complicated, particularly in the case of student visas, largely because each class of visa is tailored to the needs of the alien.

Ordinarily, true non-immigrants have little intention of remaining in the United States permanently.\textsuperscript{30} However, non-immigrant visa holders can adjust their status to immigrant or lawful permanent resident.\textsuperscript{31} Both immigrant and non-immigrant visas combined account for the vast majority of aliens entering into the United States each year.\textsuperscript{32}

2. Asylum and Refuge

Apart from an entry to the United States by visa, hopeful immigrants have two principal backdoor methods of acquiring citizenship in the United States: asylum or refuge and equitable petitions. As only specified groups qualify for a preference visa,\textsuperscript{33} and the wait for a general, non-preference visa can last for years, most potential citizens must look to other methods. For persons under persecution from their home government, the threat of imminent bodily harm will rule out a patient wait through the lengthy visa process. Aliens here illegally, even if already partially assimilated, are barred from visa application altogether and thus must seek an alternate route to citizenship as well.\textsuperscript{34} There are certain provisions which might qualify a prospective immigrant for either a visa

\textsuperscript{25} See \textit{Weissbrodt}, \textit{supra} note 17, at 108. In fact, the 1990 Act completely eliminated this type of visa. See INA § 203.
\textsuperscript{26} See 8 U.S.C. § 1153(d) (1999).
\textsuperscript{27} See \textit{id.} § 1101.
\textsuperscript{28} See \textit{Weissbrodt}, \textit{supra} note 17, at 128.
\textsuperscript{29} See \textit{id.}
\textsuperscript{30} See \textit{generally id.} at 129-49.
\textsuperscript{31} See 8 U.S.C. § 1255 (1999). Aliens may also switch between types of non-immigrant visas (i.e., student visa to fiancée or temporary worker visa). See \textit{id.}
\textsuperscript{32} See \textit{Weissbrodt}, \textit{supra} note 17, at 128.
\textsuperscript{33} For example, diplomatic personnel, visitors, students, and the media all qualify for some type of special visa. See \textit{generally} 8 U.S.C. § 1101(a) (1999). These visas, however, do not grant automatic citizenship. Thus, the question of legal entry and citizenship are related, but different, issues.
\textsuperscript{34} See INA § 212(a)(6)(A).
or citizenship under an expedited review. But if the alien does not qualify for the visa, expedited review will only accelerate the denial of their application. Accordingly, aliens in unusual circumstances not covered by the routine visas may try for either asylum or other procedures.

Asylum is sought by aliens who are fleeing a nation where their life has become unbearable, but is granted only under certain narrowly defined conditions. An alien must meet one of five statutory categories before an asylum petition will be granted. That is, a potential asylee must demonstrate a well-founded fear of persecution on the basis of their race, religion, nationality, membership in a particular social group, or political opinion.

Refuge is also sought by aliens fleeing their native land; for our purposes, it is similar to asylum. The main conceptual difference is the physical location from which the alien seeks the protection of the United States. Asylees are generally already within the U.S. or at our border or port of entry, while refugees are generally still in their home country or otherwise outside the U.S.

3. Equitable Petitions and Private Legislation

Another alternate route to citizenship is the equitable petition. This term covers various types of relief, usually granted at the discretion of the Attorney General and ordinarily at the point in time where an illegal alien faces an order of deportation. Asylum and equitable petitions are not mutually exclusive. An alien may seek both at the same time. For example, if a refugee from a nation entangled in civil war were to illegally enter the United States and be detained by the Border Patrol, he might apply for both asylum and a suspension of deportation.

Congress can also pass bills specifically exempting an alien, by name, from the general immigration laws. Bills of this nature are termed, "private legislation" as they refer to a private party as opposed to the public at large. There were ten private bills offered in the 105th congressional session, nine of which touched upon immigration concerns. All nine immigration bills passed, but under extreme factual circumstances illustrative of the extraordinary nature of this type of immigration relief.

35. See, e.g., id. § 217 (governing the Visa Waiver Pilot Program).
36. See INA § 208. See generally Divine, supra note 10, § 16-3, at 575.
37. See INA, supra note 15 § 101(a)(42) (defining "refugee" as applied to the asylum provisions).
39. See Divine, supra note 10, at 571, 575.
40. See Divine, supra note 10, § 16-4, at 588.
41. See INA §§ 241(b)(3), 243(h).
42. See generally Weissbrodt, supra note 17, at 88.
43. See id.
45. See id.
4. Illegal Entry

The specter of the illegal alien has haunted our immigration law since the very first immigration legislation in 1864.46 Immigration and Naturalization Service (INS) regulations mandate that all persons seeking entry into the United States, except citizens, make themselves available for "inspection."47 Any person who evades inspection, or falsely claims to be a citizen, has "entered without inspection" (EWI), and is present in the United States illegally.48 Furthermore, an alien who has overstayed his visa is also present illegally.49 By recent estimates, undocumented, or illegal, aliens number somewhere in the millions.50

B. CONTINUED PRESENCE

1. Citizenship

For persons born within the territorial borders of the United States, citizenship comes "naturally." Those who were not fortunate enough to be born in the U.S. must follow one of two basic paths to citizenship: naturalization or diplomatic accession. Naturalization is a general term for a quasi-legislative act whereby persons not born in the United States accede to the status of "citizen."51 Naturalization has the effect of making an alien a citizen, a status which may not ordinarily be altered once conferred, except under very narrow circumstances.52 Grounds for denaturalization include refusal to testify before Congress as to the citizen's subversive activities, membership in certain proscribed subversive organizations, and illegal procurement of naturalization.53

Diplomatic accession refers to a complicated set of rules regarding when the child of an alien present in the U.S. under certain visa classifications may obtain citizenship.54 Essentially, certain diplomats are not considered subject to U.S. jurisdiction and, accordingly, their children born in the U.S. are not automatically granted citizenship.55 Instead, these children are granted lawful permanent residence at birth, and may thereby accede to citizenship, albeit under a different set of rules than for ordinary lawful permanent residents.56

47. INA §§ 221(f), 240(b); 8 C.F.R. 235.1(d) (2000).
48. See INA §§ 241(a)(1), 275.
49. Id. § 221(g).
50. See WEISSBRODT, supra note 17, at 22.
51. See id. at 296.
52. See id. at 335.
53. See id.
54. See DIVINE, supra note 10, § 17-5(n)(3), at 818.
55. See id.
56. See id.
2. **Lawful Permanent Residence (LPR)**

One step short of citizenship is the status of “lawful permanent residence” (LPR). LPR status confers the right of the alien to live and work in the U.S. indefinitely.\(^{57}\) If an alien maintains his LPR status for a statutorily mandated time period, he may then proceed to naturalization. Although LPR status does not completely immunize an alien from subsequent deportation, it does eliminate any requirement that he maintain a visa status, or otherwise report to the immigration authorities on a continuing basis. Maintaining LPR status includes, among other things, requirements that the alien pay U.S. taxes and keep a home in the U.S.

3. **Temporary Protected Status (TPS)**

Aliens present in the U.S. who have not been able to procure entry visas, or have overstayed their visas, are subject to deportation.\(^{58}\) When an alien has been apprehended and handed an Order to Show Cause (why he should not be deported), he may file for Temporary Protected Status (TPS) and thereby stay the proceedings against him.\(^{59}\) The general TPS statute authorizes the Attorney General to issue a grant of TPS, provided he makes certain factual determinations.\(^{60}\) TPS status is designed as a temporary safe haven for refugees of particularly turbulent nations.\(^{61}\) Accordingly, the factual determinations center around unrest and strife in the nation from which the alien flees.\(^{62}\) The three disjunctive findings are any one of either: current armed conflict (e.g., civil war); environmental disaster which substantially, but temporarily, lowers living conditions (e.g., Hurricane Mitch); or, other “extraordinary,” and also temporary, conditions that prevent the safe return of the alien to his native land.\(^{63}\) TPS grants are limited, however, to a term of six to eighteen months, but may be extended.\(^{64}\)

The benefits of the general TPS statute are as generous as they are ephemeral. An alien under TPS cannot be deported, may travel abroad (an unusual grant, requiring express permission), may work, and may even adjust his status (in accordance with the usual procedure) while enjoying his stay in the United States.\(^{65}\) But these benefits are not handed out lightly. Certain subclasses of immigrants may find themselves disqualified for various reasons, the most straightforward of which is the conviction of a felony or of two (or more) misdemeanors.\(^{66}\) Additionally, an alien may find his status terminated if he leaves the country without

\(^{57}\) See id. at 60.
\(^{58}\) See infra Part II.E for more information on grounds for deportation.
\(^{60}\) See id.
\(^{61}\) See Divine, supra note 10, § 16-7, at 602.
\(^{62}\) See id. at 602.
\(^{63}\) 8 U.S.C. § 1254a(b)(1)(A)-(C) (1999); see Kurzban, supra note 46, at 164.
\(^{64}\) See 8 U.S.C. § 1254a(b)(1)(A)-(C); see Kurzban, supra note 46, at 164.
\(^{66}\) See Kurzban, supra note 46, at 236.
permission, fails to register every twelve months, or the Attorney General finds that the particular reasons for granting TPS no longer apply.\textsuperscript{67} Some otherwise disqualifying factors may be waived.\textsuperscript{68} Other disqualifiers, such as the national security and drug inadmissibility grounds, may not be waived by INS, and will always subject the alien to deportation.\textsuperscript{69}

The TPS statute is relatively new to immigration law.\textsuperscript{70} The 1990 Immigration and Naturalization Act created TPS as a replacement for the prior, piecemeal approach to allowing otherwise deportable aliens a brief stay in the United States.\textsuperscript{71} It is intended to be a temporary remedy whereby the alien is authorized to delay return to his home country, not as an alternate route to citizenship.\textsuperscript{72} Accordingly, there are nuances of TPS law peculiar to this intent.

Under the general TPS statute, the Attorney General may run numerous programs at any one time, depending on the findings of fact applicable to any particular nation.\textsuperscript{73} Occasionally, the Attorney General may authorize special programs, under his statutory TPS authority, in an attempt to organize and streamline a large group of immigrants arriving on our shores as a result of a recent crisis abroad.\textsuperscript{74} These programs establish a time window during which the alien must file his petition for TPS, usually 180 days in length.\textsuperscript{75} There is a such a program for Salvadorans with some provision for Guatemalans.\textsuperscript{76} Some of the other active special programs include citizens of Liberia, Somalia, and Sierra Leone.\textsuperscript{77}

By way of example, the Salvadoran TPS program protects Salvadoran nationals, whether here legally or otherwise, commencing for an initial period of eighteen months, beginning January 1, 1991.\textsuperscript{78} This special program was initiated in conjunction with the American Baptist Churches (ABC) settlement, discussed \textit{infra}, Part V.B.2. The usual ineligibility on the basis of felony or misdemeanor convictions applied, and the alien must have been continuously present in the U.S. since September 19, 1990.\textsuperscript{79} These aliens were permitted to work while in the United States, but only in six month, renewable increments.\textsuperscript{80} But the registrant for the special TPS program also found himself with an Order to Show Cause and an appointment with the Immigration Court for a deportation hear-

\textsuperscript{67} See \textit{id.} at 237. \\
\textsuperscript{68} See \textit{Divine, supra} note 10, at 605. \\
\textsuperscript{69} See \textit{id.} \\
\textsuperscript{70} See generally \textit{Divine, supra} note 10, at 602. \\
\textsuperscript{71} See generally \textit{id.} \\
\textsuperscript{72} See \textit{id.} at 603. \\
\textsuperscript{73} See \textit{generally Divine, supra} note 10, at 602. \\
\textsuperscript{74} See \textit{generally id.} \\
\textsuperscript{75} See \textit{generally Divine, supra} note 10, at 603. \\
\textsuperscript{76} See \textit{generally id.} \\
\textsuperscript{77} See \textit{INA} \$ 244A. \\
\textsuperscript{78} See \textit{id.} \\
\textsuperscript{79} See \textit{Divine, supra} note 10, at 603. \\
\textsuperscript{80} See \textit{generally Divine, supra} note 10, at 602. \\
\textsuperscript{76} See \textit{57 Fed. Reg.} 28700-01 (1992); \textit{Kurzban, supra} note 46, at 168. \\
\textsuperscript{77} See \textit{Divine, supra} note 10, at 603-05; \textit{Kurzban, supra} note 46, at 244-45. \\
\textsuperscript{78} See \textit{Kurzban, supra} note 46, at 243-44. \\
\textsuperscript{79} See \textit{8 C.F.R.} \$ 244.2, 244.3 (2000). \\
\textsuperscript{80} See \textit{id.} \$ 244.12 (based on the initial TPS designation period).
ing; emphasizing the “temporary” in Temporary Protected Status.81

C. DEPENDANTS OF ALIENS

The status of the alien’s children may be the central consideration as to whether the alien elects to remain in the United States and pursue citizenship. For immigrants with young children, their sons and daughters will usually be able to apply for whatever benefit their parents are seeking, often on the same form. These derivative beneficiaries82 are not required to file a separate application, but instead obtain relief on the basis of the primary applicant’s claim.83 Where certain types of relief require elaborate showings of work ability or fear of prosecution, for example, only the principal applicant need prove his case.84 This distinction is particularly important in asylum cases, where young children can rarely satisfy the statutory requirements.85 Were the dependents forced to demonstrate their own colorable claim, their petitions would be likely to fail, leaving the parents forced to choose between their children and their freedom.

D. DOUBLE JEOPARDY

One of the more confusing aspects of immigration law is the dual-agency nature of the primary administrative bodies. An alien may find himself in either Immigration and Naturalization Service (INS) office proceedings or before an Administrative Law Judge (ALJ) in Immigration Court. An alien may, for example, file a “defensive” asylum application with the INS while he is in deportation proceedings before an Immigration Judge.86 Depending on the route chosen by the alien to pursue citizenship, one of the two bodies will be responsible for handling his case.87 As certain INS proceedings may result in removal (i.e., deportation) hearings, an alien may begin his case in an INS office, only to find himself later before a judge. Furthermore, the jurisdictional boundaries define which body may hear which type of action.88 As the procedural aspects of each case may be determinative (e.g., filing deadlines, route of appeal), it is important to understand which body has jurisdiction over an alien’s case at any particular point in time. The jurisdictional rules may also result in the alien’s case being shuffled back and forth between the INS and an ALJ several times before final resolution of his citizenship

81. *Id.* § 244.18(b).
82. The term “derivative beneficiaries” refers to persons whose request for relief is ancillary to another’s request. Usually, this refers to the spouse and unmarried, minor children of the applicant.
83. *See, e.g.*, INA §§ 101(a)(15)(K), 203(d), 207(c), 208(c).
84. *See id.* § 207(c).
85. *See id.* § 207(c)(2). For example, a young child may not have been subjected to the same treatment that caused his parents to flee prosecution, and thus may not be able to establish his own grounds for asylum.
86. *See generally* INA § 208; 8 C.F.R. § 208.2(b).
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status. Sorting out the various jurisdictional rules also requires an understanding of the structure and function of both bodies.

The Attorney General has been entrusted with the administration of the Immigration and Naturalization Act\textsuperscript{89} for all powers not expressly delegated to another agency.\textsuperscript{90} The Immigration and Naturalization Service (INS) is a component of the Department of Justice, and has been delegated most of the Attorney General's authority to administer and enforce the INA.\textsuperscript{91} More specifically, the INS conducts border inspections and exclusion proceedings of entering aliens, processes visa petitions, adjudicates citizenship and adjustment of status requests, and manages deportation proceedings.\textsuperscript{92}

Causes which may be heard at INS include: adjustment of status, immigrant visa requests, visa extensions, affirmative and defensive asylum petitions, cancellation of removal petitions, and applications for various other benefits under the immigration laws.\textsuperscript{93} Direct jurisdiction in initial proceedings lies whenever the alien initiates contact with the INS for various requests (e.g., visa or affirmative asylum applications), or when the INS elects to process aliens under administrative procedures such as rescission of adjustment of status.\textsuperscript{94} Indirect jurisdiction may be had when an alien's case is transferred from an immigration court for administrative action.\textsuperscript{95}

Some of the Attorney General's powers under the INA are also delegated to the Executive Office of Immigration Review (EOIR).\textsuperscript{96} The EOIR consists primarily of the Board of Immigration Appeals (BIA) and the Immigration Courts, staffed by Immigration Judges (IJ). Appeals from IJ decisions are taken to the BIA, with ultimate judicial review in the federal courts. IJs may hear cases involving: exclusion and deportation, defensive asylum applications, and proceedings to rescind adjustment of status.\textsuperscript{97} The immigration courts acquire direct jurisdiction in initial proceedings in all exclusion cases and in cases where an alien is apprehended and prosecuted for deportation and is not already in a proceeding before the INS.\textsuperscript{98} Indirect jurisdiction may be had when an alien's case is transferred or appealed from the INS.\textsuperscript{99}

E. Deportation

For some aliens, particularly those who have entered illegally or wrongfully overstayed a visa, interaction with the U.S. immigration laws is

\textsuperscript{89.} See INA § 201(a).
\textsuperscript{90.} See id. § 103(a).
\textsuperscript{91.} See id. § 103.
\textsuperscript{92.} See 8 C.F.R. §§ 2.1, 100.2 (2000).
\textsuperscript{93.} See generally Divine, supra note 10, at 20.
\textsuperscript{94.} See id.
\textsuperscript{95.} See id.
\textsuperscript{96.} See INA § 101(b)(4).
\textsuperscript{97.} See generally Divine, supra note 10, at 30.
\textsuperscript{98.} See id.
\textsuperscript{99.} See id.
somewhat non-consensual. An undocumented alien is unlikely to report his unauthorized presence to the U.S. authorities and will spend his time in the U.S. under the shadow of pending removal. Despite the media representations of INS raids on known havens for undocumented aliens, there are many different ways INS can gain control of, and subsequently remove, an undocumented alien.

As is consistent with the provisions of the INA, responsibility for enforcing our immigration laws begins at the border. The procedures and constitutional protections afforded an undocumented alien vary greatly with his status at the time of detection. Generally, an alien apprehended at the border, before successfully “entering” the U.S. is subject to “exclusion” proceedings. “Entering” the U.S. carries the implication of getting past the border inspection. An alien detained at the border, at an airport for example, has not “entered” the U.S. and, accordingly, is treated differently from one who has established a physical presence beyond the INS buffer zones. An alien apprehended within the territory of the U.S., arriving either by entering without inspection (EWI) or overstaying a visa, is subject to “deportation” proceedings.

For aliens in proceedings after April 1, 1997, however, the above definitions no longer apply. Under the new rules, all aliens, whether successfully admitted or not, are subject to “removal.” Generally, removal proceedings are more streamlined and harder to avoid for the alien than the previous procedures. Removal proceedings maintain the prior distinction between aliens who have been successfully admitted and those who have not, although how those aliens are treated has changed. Also, it is important to note that these are considered civil, not criminal proceedings. Furthermore, as noted above, all of these proceedings take place in an administrative agency (either the INS or the EOIR) under the guidance of the executive branch.

Because there are still many aliens who were already in proceedings before the effective date of the new rules, it is useful to understand the differing treatment among aliens under the prior exclusion and deportation procedures. The main difference between exclusion and deportation, aside from the rights accorded the alien, lies in the subtleties between the grounds for exclusion and those applicable in deportation. The grounds for exclusion include: communicable disease of public health significance; certain physical or mental disorders; drug abusers or

100. See generally 8 C.F.R. § 235 (2000).
101. See Kurzban, supra note 46, at 140.
102. See INA § 240(a).
103. Id. § 240(a)(3). See Divine, supra note 10, at 329.
104. See Divine, supra note 10, at 296.
105. See id. at 296.
106. The specific differences between the two processes under NACARA will be discussed in greater detail in Part V, infra.
107. See generally INA § 212(a)(1); Kurzban, supra note 46, at 29.
108. See INA § 212(a)(1)(A)(i).
addicts; 110 persons likely to become a public charge; 111 certain labor-
ers; 112 commission of crimes of moral turpitude; 113 commission of drug-
related crimes; 114 prostitution or solicitation; 115 other moral grounds; 116
or, violation of INS laws. 117

The grounds for deportation include: 118 excludable at time of entry; 119
entry without inspection or otherwise in the U.S. in violation of law; 120
failure to maintain nonimmigrant status; 121 termination of conditional
permanent residence; 122 participation in illegal immigration activities; 123
commission of marriage fraud; 124 various security grounds; 125 failure to
register or filing of false documents; 126 and, criminal grounds similar to
those listed in connection with exclusion, committed after entry. 127

As can be readily determined, deportation includes all of the grounds
for exclusion, adding significant failures to conform to U.S. laws and a
handful of other grounds, only applicable to aliens who are already pre-
sent. Finally, certain classes of aliens are excludable under expedited de-
portation processes, e.g., stowaways, suspected terrorists, and aliens
making misrepresentations to the INS. 128

With the foregoing as background, we may now turn to the Nicaraguan
Adjustment and Central American Relief Act of 1997 (NACARA).

III. NACARA IN GENERAL

A. Application

Before addressing the function NACARA serves, it is useful to con-
sider the context in which the statute operates. NACARA applies to
aliens who are outside the visa or asylum processes of immigration. 129 As
to Nicaraguans and Cubans, it provides an overriding route to acquiring
citizenship, regardless of any prior applications or attempts. 130 For
Salvadorans, Guatemalans, and certain Eastern Europeans, NACARA

110. See id. § 212(a)(1)(A)(iii).
111. See id. § 212(a)(4).
112. See id. § 212(a)(5)(A).
114. See id. § 212(a)(2)(A)(i)(II).
115. See id. § 212(a)(2)(D)(I)-(ii).
116. See id. § 212(a)(9)(A).
117. See id. § 212(a)(6)(A).
118. See generally INA § 241(a); KURZBAN, supra note 46, at 81.
119. See INA § 241(a)(1)(A).
120. See id. § 241(a)(1)(B).
121. See id. § 241(a)(1)(C).
122. See id. § 241(a)(1)(D).
123. See id. § 241(a)(1)(E).
124. See id. § 241(a)(1)(G).
125. See INA § 241(a)(4)(A).
126. See id. § 241(a)(3).
127. Id. § 241(a)(2)(A)(i).
128. See DIVINE, supra note 10, at 296.
(1997).
130. See id. § 202(a)(2).
allows only for suspension of deportation or cancellation of removal.\textsuperscript{131} For one group, this statute addresses their citizenship directly; for the other it merely halts deportation proceedings against them. Thus, depending on the current status and nationality of the alien, NACARA will have very different procedural and substantive consequences.

\section*{B. Legislative Issues}

Familiarity with the context in which the NACARA statute arose is also useful in deciphering its operation. The Immigration Act of 1996\textsuperscript{132} changed the rules for avoiding involuntary deportation of aliens. Prior to the Act, an alien could make one final attempt to remain in the United States by filing for "suspension of deportation."\textsuperscript{133} The 1996 Act changed the suspension proceedings to "cancellation of removal," and raised the bar for obtaining relief.\textsuperscript{134} One significant effect of the new procedure was to end the accrual of time after receipt of an order of deportation.\textsuperscript{135} This had the effect of keeping many aliens, particularly Central Americans, from building up enough time in the United States to qualify for many types of relief.\textsuperscript{136} In particular, continuous time accrual was critical in establishing defenses to acts rendering the alien ineligible for admission. For example, "good moral character" requires a certain length of time to pass after the commission of a crime. Ending the accrual effectively eliminated the ability of many aliens to show that they had not committed certain acts for the requisite number of years.\textsuperscript{137}

Because of the adverse consequences of the new statute, political blocks sympathetic to the plight of these aliens petitioned their congressmen to provide damage control.\textsuperscript{138} Large groups of aliens in districts vulnerable to challenge were able to convince their incumbent congressmen to pass statutes favorable to their needs.\textsuperscript{139} In one of the final acts before adjournment, Congress passed NACARA, thus providing a favorable piece of successful legislation on which the Representatives and Senators could campaign during the 1998 elections.

Aside from the obvious political aspects of the statute's passage, NACARA also addresses serious questions left unresolved or even caused by the 1996 Act. The changes in the law pursuant to the 1996 Act had created a large pool of aliens whose cases would suddenly need attention.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{131} See id § 203(b).
\item \textsuperscript{133} See INA § 240(a)(3).
\item \textsuperscript{134} See id. § 240(a)(2).
\item \textsuperscript{135} See \textit{Divine}, supra note 10, at 330.
\item \textsuperscript{136} See id.
\item \textsuperscript{137} See id.
\item \textsuperscript{138} See CLIN Materials, supra note 2, at 1, 107.
\item \textsuperscript{139} Interestingly, Haitians were not included in NACARA. Instead, they received their own statute, the Haitian Adjustment Act of 1997.
\item \textsuperscript{140} See CLIN Materials, supra note 2, at 1.
\end{itemize}
Whereas an alien under the old statue might wait several years under the protection of a TPS grant, the 1996 Act ended the protective period and required the INS or Department of Justice to reconsider thousands of dormant cases. The subsequent backlog in the immigration courts and at the INS alone would have warranted congressional consideration, independent of the needs and concerns of the aliens.

Additionally, the 1996 Act did not provide answers as to the status of the aliens left unprotected. It might be expected that the Immigration Judges would adjudicate each case under the old standards, except for the fact that the 1996 Act explicitly amended those standards without providing much guidance on the consequences of the amendments. Primarily, the statute did not provide guidance as to how the new “exceptional and extremely unusual hardship” standard differs from the old “extreme hardship” standard. At least as to the particular groups of aliens under its aegis, NACARA attempts to resolve some of those status questions.

NACARA addresses two distinct groups of aliens in two separate provisions. We begin, as the statute does, with Cubans and Nicaraguans.

IV. THE MIDAS TOUCH: NACARA FOR CUBANS AND NICARAGUANS (SEC. 202)

Section 202 of NACARA provides for adjustment of status for Cubans and Nicaraguans. It is relatively simple in its approach, but serves also to provide a framework by which to compare the treatment of the other classes of aliens covered by the remainder of the statute. As a preliminary matter, it is important to keep in mind that the procedures and rules of section 202 apply only to Nicaraguans and Cubans, not to the other classified aliens. This distinction is easy to forget, as some of the rules are very similar.

A. BASICS: WHO QUALIFIES AND WHAT DO THEY RECEIVE?

NACARA begins with an address to Cubans and Nicaraguans, which are treated far differently from other Central Americans. Cubans and Nicaraguans can apply for adjustment of status (to lawful permanent resident (LPR)) regardless of whether they had overstayed a voluntary departure, were ordered deported, or were still in processing. This is as close to a free pass as the INS ever gets. Absent an aggravated felony or other disqualifying action on the part of the applicant, this group of
immigrants is being encouraged to remain in the United States.150

As compared to the provisions applicable to Guatemalans and Salvadorans, the first part of NACARA is quite brief.151 Certain Nicaraguans and Cubans “shall” be adjusted to LPR status provided the alien makes the required showings; the Attorney General is allowed only limited discretion as to these aliens.152 The showings themselves are very simple: the alien must apply before April 1, 2000, must be otherwise eligible to receive an immigrant visa, and must be otherwise admissible for permanent residence.153 By the terms of the statute, the mandatory adjustment to LPR status applies regardless of the alien’s present status.154 Thus, a Cuban facing an order of deportation who files for adjustment will be granted LPR status as if he had never been ordered to leave the United States.155 Furthermore, he need not file any other documentation or petition except the application for adjustment of status.156

There is some limited discrimination among the potential beneficiaries.157 Section 202(a) applies only to Cubans and Nicaraguans who have been continuously present in the United States, not for the usual seven years, but only since December 1, 1995.158 This ordinarily strict standard has also been relaxed in that the alien may have broken the continuous presence, as long as the aggregate time abroad does not exceed 180 days, with or without INS permission.159 A Guatemalan who had absented himself for that long, even over brief, sporadic trips, would find himself ineligible for the benefits of NACARA.160 The relaxation of the usual standard is somewhat diminished in that the INS has stated that the 180 day limit will be strictly enforced.161

Section 202(a) also allows derivative claims by eligible spouses and children.162 The significance of the derivative claim is that it allows the dependents to “piggy-back” onto the application of the principal. The derivative claim allowed for children, however, does not extend to adult sons and daughters.163 Unmarried sons and daughters must pursue their own petitions unless they arrived in the United States before December

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150. See CLIN Materials, supra note 2, at 2.
152. See id. § 202(a)(1).
153. See id. § 202(a)(1)(A), (B).
154. See id.
155. See id. § 202(a)(2).
156. See id.
157. See id.
159. See id.
160. See id. § 203(a)(5)(C)(I).
161. See generally INS interim rule 1983-97, 63 Fed. Reg. 27823 (May 21, 1998). The INS did not have much discretion in this declaration; the statute explicitly excludes Nicaraguans and Cubans whose aggregate absence exceeds 180 days.
162. See NACARA § 202(d)(1). “Child” is defined as “under twenty-one years of age and unmarried.” INA § 101(a)(15)(K).
163. See NACARA, supra note 1, § 202(d)(1)(B).
In every case, applicants under section 202 must file their petitions before April 1, 2000. These derivative claims are different from the usual family-based adjustment claims, largely in that the usual grounds of inadmissibility are waived. Interestingly, for a spouse or dependent child to qualify under section 202, he or she must also be of Nicaraguan or Cuban nationality. Derivative claimants are exempted from the continuous presence requirement, but must meet the commencement requirement.

An additional benefit available to Cubans and Nicaraguans exclusively is the ability to secure a work authorization. This seemingly minor detail can have a critical impact on whether the alien may be financially able to wait within our border while his application is pending. The Attorney General is authorized, but not required, to issue a work permit to this class of aliens while their application is pending. However, should the adjustment process take longer than 180 days, the work permit must be approved and issued. No such relief is granted to the other classes of aliens under NACARA. In fact, the clock is stopped as to these aliens; they may not even accrue the usual 150 post-filing days ordinarily available to applicants.

A final significant aspect of section 202 is that it does not require favorable discretion on the part of the reviewing officer. One component of all other suspension of deportation, cancellation of removal, or adjustment of status proceedings is the judge’s discretion. An alien who is prima facie eligible for suspension of deportation must still convince the immigration judge that he should be allowed to remain in the United States. Section 202 removes this discretion, mandating that all eligible applicants be adjusted to lawful permanent resident.

B. PROCEDURES AND PROBLEMS

1. Demonstrating Qualifications: Commencement and Continuity of Presence

As a threshold matter, aliens seeking relief under section 202 must...
have been physically present for the statutory period. However, demonstrating the commencement and continuity of their presence is often problematic, requiring documentation that an unwary alien might not have maintained. Furthermore, the standard of proof for commencement is different than that for proving continuity. The INS has issued preliminary regulations on what they will require, but these standards are subject to change, based on the experience INS gains in administering the statute’s new requirements.

To prove commencement of the alien’s period of physical presence, he must provide hard evidence from a governmental authority that he was present in the United States before December 1, 1995. According to INS interim rules, commencement proof requires one of the following documents:

1. An asylum application;
2. An Order to Show Cause (or evidence of exclusion proceedings);
3. An application for adjustment of status;
4. An application for employment authorization;
5. Social Security Administration employment documents;
6. Any INS application which demonstrates presence; or,
7. Any document which contains proof of issuance by a federal, state, or local government.

Each of the above documents must have been issued from the appropriate government agency. In the case of an asylum application, for example, the alien’s copy of his application will not suffice; the copy must have been issued by the Department of Justice from its own files. The documents must have been dated at the time of creation and documents from state or local governments must bear the seal of the issuing authority. For aliens unable to produce any of the first six listed documents, finding an appropriate commencement document may be difficult. Many local governments do not even have an official seal, and many standard state documents are never sealed. Finding a valid commencement document might be the toughest step for applicants under section 202.

The standard of proof for continuity of presence is significantly lower. Here, documents are allowed from any source, governmental or non-governmental, provided the documents refer to the alien by name.

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178. Specifically, they must have been physically present in the United States since Dec. 1, 1995, and continuously present since that date. See NACARA § 202(b)(2).
179. See id. § 202(b)(1). Cf. id. § 202(b)(2).
181. See NACARA § 202(b)(2)(A).
182. See id.
183. See id.
184. See id.
185. See id.
186. See CLIN Materials, supra note 2, at 3, 32.
187. See id. at 4.
188. See id. at 33.
and are dated and signed by the issuing authority. Furthermore, the alien may refer to documents known to be in INS files, without having to produce a copy of the document itself. Appropriate documents might include: rent receipts, employment pay stubs, scholastic records, religious (e.g., baptismal) records, medical records, bank slips, or even traffic tickets, as long as they meet the regulatory criteria.

In the final rule, the INS modified the above requirements, keeping the distinction between commencement and continuity documents. Commencement may now also be proved by a transcript from a recognized private or religious school that the alien attended as a child. Acceptable continuity documents have been expanded to include certified copies of records made by certain government-chartered entities (e.g., electric and water companies), banks, and accredited private and religious schools. And, if an alien demonstrates that his "family unit" was present and cohabitating in the U.S., documents establishing continuity of one family member may be used by all.

As a practical matter, continuity of presence only requires that the alien not have left the United States for more than 90 days at a time, or 180 days in the aggregate. Brief absences of less than 90 days are not considered significant, and therefore, the INS only requires a document demonstrating presence every 90 days. Additionally, time spent abroad by aliens who departed the United States with an approved advanced parole is not counted towards the 180-day aggregate.

Advanced parole is the method by which an alien asks permission of the INS to depart the United States and retain the ability to re-enter. Generally, parole temporarily allows aliens to enter the territory (not an admission, only a limited-time physical presence) and is granted on a case-by-case basis for urgent humanitarian reasons or a significant public benefit. Ordinarily, departure is grounds for inadmissibility, disrupts the continuity requirements, or renders aliens ineligible for certain relief (e.g., asylum). As a result of ambiguity in the law in 1997, the INS is also tolling time abroad for aliens who departed without advanced parole before December 31, 1997 and were outside the U.S. from November 19, 1997 to July 20, 1998. An application for advance parole also tolls the 180-day counter while the application is pending. This is risky, however, as the days abroad are counted if the parole application is subse-

190. See id.
193. See id.
194. See id.
197. See INA § 2122(d)(5)(A).
198. See 8 C.F.R. § 245a.1(c), 245a.3(b)(2).
quenty denied.\textsuperscript{199}

The INS has built in some preferences for certain types of documents under either required showing.\textsuperscript{200} The delay in receipt of a work authorization varies greatly depending on which documents the applicant chooses to file with his petition.\textsuperscript{201} If the alien files his NACARA application using INS generated documents to demonstrate commencement and continuous presence and files his work authorization at the same time, the work authorization will be issued with the adjustment of status adjudication, assuming the application is approved. If he files the work authorization request with his NACARA application, but uses Social Security Administration documents, the alien must wait 180 days after approval to receive his work permit.\textsuperscript{202} Similarly, if the alien fails to request work authorization, he must wait 90 days after filing his NACARA claim to even ask for a work permit, and must then wait an additional 180 days for the work authorization.\textsuperscript{203} However, if the NACARA application is pending for more than 180 days, by statute the alien will be issued a temporary employment permit.\textsuperscript{204}

Having met the calendar requirements, the alien must also meet the other requirements: eligibility for an immigrant visa and eligibility for permanent residence.\textsuperscript{205}

2. **Demonstrating Qualifications: Visa and Residence Eligibility**

The term "otherwise admissible" under section 202 refers to the broad grounds for exclusion and deportation common to all immigration actions.\textsuperscript{206} Eligibility for an immigrant visa clears the alien of the exclusionary grounds while eligibility for permanent residence clears the alien of the deportation grounds.\textsuperscript{207}

One set of procedural hurdles removed for Nicaraguans and Cubans is a group of the standard grounds of inadmissibility.\textsuperscript{208} Ordinarily, an alien is statutorily barred from admission if he is likely to become a public charge, has entered unlawfully, has remained unlawfully (i.e., overstayed his visa), has arrived in the United States for employment without a labor certification, or has re-entered the country without proper documentation.\textsuperscript{209} Under section 202, all of these grounds of inadmissibility are

\begin{itemize}
  \item \textsuperscript{199} See id.
  \item \textsuperscript{200} See U.S. Dept. Of Justice, INS Fact Sheet, May 20, 1998, at 3 [hereinafter INS Fact Sheet].
  \item \textsuperscript{201} See id. at 4.
  \item \textsuperscript{202} See id.
  \item \textsuperscript{203} See CLIN Materials, supra note 2, at 58. See generally INS interim rule 1983-97, 63 Fed. Reg. 27823 (May 21, 1998).
  \item \textsuperscript{204} See NACARA, Pub. L. No. 105-100, tit. II, § 202(c)(3), 111 Stat. 2160 (1997).
  \item \textsuperscript{205} See id. § 202(a)(1)(B).
  \item \textsuperscript{206} See id. § 202(a); see also supra Part II.
  \item \textsuperscript{207} See supra Part II.
  \item \textsuperscript{208} See generally INA § 247A.
  \item \textsuperscript{209} See INA § 212(a).
\end{itemize}
waived. This is less of a boon than it sounds, because some of the bars are waived automatically in certain circumstances. The labor certification, for example, is waived without request in asylum cases.

Several important deportation grounds are not waived. Security grounds, health risks, drug-related crimes, and acts of moral turpitude are still bars to section 202 applicants. Significantly, if an alien has been illegally present in the United States for more than one year, then leaves the country and re-enters without inspection, he is permanently barred from any relief whatsoever. This requirement, more than any other, is likely to take many hopeful immigrants by surprise.

For Cubans and Nicaraguans who have already been ordered deported, which order has been executed, INA mandates a ten-year wait before an application to re-enter can even be filed. NACARA maintains this requirement, but does allow for a waiver. Finally, an alien who has been deported and illegally re-enters is barred from relief under NACARA altogether.

3. Procedural Considerations

a. Initial NACARA Applications Under Section 202

How the section 202 applicant files for relief will be determined by where the alien is in our immigration system. If the alien is unknown to the INS and not in any removal or asylum proceedings, he simply files his application with the Regional Service Center of the INS. Where the alien is already in some type of processing, the procedure becomes more complicated.

INA allows either the Immigration Judge or the INS to adjudicate NACARA claims. For strategic reasons, the applicant is better off filing with the INS. If they decide against him and place him in removal proceedings, he will get a second chance to make his case before the immigration judge. Unless there are other overriding concerns, even aliens presently before immigration judges will wish to file with the INS. For example, children nearing the age of twenty-one (when they will have to file their own petition) may put pressure on parents to have their cases decided as soon as possible. The problem lies in convincing the immigration courts to relinquish jurisdiction over the aliens so that they might

211. See INA § 212(a)(5).
212. See, e.g., id. § 212(a)(1), (3).
213. See NACARA § 202(c). For a discussion of the statutory grounds for exclusion and deportation, see supra Part II.
214. See INA § 212(a)(9)(C).
215. Deportation orders are “executed” when the alien leaves the United States. This would seem to punish those aliens who followed our laws and left the country.
216. See INA § 212(a).
218. See id. § 202(c)(2).
219. See INS Fact Sheet, supra note 200, at 2.
220. See INA § 203(a).
appear before the INS.\textsuperscript{221}

For aliens in proceedings before an immigration judge, they may petition the court to administratively close the case, pending INS review of their NACARA application.\textsuperscript{222} Similarly, aliens whose cases are on appeal to the BIA may request that they remand the case to the immigration court for administrative closure.\textsuperscript{223} While the INS may block administrative closure of any case, if it does not, the court (or BIA) will usually grant the request.\textsuperscript{224} In NACARA cases, the INS has stated that it will not block closure unless the alien fails to qualify under NACARA.\textsuperscript{225} If the alien subsequently fails to file his NACARA application, the courts will automatically re-open his case.\textsuperscript{226}

If the alien is already in a proceeding before the INS (e.g., seeking asylum), he may file his NACARA petition without having to close his asylum case.\textsuperscript{227} Aliens who are still present, but have received a warrant of deportation after a rejected asylum petition to the INS, may file their NACARA application with the INS, but must also apply for a Stay of Removal while their section 202 claim is pending.\textsuperscript{228} The final rule, however, provides that “absent significant negative discretionary factors,” the request for a Stay will be granted until the adjustment of status application is decided.\textsuperscript{229}

\begin{itemize}
\item[b. Section 202 Appeals]
\end{itemize}

Should an alien be denied relief by either the INS or an Immigration Judge, section 202 applicants may appeal that decision.\textsuperscript{230} To whom they direct their appeal depends on which body adjudicated the original NACARA application.

The simplest case is where the application is rejected by the INS. Here, the alien simply refiles his application for de novo review with the immigration court.\textsuperscript{231} The court will gain jurisdiction over the alien either through an initial deportation/removal hearing, initiated by the INS after rejecting the NACARA claim, or by re-opening an existing case against the alien.\textsuperscript{232}

Where the alien filed his original petition in the immigration courts, appeal is to the BIA.\textsuperscript{233} If the immigration court had the case on a gen-

\begin{footnotes}
\item[221.]
See CLIN Materials, \textit{supra} note 2, at 3.
\item[222.]
\item[223.]
See id.
\item[224.]
See id.
\item[225.]
See \textit{generally} Office of the General Counsel, Department of Justice Memorandum, \textit{Administrative Closure of EOIR Proceedings} (Dec. 31, 1997).
\item[226.]
\item[227.]
See id. § 242.13.
\item[228.]
See id. § 208.3(b).
\item[229.]
\item[230.]
See \textit{generally} 8 C.F.R. §§ 3.3, 240.15.
\item[231.]
See id. § 245.13(m).
\item[232.]
See id. § 245.13(n).
\item[233.]
See INA § 106(a).
\end{footnotes}
eral remand, the BIA will review the NACARA application as well as any other previously pending issues.\textsuperscript{234} If the immigration court had the case on remand for NACARA-only review, the BIA will only look at the NACARA adjudication.\textsuperscript{235} All other appeals from denials by the immigration court must follow the usual procedures (including filing a notice to appeal and paying the requisite fee).\textsuperscript{236} There is no judicial review of the BIA action on appeal. However, the usual exceptions to limited judicial review apply, under general administrative law (e.g., constitutional issues).

Compared to the usual requirements for adjustment of status, the burdens on section 202 applicants are relatively light. As to Nicaraguans and Cubans, this legislation will allow most of these aliens to become lawful permanent residents, and begin working in the United States.\textsuperscript{237} Other beneficiaries of NACARA, those that fall under the section 203 definitions, will not find our immigration laws as forgiving.

V. THE MINOTAUR: NACARA FOR GUATEMALANS, SALVADORANS, AND E. EUROPEANS (SEC. 203)

As mentioned above, the second half of NACARA, section 203, is radically different from section 202. For the section 203 alien, meeting the statutory requirements is much more difficult and yields a less valuable “prize.” Two facets in particular, the “extreme hardship” and “otherwise admissible” requirements, will make it very tough for applicants to gain admission. Furthermore, the status of dependents under section 203 is still uncertain, as the statute does not allow derivative claims.\textsuperscript{238}

A. WHAT THE STATUTE SAYS

The second half of NACARA, section 203, applies principally to Guatemalans, Salvadorans, and Eastern Europeans.\textsuperscript{239} The rules are very specific as to what requirements these aliens must meet before being eligible for a suspension of deportation.\textsuperscript{240} Suspension proceedings are very different from adjustment of status.\textsuperscript{241} Adjustment allows for eventual citizenship after seven years of maintaining continuous residence and good moral character, with no aggravated felonies. Suspension only guarantees that the alien will not be deported unless they become eligible for deportation by committing an aggravated felony.\textsuperscript{242} While suspension

\textsuperscript{234} Additionally, the alien need not file a notice of appeal; nor must he pay an additional appeal fee. Presumably, these requirements were met during the pre-NACARA appeal.

\textsuperscript{235} Here, however, the alien must file a notice of appeal and pay the appeal fee.

\textsuperscript{236} Generally, appeals from immigration court decisions go to the BIA.


\textsuperscript{238} See id. § 203(a)(1)(C)(i)(III).

\textsuperscript{239} Also addressed are nationals of certain former Soviet Union and other Eastern European countries.

\textsuperscript{240} See NACARA § 203(a)(5).

\textsuperscript{241} See INA § 240(a). Cf. INA § 245.

\textsuperscript{242} See id. § 240(a).
allows an alien to live and work in the U.S. permanently, it does not di-
rectly allow for eventual citizenship.\(^{243}\) There are other means by which
an alien can gain residence, and thereby citizenship, but for those who are
here under a suspended deportation, if they could have gained lawful res-
idence, they would ordinarily have applied for it.\(^{244}\)

NACARA also allows for a cancellation of removal, a change of status
to somewhat less than full citizenship.\(^{245}\) The alien might never gain vot-
ing rights or other benefits accruing to full citizens, but at least will be
able to live and work in the U.S. indefinitely.\(^{246}\) When faced with the
threat of imminent deportation, the inability to vote may seem trivial to
these immigrants, who are thankful simply for the opportunity to remain
here. Differences between cancellation of removal and suspension of de-
portation will be covered in more detail in Part V.B.1, \textit{infra}.

The mechanism by which NACARA makes these changes to the rights
of Guatemalans and Salvadorans is worth mentioning. The statute was
passed as part of the 1998 D.C. Appropriations Act.\(^{247}\) Essentially, it
ends the TPS and ABC protective period and returns the affected aliens
to the status they held prior to certification under TPS or as an ABC class
member.\(^{248}\)

Congress has drawn the beneficiary class boundaries very narrowly. To
qualify for relief under NACARA, the alien must have arrived before a
certain date\(^{249}\) and have registered as an ABC class member before a
certain date,\(^{250}\) or have applied for asylum to the INS before April 1,
1990.\(^{251}\) Guatemalans or Salvadorans, even if ABC class members, who
entered the United States after December 19, 1990 and were subse-
quently apprehended, are ineligible for relief under NACARA.\(^{252}\) Com-
pared to section 202 beneficiaries, Guatemalans and Salvadorans had to
be present in the United States earlier and are granted a more limited
form of relief.\(^{253}\)

In addition to the filing and registration date bars, NACARA retains
similar disqualifiers as are found in the general immigration law, some of
which are automatically waived under the statute.\(^{254}\) But, the criminal
and national security bars are explicitly maintained in the statute.\(^{255}\) The
details of the criminal bars tell much about our national political climate.

\begin{footnotes}
\item[243] See Divine, supra note 10, at 329-30.
\item[244] See id.
\item[246] See id. § 203(f)(1).
\item[248] See CLIN Materials, supra note 2, at 107.
\item[249] September 19, 1990 for Salvadorans; October 1, 1990 for Guatemalans.
\item[250] October 31, 1991 for Salvadorans; December 31, 1991 for Guatemalans. ABC
Class members are discussed \textit{infra} Part V.B.2.
\item[251] Nationals of other countries have different filing requirements as they cannot be
ABC class members. See \textit{infra} Part V.B.2.
\item[252] See NACARA § 203(a)(1).
\item[253] See supra Part IV.
\item[255] See id. § 203(f)(1)(A)(i).
\end{footnotes}
They include ineligibility for commission of an act of prostitution within the last ten years, anywhere in the world; trafficking in, conviction for, or abuse of illegal drugs; conviction of a crime of moral turpitude; conviction of a domestic violence crime or violation of a protective order; conviction on a firearms charge; commission of terrorism or related activities; and, an attempt to gain a benefit of citizenship by falsely claiming current eligibility.\textsuperscript{256} Ineligibility under these particular bars does not render the alien without any relief whatsoever; it merely puts the alien back under the usual procedures (\textit{i.e.}, cancellation of removal). However, in order to win relief, the alien must meet stricter standards and receives only a ten-year suspension of deportation.\textsuperscript{257}

The other usual requirements for suspension of deportation remain in NACARA.\textsuperscript{258} The alien must maintain a seven-year continuous presence in the United States, possess good moral character, demonstrate that a return to his native country would cause himself (or other qualifying dependents) extreme hardship, and otherwise merit a favorable exercise of discretion.\textsuperscript{259}

**B. Basic Eligibility**

1. **Suspension v. Cancellation**

A basic understanding of the differences between suspension of deportation and cancellation of removal is critical to understanding how NACARA section 203 works. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) ended the previous suspension of deportation procedures and replaced them with the cancellation of removal provisions.\textsuperscript{260} More than just a name change, the new cancellation of removal also changes the substantive rules for deportation relief.\textsuperscript{261}

Prior to IIRIRA, aliens facing deportation could apply for suspension of deportation.\textsuperscript{262} As mentioned in Part II.E, \textit{supra}, aliens apprehended at the border, before entry, were placed in exclusion proceedings. Because of the continuous physical presence requirements of NACARA, aliens in exclusion proceedings are unprotected by NACARA.\textsuperscript{263} Under the rules for suspension of deportation ("suspension"), an alien must demonstrate: continuous physical presence for seven years; good moral character during the entire continuous physical presence; and extreme

\textsuperscript{256} See generally INA §§ 212(a)(2), 237(a)(2)-(3).
\textsuperscript{257} See id. § 203(b).
\textsuperscript{258} See id. § 203(a)(5)(A), (f)(1).
\textsuperscript{261} See id. § 309.
\textsuperscript{262} See INA § 240(a).
hardship, either to the applicant, or to a qualifying relative. Departures from the U.S. during the seven-year period will be waived if not "meaningfully interruptive," usually restricted to brief, casual, and innocent departures. This standard has been articulated in NACARA as departures of less than 90 days at a time and less than 180 days in the aggregate. Demonstrating good moral character is the same as for NACARA section 202 applicants, discussed in Part IV, supra. Extreme hardship under suspension of deportation is discussed in Part VI, infra.

After IIRIRA, all aliens are processed in removal proceedings, subject to a request for cancellation of removal. Under the rules for cancellation of removal (or, "cancellation"), an alien must demonstrate: continuous physical presence for 10 years; good moral character for the required continuous presence; absence of conviction of an aggravated felony; and, "exceptional and extremely unusual hardship." At first glance, the new rules seem very close to the old rules, with the simple differences of an extended time for continuous physical presence and the absence of an aggravated felony conviction. However, several critical changes have been made in how the requirements are met and interpreted. First, there are new rules for determining continuous physical presence. Under the old rules, the time of continuous presence was calculated from the date the alien entered the U.S. to the date when a final order or adjudication of the alien's case. Under the new rules, the continuous presence is calculated from the date the alien enters the U.S. to the date the alien is served with notice of removal proceedings. The 90/180 day rules also apply under cancellation. Thus, under the new rules, aliens served with removal papers gain no advantage for administrative delay.

While the length of time for most aliens is extended from seven to ten years, certain aliens qualify for a reduced showing of continuous presence. Under the new rules, a battered spouse or child must only demonstrate three years of continuous presence. This classification is less generous than it seems. The abuse must have occurred within the

264. See INA § 244(a). See generally, Kurzban, supra note 46, at 603.
265. INA § 244(b)(2).
267. NACARA makes no changes to the good moral character requirement. See NACARA § 202(h), 203(a)(1). See also Divine, supra note 10, at 336.
268. See generally INA §§ 236, 238-242.
269. Id. § 240A. See generally Divine, supra note 10, § 11-5(m), at 339.
270. See Divine, supra note 10, at 330.
271. See INA § 244(a)(1). Under the old rules, an applicant could accrue time towards the seven-year presence even during an appeal of an Immigration Judge's final order of deportation. See generally Cipriano v. INS, 24 F.3d 763 (5th Cir. 1994).
272. See INA § 240A. The clock also stops as of the date an alien commits an offense which would thereby render him inadmissible or deportable. See id.
274. See id.
275. See id. at 331.
U.S., and must have been committed by a spouse or parent who is a U.S. citizen or lawful permanent resident. Presumably, abuse occurring outside the territorial boundaries of the U.S. or at the hands of a foreign national does not count.

The rules for a hardship showing under cancellation are discussed in greater detail in Part V.C.1, infra. For the moment, the important change is that the hardship must be as to the applicant’s family, not the applicant himself.

2. ABC/TPS Class Members

Further complicating eligibility under NACARA, a class-action settlement affects the rights of certain eligible aliens. Prior to the special TPS program, Salvadorans and Guatemalans were treated particularly harshly in asylum hearings. Often, they were summarily dismissed without a significant hearing or required to make evidentiary showings not mandated for other groups. The abuses suffered by these immigrants led to a lawsuit, American Baptist Churches v. Thornburg (the ABC suit), in an attempt to force the INS to treat Salvadorans and Guatemalans fairly. The suit settled, and as part of the agreement Salvadorans in the United States as of September 19, 1990, and any Guatemalans in the United States as of October 1, 1990 were granted de novo asylum interviews. Salvadorans must have applied for TPS (or otherwise informed the INS of their desire to have a new interview) by June 30, 1991. Guatemalans must have filed written notice with the INS to notify the agency of their desire for a de novo interview between July 1, 1991 and December 31, 1991.

Naturally, relief under the settlement agreement is more complicated than simply filing a notice. Rejected from the class able to file under the ABC were aggravated felons, apprehendees after December 31, 1990, and aliens who were interviewed between July 1, 1991, and December 31, 1991. Obviously, the INS tried to narrow the class as much as possible. In the Service’s defense, the threat of the lawsuit, occurring before July 1, 1991, would have potentially caused the asylum officers to mend their ways. Additionally, limiting the class to entrants before the December 31, 1991 deadline only makes sense. Why should an alien who entered after the deadline to file for a de novo interview be a class member in a group alleged to have been mistreated (and given an opportunity to re-

276. See id.
277. See id.
278. According to the Catholic Legal Immigration Network, only 1% of asylum cases filed by Salvadorans and Guatemalans in the 1980’s were approved. See CLIN Materials, supra note 2, at 107.
279. See id.
281. See Kurzban, supra note 46, at 170.
282. See id.
283. See id.
284. See id.
C. PROBLEMS FOR IMMIGRANTS

What is particularly troublesome for the practitioner is that some of the procedural and substantive rules are still outstanding.286 While the INS has already spoken on the issues of when Motions to Reopen are to be filed and has set preliminary hearing dates on the merits, there are two critical areas of law still undetermined: the "extreme hardship" standard and the question of "derivative beneficiaries," discussed in Part VI, infra.287

Another critical issue, as yet undecided by the INS, is the question of work authorizations.288 Continued presence in the United States, while a welcome relief from foreign persecution, means little unless supported by the ability to earn a living. Part of the findings in a deportation hearing is a determination of whether the alien is likely to become or remain a ward of the state.289 Without the ability to work, it would appear that an otherwise qualified alien is doomed to live through charity as he is specifically prohibited from obtaining gainful employment. Until the INS promulgates a decision on this point, thousands of potential workers must remain in the care of their sponsors. In a practical sense, this requirement alone may check the flow of immigrants into the U.S.

Often the language barrier, or lack of education generally, will lead an alien to disregard or misinterpret a summons for his hearing.290 Immigration courts do not wait for an alien eventually to appear for his hearing, and will readily enter an order of deportation in absentia.291 But, there is no central recordation system for listing who has been ordered deported.292 Consequently, ABC class members may have difficulty determining if they are even eligible under NACARA, as part of the requirement for eligibility is that they have been ordered deported.293

The INS has spoken through the issue of an interim rule on the beginning procedural issues arising under NACARA.294 The first stage of any hearing or proceeding after an order of deportation is usually the filing of a motion to reopen.295 Accordingly, it is to this issue the interim rule speaks. Due to the short period of time in which the alien must file his

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285. See id.
286. See CLIN Materials, supra note 2, at 108.
288. See id. at 867.
289. See INA § 212(a).
290. See Silverman, supra note 259, at 869.
291. See INA § 240(b)(5).
292. Records are kept at each INS Regional Office.
295. See 8 C.F.R. § 3.2(c)(1)-(4) (2000). An alien may also file a motion to reconsider. See id. § 3.2(b).
motion to reopen, INS has allowed petitioners to file their motion before filing a completed suspension application. Once the applicant meets the motion deadline, September 11, 1998, he has until February 8, 1999 to complete and file his suspension or cancellation of removal application.

I. Extreme Hardship

Even someone who has been ordered deported by an immigration court still has some potential relief available. Congress has authorized the Attorney General, in his discretion as head of the Department of Justice, to suspend the deportation of an alien when the alien meets certain criteria of eligibility. The same statute authorizes the Attorney General to adjust the status of the alien to lawful permanent resident. To qualify for the beneficence of the Department of Justice, the alien must meet the qualifications under either of two subparagraphs of section 1254(a) of the U.S. Code, both of which require a showing of some type of hardship.

The first option, available for aliens not deportable under certain specified sections of the Code, requires a showing of “extreme hardship” either to the alien himself or to those of his immediate relatives who are citizens or lawfully admitted permanent residents. This basis for suspension of deportation also requires a seven-year continuous presence in the United States and a showing of good moral character.

The second option under section 1254(a)(2) is reserved for aliens who are saddled with certain statutory misdeeds. Aliens who have committed certain felonies are required to demonstrate a ten-year continuous presence, beginning after the commission of an act which renders them deportable, a showing of good moral character, and “exceptional and extremely unusual hardship.”

While there is room for some maneuvering as to the continuous presence and good moral character requirements, the burden of proving extreme hardship has generated much litigation. The general idea behind the suspension of deportation and adjustment of status is that, in some cases, the balance of equities makes it unfair for certain aliens to suffer deportation. The extreme hardship standard is meant to separate those aliens Congress wishes to remove from those aliens whose deportation would run counter to our notions of justice and freedom.

297. See id.
299. See generally id.
300. See id.
301. Id. § 1254(a)(1).
302. See id.
303. See id. §§ 1251(a)(4)-(7), (11), (12), (14)-(18) (1999).
305. See Divine, supra note 10, at 338-41.
306. See id.
light, the statutory requirements of continuous presence and good moral character serve as preliminary qualifications while the extreme hardship addition makes the final cut.  

The factors courts consider when deciding the extreme hardship question lean towards selection of those aliens who are somewhat assimilated already, are contributing to society rather than existing as wards of the state, and who would suffer a genuine loss of the sort to which aliens are entitled to prevent, unattached to their illegal presence in the country. A closer look at the specific factors will clarify this point.

2. **Demonstrating Admissibility**

The statute states four basic requirements for eligibility, which are repeated in the interim rule. The applicant must show: (1) prima facie eligibility for suspension of deportation; (2) actual eligibility for suspension, cancellation or removal; (3) absence of any conviction (at any time) of an aggravated felony; and (4) membership in one of the six enumerated classes of 8 C.F.R. § 3.43(b)(4).

Prima facie eligibility is a fairly straightforward showing, requiring minimal documentation, largely because of the separate motion to reopen and suspension application filing deadlines. Continuous presence, good moral character, and extreme hardship form the basic elements of a favorable suspension disposition, each of which may easily be alleged in the motion to reopen.

Actual eligibility for suspension or cancellation, as compared with prima facie eligibility, is a slightly different showing. Here, the focus is on the statutory requirements for either suspension or cancellation and on the specific qualifiers under NACARA. The absence of felony conviction is handled in the exact same manner as ordinary adjudications of suspension applications, as is the proof of membership in one of the "six enumerated classes." As to the classes themselves, they are the exact same groups which establish eligibility under the statute (i.e., the time window, ABC membership, etc.).

Overriding the discretionary power of the Attorney General in deciding whether to grant suspension or cancellation claims in general is an aggregate annual limitation of 4,000 aliens per fiscal year. For the moment, aliens admitted under NACARA have been exempted from the

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307. See id.
308. See id. at 340.
309. See id.
311. There is still some controversy regarding the extreme hardship showing. See infra Part VI.
312. See Divine, supra note 10, at 613.
313. See id.
314. See infra Part VI (regarding extreme hardship controversy).
315. See Divine, supra note 10, at 613.
annual limitation.  

VI. THE EXTREME HARDSHIP STANDARD

A. The Old Standard

After an alien makes the required showings of qualification for suspension of deportation, he must clear one final hurdle, a demonstration of "extreme hardship" which would warrant favorable discretion on the part of the Immigration Judge. Because this is essentially a question of convincing the court to use its discretion in the alien's favor, it tends to be a highly judge-specific requirement, with large variance between districts. The statutory requirements are vague, leaving most of the heavy lifting to the court. While the requirement of "extreme hardship" is technically a separate necessity from favorable discretion, it is often the facts that determine the hardship question which tip the scale of discretion.

In terms of guidance for the Immigration Judges in making their decision, case law has developed a rough set of issues to balance. But, because each alien's case is different, the relevant law tends to provide only examples of what will or will not survive review by the Board of Immigration Appeals. The relevant factors may be grouped into five broad categories: (1) family issues, (2) psychological adjustment, (3) community ties, (4) economics, and (5) residence.

As to family issues, it is clear that keeping families together is an important consideration. In *Ravancho v. INS*, 318 the Third Circuit reversed a BIA decision ordering deportation of a Philippine couple for failure to consider family separation in conjunction with all other relevant information, in particular the effect on a minor child with close relatives in the U.S. In *Mejia-Carillo v. INS*, 319 the Ninth Circuit reversed a BIA decision on similar grounds for failure to consider non-economic factors such as family separation, in a case where the dependant children were lawful permanent residents, living with their mother, and would be forced to follow her back to Mexico while their lawful permanent resident father remained in the United States.

Family separation considerations apply even where the alien is not strictly related to the family from which he would be separated. In *Antoine-Dorcelli v. INS*, 320 a First Circuit case, and *Zamora-Garcia v. INS*, 321 a Fifth Circuit case, the courts reversed BIA rulings for failure to consider family separation in cases where an alien had worked as a servant for, and had close "family ties" with, U.S. citizens. What is apparent from this line of cases is that separation issues causing hardship to U.S. citizens or lawful permanent residents carry significantly more weight than hardship to non-citizens.

317. See id.
319. 656 F.2d 520 (9th Cir. 1981).
320. 703 F.2d 19 (1st Cir. 1983).
321. 737 F.2d 488 (5th Cir. 1984).
Along similar lines, adjustment issues often concern the effect of family separation, particularly as to small children. In *Ramos v. INS*,322 another Fifth Circuit case, the court reprimanded the BIA for failing to consider the effect of moving the alien's two small children who had spent their entire lives in the United States to a country foreign to them, where they did not speak the language or understand the culture.

Psychological hardship to the applicant is also a relevant factor. In *Batoon v. INS*,323 the court specifically endorsed the use of medical affidavits demonstrating the likely psychological impact of deportation in determining hardship. Furthermore, even without medical affidavits, appellate courts are encouraging the BIA to consider psychological issues. In *Tukhowinich v. INS*,324 the Ninth Circuit required the BIA to consider the alien's frustrated goals in providing for her family abroad should she be deported. Of critical importance in this case, however, was that the alien had demonstrated that providing for her family was the "overriding mission" of her life.325

Ties with the community are also probative in addressing hardship. A petitioner's community service and close relationship with a local religious congregation are relevant in determining the petitioner's integration into U.S. society.326 Also relevant are the alien's position in the community and his contributions in general.327

Economic considerations are clearly probative, but not determinative.328 Standing alone, the inability to find work in the alien's country of origin is not enough.329 However, when such economic considerations impact upon the alien's ability to provide for his dependent family, particularly when that family is comprised of U.S. residents, economic factors may provide additional support for hardship.330 On the other hand, the financial status of an individual may work against the alien, when that alien can clearly support himself in his native country.331

The amount of time the alien has spent in the United States is also an important factor, although not strictly determinative.332 In *Salameda v. INS*,333 the Seventh Circuit held that a long residence in the U.S. may be used in determining whether the alien had demonstrated extreme hardship. However, in order to discourage illegal entry, simply waiting long enough, without more, will not establish hardship.334

322. 695 F.2d 181 (5th Cir. 1983).
323. 707 F.2d 399 (9th Cir. 1983).
324. 64 F.3d 460 (9th Cir. 1995).
325. Id. at 464.
326. See generally *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995).
328. See generally *Santana-Figueroa v. INS*, 644 F.2d 1354 (9th Cir. 1981).
329. See id.
330. See id.
331. See Matter of Anderson, 16 I.&N. at 597.
332. See *Zamora-Garcia v. I.N.S.*, 737 F.2d 488, 491 (5th Cir. 1984).
333. 70 F.3d 447 (7th Cir. 1995).
334. See, e.g., *Ahn v. INS*, 651 F.2d 1285 (9th Cir. 1981).
In addition to the standard factors discussed above, courts will often use other information in making their determinations. The age or health of the petitioner, the conditions in the alien’s native country, the relative difficulty of obtaining an immigrant visa, and even the alien’s sexual orientation are all potentially probative.

The presence of all the relevant factors, however, does not guarantee that the alien will satisfy the judge’s standard of how extreme the hardship must be to warrant relief. Furthermore, appellate courts are hesitant to substitute their own judgment as long as the Immigration Judge has expressly considered all of the relevant factors. Thus, in order to prevail in a request for suspension of deportation, an alien must demonstrate relevant factors of the types shown above, to the degree that will satisfy the local immigration court.

B. THE PROBLEMS RELATED TO GUATEMALANS AND SALVADORANS

Many of the Guatemalans and Salvadorans residing in the United States, but under the threat of a pending deportation, do not easily meet any of the extreme hardship guidelines as they stand. Often the language barrier hinders their assimilation, or the rest of their family remains abroad, and the immigrant is thus missing two of the more important factors a judge will consider when granting a suspension of deportation. NACARA purports to handle this situation. There is no clear picture of this at the moment, and the proposed regulation to date does not provide much guidance. As a practical matter, because NACARA section 202 does not require any type of hardship showing, only section 203 applicants will be effected. Because Guatemalans and Salvadorans comprise the bulk of expected section 203 petitioners, any changes to the standard will have the greatest impact on these aliens. Accordingly, the INS will have to take into account the effect on Guatemalans and Salvadorans as such, rather than the effect on a more heterogenous class of unknowable prospective petitioners.

C. A NEW STANDARD?

Because the newer cancellation of removal requirements speak of “exceptional and extremely unusual hardship,” there is some concern that this showing will also be harder than the suspension requirements. Addi-

335. See Matter of Anderson, 16 I.&N. at 597.
338. See generally Sullivan v. INS, 772 F.2d 609 (9th Cir. 1985) (Pregerson, J., dissenting).
339. See generally Carrete-Michel v. INS, 749 F.2d 490 (8th Cir. 1986).
340. See CLIN Materials, supra note 2, at 107.
341. See id.
342. See INS interim rule 1983-97, supra note 161.
tionally, the NACARA, even while allowing aliens to use the old suspension of deportation qualifications, does not specify what will be expected in terms of demonstrating hardship.\textsuperscript{344} Until the INS speaks clearly on this issue, if ever, immigration courts will be forced to rely on case law developed under the old standard. Thus, the new rules may not result in a significant departure from the old rules, except to the extent that individual judges interpret the new standard in a stricter fashion. Despite the official silence of the INS, immigration courts are working to inform practitioners of their intended course. An example of such outreach is exhibited in Part VII, \textit{infra}.

\section*{VII. PROSPECTIVE IMMIGRATION COURT INTERPRETATIONS AND CONCLUSION}

On November 4, 1998, Immigration Judge Anthony Rodgers of the Executive Office for Immigration Review in Dallas, Texas, spoke before a group of practitioners at a NACARA seminar.\textsuperscript{345} His remarks illustrate the Immigration Court's perspective on the ambiguities in present NACARA regulation.

In general, Judge Rodgers explained that while he felt that NACARA was a politically driven and reactive statute, the need for some resolution of the classes of aliens covered by the statute was sorely needed.\textsuperscript{346} From a court calendar perspective, NACARA may not have much effect. In Dallas, the immigration courts only adjudicated approximately five to six NACARA cases, mostly very strong cases (one alien litigated, lost, and filed a motion to reopen).\textsuperscript{347}

In Judge Rodgers's opinion, NACARA puts aliens back to the pre-IIRIRA standard.\textsuperscript{348} For the most part, this is a hardship issue, but still amounts to a large group of people.\textsuperscript{349} Furthermore, location will make a significant difference in the success or failure of a NACARA claim.\textsuperscript{350} Suspension in San Francisco is notoriously easy; in Dallas, this is not the case.\textsuperscript{351}

Regarding the pending regulations, the consensus among Judge Rodgers's peers is that while judges do not know what the INS's (administrative) standard will be, their main concern will be: "is it lower than the IJ's standard?"\textsuperscript{352} But, according to Judge Rodgers, "we will not lower the standard; so back [the petitioners] go to the INS."\textsuperscript{353}

\textsuperscript{344} See id. § 203.
\textsuperscript{345} See Immigration Judge Anthony Rodgers, Remarks at the Catholic Legal Immigration Network NACARA Training, Dallas, Texas (Nov. 4, 1998) [hereinafter Rodgers].
\textsuperscript{346} See id.
\textsuperscript{347} See id.
\textsuperscript{348} See id.
\textsuperscript{349} See id.
\textsuperscript{350} See id.
\textsuperscript{351} See Rogers, supra note 345.
\textsuperscript{352} Id.
\textsuperscript{353} Id.
There is a curious procedural problem in returning the cases to the INS. Without the pending regulations, immigration judges are unsure how to proceed. For the moment, they have tabled the cases, re-setting every three months until they know something about the new regulations. Until the immigration judges know something about the new standard, these cases are on hold, unless the attorneys want to try the case.

With potentially helpful regulation waiting in the wings, why proceed to try the case? “Aging out” of a good case is one reason. All the statute does for dependants is let them “mark time” until the parents’ or principal’s case is adjudicated. If they no longer satisfy the age requirements for a derivative claim, at the time the principal’s case is adjudicated, the child (now adult) will be forced to proceed with his own claim, often a very weak one. In Dallas, dependants’ cases are being set for trial in April 1999. There will be no difference in how the IJs will proceed, but after the new regulations issue, the Dallas IJs might administratively close those cases.

There is also a philosophical stance evident from Judge Rodgers’s remarks. He does not believe there is any difference in how the NACARA statute will apply in court or before the INS. Only the new regulations and certain standards (i.e., seven years, GMC, hardship) have changed; but, those changes are effective in either forum. Nor does he believe that “new language” implies a “new standard;” Congress was merely emphasizing the extreme nature of the relief, not the diluted form it has become. Thus, different BIA panels seem harder or easier, even in cancellation cases, because this is expected to be a case-by-case standard. The three Dallas judges believe “hardship” means exactly that, not a casual or purely economic inconvenience. Judge Rodgers’ remarks underscore the highly discretionary nature of the extreme hardship standard.

Cases involving children are particularly problematic, aside from procedural considerations. In assessing the relative merits and likely success of many hardship cases, Judge Rodgers was able to provide some guidance as to what showing should suffice, at least in his courtroom. The child’s age is clearly probative: young children can acclimate anywhere;

354. See id.
355. See id.
356. See id.
357. Rodgers, supra note 345.
358. See id.
359. See id.
360. See id.
361. See id.
362. See id.
363. Rodgers, supra note 345.
364. Id.
365. See id.
366. See id.
367. See id.
older children have better roots for demonstrating the hardship of moving.\textsuperscript{368} In Dallas, the winning hardship cases have children who are "achievers."\textsuperscript{369} In fact, a recent BIA case turned on a twelve-year-old boy, his "achievements," and discomfort with the Spanish language.\textsuperscript{370} Thus, even where there is no illness or property involved, the children are important, and may even be outcome determinative.\textsuperscript{371}

Judge Rodgers also provided advice on demonstrating the hardship effect on the dependent children. He advises several evidentiary steps, including introducing the children's report cards and the testimony of teachers or counselors.\textsuperscript{372} Even so, he made quite clear that it is his belief that there is no difference between the hardship standards of removal and cancellation.\textsuperscript{373} The significance of NACARA lies in who may demonstrate hardship.\textsuperscript{374}

Despite the difficulties in demonstrating hardship, the Dallas IJs would prefer to adjudicate NACARA cases, rather than send them back to the INS.\textsuperscript{375} In general, there are three categories of NACARA cases Judge Rodgers sees as arising in the near future.\textsuperscript{376}

First, there will be remands from BIA for NACARA work.\textsuperscript{377} In this case, he expects the court to send notices to the alien for master docket scheduling.\textsuperscript{378} This poses a significant risk to the alien, particularly where there are problems in finding respondent.\textsuperscript{379} Failing to appear will result in an in absentia order, which will constitute a waiver of all relief, and is non-appealable.\textsuperscript{380} This will clearly put the alien in a worse position than when his case was before the BIA on appeal.\textsuperscript{381}

Second, there will be a large volume of Motions to Reopen (MTRs).\textsuperscript{382} In these cases, it is unlikely that the respondent will fail to appear, since he will have had to contact his attorney in order to file the MTR.\textsuperscript{383} Furthermore, Judge Rodgers expects these cases to be handled relatively simply; he will administratively close the case and return it to INS for adjudication.\textsuperscript{384}

A similar disposition is expected for the third class of cases, those presently pending before the court.\textsuperscript{385} These cases will not be terminated, but

\textsuperscript{368} See id.  
\textsuperscript{369} See Rodgers, supra note 345.  
\textsuperscript{370} See id.  
\textsuperscript{371} See id.  
\textsuperscript{372} See id.  
\textsuperscript{373} See id.  
\textsuperscript{374} See id.  
\textsuperscript{375} See Rodgers, supra note 345.  
\textsuperscript{376} See id.  
\textsuperscript{377} See id.  
\textsuperscript{378} See id.  
\textsuperscript{379} See id.  
\textsuperscript{380} See id.  
\textsuperscript{381} See Rodgers, supra note 345.  
\textsuperscript{382} See id.  
\textsuperscript{383} See id.  
\textsuperscript{384} See id.  
\textsuperscript{385} See id.
administratively closed and returned to INS for adjudication.\textsuperscript{386} Return to INS may actually be more helpful to the alien in that the INS may adjudicate both the NACARA petition as well as any pending asylum claims the alien may have.\textsuperscript{387} Asylum, as noted above, is much more helpful for derivative beneficiaries, as they are already present.\textsuperscript{388}

Overall, however, Judge Rodgers does not expect NACARA to result in any dramatic changes in the way he handles hardship cases.\textsuperscript{389} He will not grant continuations to find relief; one in twenty is a "high" estimate of his expected hardship approvals.\textsuperscript{390} Cancellation, he asserts, is much harder than suspension hardship, and will be reflected in his rulings.\textsuperscript{391}

Thus, even while noting that he believes that the standard has not changed, Judge Rodgers still expects cancellation petitioners to face greater obstacles than suspension applicants.\textsuperscript{392} Because NACARA allows reversion to the suspension rules, whether or not the alien qualifies for NACARA may be determinative.\textsuperscript{393}

Judge Rodger's insight was remarkably prophetic. On May 21, 1999, the INS issued an interim rule governing section 203 NACARA applicants.\textsuperscript{394} Among other things, the interim rule established a presumption of extreme hardship for NACARA applicants who are also ABC class members.\textsuperscript{395} The applicants who qualify are: 1) Guatemalans present in the U.S. as of October 1, 1990, who registered as ABC class members before December 31, 1991, and who were not apprehended at time of entry after December 19, 1990; 2) Salvadorans present in the U.S. as of September 19, 1990, who applied for TPS or ABC benefits before October 31, 1991, and who were not apprehended at time of entry after December 19, 1990; and, 3) Guatemalans or Salvadorans who filed for asylum with the INS before April 1, 1990, or who filed for asylum in an immigration court and served the INS with a copy before April 1, 1990.\textsuperscript{396} The effect of the above restrictions is that all Guatemalans and Salvadorans who qualify for NACARA as principals also qualify for the presumption. Aliens who only qualify for NACARA as a dependant, and Eastern European applicants, do not receive the presumption.\textsuperscript{397}

The presumption, however, is rebuttable, and will not "eliminate the necessity of examining the evidence of extreme hardship in each case."\textsuperscript{398} Instead, adjudicators will look for evidence from the record that would

\textsuperscript{386} See id.
\textsuperscript{387} See Rodgers, supra note 345.
\textsuperscript{388} See id.
\textsuperscript{389} See id.
\textsuperscript{390} See id.
\textsuperscript{391} See id.
\textsuperscript{392} See id.
\textsuperscript{393} See Rodgers, supra note 345.
\textsuperscript{394} See INS interim rule 1915-98, 64 Fed. Reg. 27855-82 (May 21, 1999).
\textsuperscript{395} See id.
\textsuperscript{396} See 8 C.F.R. § 240.61 (2000).
\textsuperscript{397} See id. § 240.64(d).
\textsuperscript{398} See INS interim rule 1915-98, supra note 394, at 27865.
disprove the presumption of extreme hardship. Factors the adjudicators will consider include:

- the age of the alien, both at the time of entry and at the time of application for suspension;
- the age, number, and immigration status of the alien’s children and their ability to speak the native language and to adjust to life in the country of return;
- the health of the alien, or the alien’s spouse, children or parents and the availability of any required medical treatment in the country of return;
- the alien’s ability to obtain employment in the country of return;
- the length of residence in the U.S.;
- the existence of other family members who are, or will be, legally residing in the U.S.;
- the financial impact of the alien’s departure;
- the impact of a disruption of educational opportunities;
- the psychological impact of the alien’s deportation;
- the current political and economic conditions in the country of return;
- family and other ties in the country of return;
- contributions to and ties to a community in the U.S., including the degree of integration into that society;
- immigration history, including authorized residence in the U.S.;
and,
- the availability of other means of adjusting to permanent resident status.

In other words, the factors are exactly those Judge Rodgers uses to determine extreme hardship.

It is unclear what the likely practical effect of the presumption will be. The INS, in the supplemental information accompanying the interim rule, believes that the interim framework will balance the likelihood that ABC class members will suffer extreme hardship if deported against the need

399. See id.
401. See id. § 240.58(b)(2).
402. See id. § 240.58(b)(3).
403. See id. § 240.58(b)(4).
404. See id. § 240.58(b)(5).
406. See id. § 240.58(b)(7).
407. See id. § 240.58(b)(8).
408. See id. § 240.58(b)(9).
409. See id. § 240.58(b)(10).
411. See id. § 240.58(b)(12).
412. See id. § 240.58(b)(13).
413. See id. § 240.58(b)(14).
to conduct individual determinations in each case. Nevertheless, the presumption of extreme hardship is an improvement over the uncertainty in the pre-rule system.

Given the distinctly different treatment given to the two classes of immigrants under NACARA, Nicaraguans and Cubans are unlikely to face any of the foregoing concerns. For these aliens, NACARA represents a welcome relief. As for Guatemalans and Salvadorans, NACARA may provide some relief. However, the present ambiguities in the standards for a hardship showing and the evidentiary problems in demonstrating a threshold qualification for NACARA benefits may dilute the statute's positive effects to a point where they are no longer discernible. Despite these flaws, NACARA portends movement in congressional sentiment towards a more favorable treatment of aliens in the United States, regardless of how they managed to arrive on our shores.

414. See INS interim rule 1915-98, supra note 394, at 27865.