

UNDERSTANDING THE NICARAGUAN ADJUSTMENT AND CENTRAL AMERICAN RELIEF ACT

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I. INTRODUCTION

On November 19, 1997, President Clinton signed into law the Nicaraguan Adjustment and Central American Relief Act¹ (NACARA).

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NACARA, which is part of the District of Columbia Appropriations Bill for the fiscal year 1998 (H.R. 2607), has been one of the most significant pieces of immigration legislation favoring aliens to be enacted in this country in years. After years of hopelessness and frustration, hundreds of thousands of immigrants from Central America, Cuba, and former Soviet bloc countries will have the opportunity to present either applications for adjustment of status or applications for suspension of deportation or cancellation of removal under the old suspension of deportation standards. This will be done before the Immigration and Naturalization Service (INS) or the Executive Office for Immigration Review (EOIR), in the hopes of remaining in the United States in lawful status.

NACARA was a political response to the concern that many individuals had spent years in the United States, complying with the immigration laws and establishing countless equities. These individuals would be adversely affected by the harsh changes in the immigration law as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² The Congressional Record is replete with explanations for the enactment of this law. However, special reference should be made to the statements of Senator Spencer Abraham of Michigan, on the Senate Floor November 9, 1997:

Title II incorporates an agreement reached between the House and Senate negotiators to correct provisions in last years immigration law. These provisions as they were being interpreted by the Board of Immigration Appeals and others, would have had the effect of changing the rules in the middle of the game for thousands of Central Americans and others who came to the United States because their lives had been torn apart by war and oppression and are seeking permanent residency here. That violates the sense of fairness that is so much a part of the American character.³

The law provides that eligible Nicaraguans or Cubans can apply for adjustment of status to that of permanent resident aliens. Nationals of El Salvador, Guatemala and any of the republics of the former Soviet Union, the former Czechoslovakia, Poland, Romania, Hungary, Bulgaria, Albania, East Germany, or any state of the former Yugoslavia who entered the United States on or before specifically stated dates are eligible to apply for

1. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (1997) as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997) [hereinafter NACARA].

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA].

3. CONG. REC. 12, 261 (1997).

suspension of deportation or special cancellation of removal under the preexisting deportation standards.⁴

Although this new law alleviates the immigration situation for many, NACARA fell short. The law fails to amend certain sections of IIRIRA, which detrimentally affect immigrants placed in proceedings before the Executive Office for Immigration Review prior to reaching their seventh anniversary in this country. The law codifies the Board of Immigration Appeals (BIA) decision in *Matter of N-J-B*⁵ and states: (A) Subparagraph (B) and (C) of section 240(d) of IIRIRA shall apply to orders to show cause...issued before, on, or after the date of enactment of this Act.⁶ In *Matter of N-J-B*, the Board held that IIRIRA could be applied retroactively to suspension cases, thus preventing individuals from counting time spent in the United States after being served with an order to show cause towards the seven or ten year physical presence requirement. Although many members of Congress objected to the unfairness of this provision, it remains part of the law.

The purpose of this article is to provide an overview of the two sections of NACARA as they apply to adjustment of status and to suspension of deportation or special cancellation of removal and to give some practice pointers and suggestions to the reader to assist him or her with a better understanding of this law and its implementation.

II. ADJUSTMENT OF STATUS UNDER NACARA

NACARA provides an amnesty for nationals of Nicaragua and Cuba. Adjustment of status for nationals of Nicaragua or Cuba requires that eligible individuals be admissible to the United States and be physically present in the United States for a continuous period beginning on or before December 1, 1995 and ending not earlier than the date the adjustment status application is filed. The applications for adjustment of status must be filed before April 1, 2000.⁷ The law permits these individuals to adjust status even if they have been ordered excluded, deported, removed or have failed to depart voluntarily after an order of voluntary departure.⁸ Absences from the United States are permitted, but these cannot exceed 180 days.

A. *Benefits for Adjustment of Status Applicants under NACARA*

The requirements for adjustment of status under NACARA do not require that the applicant be admitted, inspected or paroled into the United

4. NACARA, *supra* note 1.

5. Int. Dec. 3309 (BIA 1997).

6. IIRIRA § 309(c)(s) amended by NACARA § 203(a)(2).

7. NACARA §§ 202(a)(1)(A), 202(b)(1).

8. *Id.*

States as required under the Cuban Adjustment Act.⁹ In addition, NACARA applicants are not subject to any of the barriers for adjustment of status provided in the Immigration and Nationality Act [hereinafter INA] § 245(c).¹⁰ Therefore, aliens who have accepted or continued in unauthorized employment, who have remained in the United States longer than authorized, or were admitted as crewmen, in transit or under the visa waiver pilot program, will be eligible to seek NACARA benefits.¹¹

NACARA requires that the applicant be admissible to the United States under all provisions of Section 212(a) of the INA with the exception of certain sections. Specifically, NACARA permits individuals who would otherwise be considered unqualified applicants because of status as public charge (INA § 212(a)(4)), for failure to obtain a labor certification (INA § 212(a)(5)), for violating documentary requirements relating to entry as an immigrant (INA §(a)(7)(A)), or, for accruing more than 180 days of unlawful presence prior to last departure or removal (INA § 212(a)(9)(B)) to adjust status.¹²

The applicant must establish that he or she has been physically present in the United States continuously since December 1, 1995.¹³ The 180-day period will be tolled during an absence from the country authorized by INS. Authorization to travel is obtained only through the grant of an advanced parole (Form I-131) by the Service.

The INS issued a policy memorandum on advance parole for NACARA beneficiaries dated December 24, 1997. The memorandum stated that these travel documents would be approved to applicants who establish eligibility for adjustment under NACARA and who seek to depart temporarily for legitimate business or personal reasons. Ineligible aliens will not be issued travel authorization.¹⁴ The memo further states that along with the advanced parole, the alien should submit supporting documentation to establish NACARA eligibility. Spouse and children of eligible NACARA applicants can also obtain this benefit and without

9. Cuban Adjustment Act, (1966), Pub.L. 89-732, 80 Stat. 1161, (as amended by Pub.L. 94-571, 90 Stat. 2706, (1976), and by Pub.L. 96-212, 94 Stat. 108, (1980)). See also Cuban-Haitian Adjustment, § 202 of the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986).

10. INA § 245(c) provides for limitations for adjustment of status, specifically excluding alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without a visa. 8 U.S.C § 1254(a) (1994) [hereinafter INA].

11. INS, Interim Rule with request for comments, 63 Fed. Reg. 98 (1998) (as reproduced in 75 INTERPRETER RELEASE 735 (1998)).

12. NACARA § 202(d)(1)(D).

13. *Id.* § 202(b)(1), (d)(2).

14. Advance Parole for NACARA, INS Office of Programs, at 2 (Dec. 24, 1997).

having to show the same amount of documentation as required of the NACARA principal alien.¹⁵

A word of caution should be given regarding travel outside the United States during the NACARA adjustment period. Any absences with or without advanced parole before the filing for NACARA adjustment will be added to the time spent outside of the country. An applicant accumulating more than 180 days outside of the United States will automatically lose eligibility for adjustment.¹⁶ Another point of concern for individuals traveling with advanced paroles under NACARA is whether they have a deportation order. Individuals with deportation orders are self-deporting themselves if they leave United States with or without permission to return.¹⁷ Furthermore, individuals who have been physically present in the United States after April 1, 1997 and who are out of status or have been out of status since that date will face the ten year bar. It is not recommended that any individual in these circumstances leave the United States.

NACARA also benefits the spouses, children and unmarried sons and daughters of qualifying aliens and permits these individuals to adjust status so long as they meet certain criteria. The family members must be nationals of Nicaragua or Cuba.¹⁸ The individual must be the spouse, child, or unmarried son or daughter of a NACARA principal and be admissible to the United States. NACARA dependents must be physically present in the United States at the time that they apply for benefits some time before the April 1, 2000 deadline. Unmarried sons or daughters over age twenty-one need to establish that they have been residing in the United States continuously since December 1, 1995 and meet the same requirements as the NACARA principal.¹⁹

Nationality is usually established with the presentation of an original birth certificate or passport. However, the Nicaraguan Constitution acknowledges that children and spouses of nationals of that country are entitled to acquire citizenship no matter where they were born if certain criteria are met.²⁰ Therefore, in cases of Nicaraguan NACARA applicants, the individual can show a birth certificate from that country, or documentation from the government of that country that he or she has been granted Nicaraguan nationality as permitted by the constitution.

15. *Id.*

16. *Id.*

17. Executive Office for Immigration Review, Adjustment of Status for Certain Nationals of Nicaragua and Cuba, 63 Fed. Reg. 27,823, 27,827 (1998) [hereinafter Executive Office for Immigration Review].

18. NACARA § 202(d)(1)(A).

19. *Id.* § 202(d)(1)(B)-(E).

20. Ley de Nacionalidad [Nationality Law], Ley No.149 [Law No. 149], chapt. II, art. 3(2) and 6.

Cuba does not have a provision in its constitution allowing for the acquisition of status through marriage or parentage. As such, the dependants of Cuban principals who are not natives of Cuba or Nicaragua cannot apply for adjustment of status under this law. These individuals will have to adjust status either through a family petition or other means, which may be available by law.

Thousands of NACARA beneficiaries have been without employment authorization for quite some time. Upon the submission of the adjustment application, employment authorization will be issued by INS, for individuals who have previously applied for immigration benefits or have been issued OSC's before December 1, 1995. The INS has 180 days to issue the employment authorization for all others. The applicant must ensure that the application for employment authorization accompanies the adjustment application.²¹

B. *Establishing Physical Presence in the U.S. for NACARA*

Continuous physical presence is one of the basic requirements for adjustment of status under NACARA. The alien is required to be physically present continuously since December 1, 1995.²² To establish physical presence, the applicant should attach to the application for adjustment, any and all INS issued documents placing him or her in deportation or exclusion proceedings, such as an Order or Show Cause or a Form I-122. In many cases, extensive documentation already exists in the applicant's INS file. References to these documents should be made in the application package to ensure that the examining official refers to them in the course of the case determination.²³

Documentation such as income tax returns, social security records, public assistance records, should follow any INS documentation. Evidence such as lease agreements, pay stubs, birth and marriage certificates as well as bills for utilities, etc. should also comprise the record. Since one of the fundamental requirements of NACARA is that the applicant be an individual of good moral character, a police clearance report from all cities where the person has lived should form an integral part of the package.²⁴

C. *Procedures for Adjustment of Status*

Adjustment of status under NACARA can be accomplished either through the Immigration and Naturalization Service or through the

21. Executive Office for Immigration Review, *supra* note 17, at 27,826.

22. NACARA § 202(b)(1).

23. Executive Office for Immigration Review, *supra* note 17, at 27,824.

24. NACARA § 202(2)(b)(A). *See also* Executive Office for Immigration Review, *supra* note 17.

Executive Office for Immigration Review, depending on the particular circumstances of the case.

Adjustment of status applications for individuals who are in proceedings before the Immigration Judge or the Board of Immigration Appeals, or who have a pending motion to reopen or reconsider which has been filed before May 21, 1998, remain within the jurisdiction of the Executive Office for Immigration Review.²⁵

The Immigration Judge is required to reopen an alien's proceedings if that alien is eligible for adjustment of status under NACARA and the alien has a pending motion to reopen or motion to reconsider. If the case is pending before the Board of Immigration Appeals, the Board is required to remand the case regardless of whether the applicant has filed an application for adjustment of status under NACARA.²⁶ If the applicant has filed a motion to reopen or reconsider with the Board prior to May 21, 1998, the Board must remand the case to the Immigration Judge for the sole purpose of adjudicating the application for adjustment. If the Immigration Judge denies the application or the alien fails to file the application by the required date, the case will be returned to the Board for adjudication of other pending issues and for consideration of the denial.²⁷

If the applicant is in proceedings before the Executive Office of Immigration Review or the Board of Immigration Appeals, no deportation or removal order can be issued if he or she is eligible to apply for adjustment of status under NACARA and there has been no administrative final decision denying the application.²⁸

An applicant before the Immigration Court has another alternative available. The applicant may move to have the proceedings administratively closed for the purposes of filing the NACARA adjustment application with the INS. The INS must concur with this motion.²⁹ This option gives the alien two shots at NACARA adjustment, and may be a wise move for the applicant whose case has complications. Should the case be administratively closed, and transferred to the INS, if it were denied, the INS will move to re-calendar the proceedings with the Executive Office for Immigration Review.³⁰

If the alien has been ordered deported or removed from the United States, he or she simply files the application for adjustment of status with the Immigration and Naturalization Service with an application for stay of removal.³¹ The law states that the Attorney General shall provide by

25. *Id.* at 27,825.

26. *Id.*

27. *Id.*

28. Nov. 24, 1997 Memorandum, Office of the Chief Immigration Judge, page 5.

29. Executive Office for Immigration Review, *supra* note 17, at 27,825.

30. *Id.* at 27,828.

31. *Id.*

regulation for the stay of any final order of deportation or removal of individuals filing for adjustment under the new law.³² Applicants who have never applied for any form of relief before the INS, follow these same procedures, but are not required to file the additional stay of deportation form.

D. *Required Forms for Adjustment of Status under NACARA*

The period of time to file for adjustment of status under NACARA began on June 22, 1998 and ends on March 31, 2000. Eligible Cubans and Nicaraguans must file an application to register permanent residence or adjust status (Form I-485) and the NACARA Supplement to Form I-485 (Form I-485 Supplement B). Attached to these forms, the applicant must also enclose a Biographic Information (Form G-325 A). The applicant must include his or her birth certificate and four photographs (two for Form I-485 and two for Form I-765) along with a report of medical examination. The documentation discussed in subsection B above should also be a part of the package. Fingerprints are required for all qualifying aliens over the age of fourteen years. There are specific procedures for obtaining fingerprints through one of the INS' Application Support Centers or authorized Designated Law Enforcement Agencies.³³

Cases presently before the Executive Office for Immigration Review are filed with the court clerk's office. All others are filed with the appropriate fees at the INS service center in their region. The application package to be filed with the Immigration Court is paid at the INS local office before filing. If the alien is filing as a NACARA beneficiary, the applicant must submit evidence of the relationship. Stays of Deportation (Form I-246) must be paid at the INS local office cashier and submitted to the district deportation office with a copy of the adjustment package in duplicate.³⁴

If the NACARA beneficiary resides outside of the United States, the INS interim rules provide special procedures for these individuals. These persons must file a request for parole authorization accompanied by photocopies of the documents that the alien intends to file with the application for adjustment. The interim rule states as follows: Parole authorization may be granted as a matter of discretion, if upon review of the application for parole authorization and related documents it is determined that the application for adjustment of status is likely to be approved once it has been properly filed. The alien would be allowed to file the application after being paroled into the United States. Accordingly,

32. NACARA § 202(a)(2).

33. INS Sets Application Procedures for Nicaraguans and Cubans under NACARA, 75 INT. REL. 724, 726 (May 22, 1998); Executive Office for Immigration Review, *supra* note 17, at 27,826.

34. *Id.*

the alien must remain outside of the United States until the request for parole is approved.³⁵

III. SUSPENSION OF DEPORTATION/CANCELLATION OF REMOVAL PROVISIONS FOR OTHER NATIONALITIES INCLUDED IN NACARA

In addition to adjustment of status for Nicaraguans and Cubans, NACARA permits certain nationals from Guatemala, El Salvador, the former Soviet Union, and certain Eastern European countries the opportunity to apply for suspension of deportation or special cancellation of removal. The Act provides that qualifying individuals from these nations can apply for these forms of relief under the standards that existed for suspension of deportation prior to the enactment of IIRIRA.³⁶ Specifically, aliens served with OSC's before being physically present in the U.S. for seven years may now be eligible for suspension of deportation, and aliens within the six groups who were ineligible for cancellation of removal under the heightened standard of exceptional and extremely unusual hardship may now be eligible under the special cancellation of removal.³⁷ The 4,000 visa limit for approvals does not apply.³⁸

Why these groups were treated differently from Nicaraguans and Cubans was not explained in the law or in the Congressional Record. Senator Ted Kennedy from Massachusetts questioned the lack of uniformity when enacting the legislation and said:

This legislation is a frank admission by the Senate that last year's immigration law treated these families unfairly, and that something must be done to correct it. But instead of correcting the injustice for all refugees, Republicans now pick and choose among their favorite Latino groups...Republicans want a blanket amnesty for Nicaraguans and Cubans, but far less for Salvadorans and Guatemalans who also faced oppression and civil war.³⁹

The Senator goes on to say: "The Republican bill provides for case-by-case consideration of the applications of refugees from El Salvador or Guatemala. Under current INS practices, less than half of those eligible to apply are expected to get their green cards."⁴⁰

35. Executive Office for Immigration Review, *supra* note 17, at 27,827.

36. Executive Office for Immigration Review; Motion to Reopen; Suspension of Deportation and Cancellation of Removal, Interim rule with request for comments, 63 Fed. Reg. 31,890 (June 11, 1998).

37. *EOIR Sets Procedures for NACARA Aliens to File Motions to Reopen*, 75 INT. REL. 832, 833 (June 15, 1998).

38. IIRIRA § 309(c), as amended by NACARA § 203(b).

39. CONG. REC. at 12,264 (1997).

40. *Id.*

Although the inequities are evident, no one can deny that all of the nationalities included in the Act are benefiting to some degree from this current legislation and every qualifying applicant should act swiftly to receive its benefits. Since these types of cases are going to be reviewed with great scrutiny, the immigration practitioner is encouraged to work with his or her client very closely to prepare the most complete applications possible to ensure that the client has the best opportunity to receive the benefits of this law.

A. *Beneficiaries of NACARA Suspension of Deportation and Special Rule Cancellation of Removal*

There are four groups, which are eligible to apply for suspension of deportation/cancellation of removal benefits. Salvadoran nationals who first entered the United States on or before September 19, 1990 and who registered for benefits under the *American Baptist Church v. Thornburgh*⁴¹ [hereinafter ABC] settlement agreement on or before October 31, 1991 (either by submitting an ABC registration or by applying for temporary protected status (TPS)),⁴² are eligible, unless apprehended at the time of entry after December 19, 1990.⁴³ They are also eligible if they filed an application for political asylum with the INS on or before April 1, 1990.⁴⁴ ABC Salvadorans and Guatemalans apprehended at time of entry after December 19, 1990 are not eligible to apply for benefits under NACARA.⁴⁵

Guatemalan nationals who first entered the United States on or before October 1, 1990 and registered for ABC benefits on or before December 31, 1991,⁴⁶ unless apprehended at the time of entry after December 19, 1990,⁴⁷ or who filed an application for political asylum with the INS on or before April 1, 1990 are also eligible.⁴⁸

Spouses and children of Salvadorans and Guatemalans granted NACARA suspension of deportation or special cancellation of removal who are in the above classes. Unmarried sons and daughters of the above classes are also eligible, so long as the unmarried son or daughter entered the United States on or before October 1, 1990 and the legal relationship existed at the time that the parent was granted the benefit.⁴⁹

41. 760 F. Supp. 796 (N.D. Cal. 1991).

42. IIRIRA § 309(c)(5)(C)(i)(I)(aa), as amended by NACARA § 203(a)(1).

43. *Id.*

44. *Id.* § 309(c)(5)(C)(i)(II).

45. *Id.*

46. *Id.* § 309(c)(5)(C)(i)(I)(bb).

47. IIRIRA § 309(c)(5)(C)(i)(I).

48. *Id.* § 309(c)(5)(C)(i)(II).

49. *Id.* § 309(c)(5)(C)(i)(I)(aa).

Nationals of any republic of the former Soviet Union, Poland, Romania, the former Czechoslovakia, Hungary, Bulgaria, Albania, East Germany, or any state of the former Yugoslavia, who entered the United States on or before December 31, 1990 and applied for political asylum before December 31, 1991.⁵⁰

B. *Definition of Suspension of Deportation and Special Cancellation of Removal*

Both suspension of deportation and special cancellation of removal are forms of discretionary relief which, if granted, permit an individual subject to deportation or removal to remain in the United States. Suspension of deportation is available to individuals who have been placed in deportation proceedings through the issuance of an order to show cause (OSC) prior to April 1, 1997. Special cancellation of removal is available to individuals in the protected groups who are inadmissible or deportable and who have been placed in removal proceedings through the issuance of a Notice to Appear (NTA) after April 1, 1997.⁵¹ A person granted either one of these forms of relief will be able to adjust their status to that of lawful permanent resident.

To be eligible for suspension of deportation or special cancellation of removal, the applicant must not be inadmissible or deportable under the criminal or security grounds. The INS has stated that persons convicted of certain crimes may still be eligible to apply under a heightened standard, but anyone convicted at any time of an aggravated felony will be unable to apply for these benefits.⁵² The specific grounds of inadmissibility and deportability are: (1) convictions for two crimes involving moral turpitude;⁵³ (2) two or more convictions with aggregate sentences of five years or more (whether or not for crimes of moral turpitude);⁵⁴ (3) a drug trafficking offense, or a drug conviction or a conviction for being a drug addict or abuser;⁵⁵ (4) convictions for a crime relating to prostitution;⁵⁶ (5) deportability as an aggravated felon;⁵⁷ (6) conviction for a firearms offense;⁵⁸ (7) deportability or inadmissibility as a terrorist or other security-

50. *Id.* § 309(c)(5)(C)(i)(V).

51. Questions and Answers, Nicaraguan Adjustment and Central American Relief Act, Immigration and Naturalization Service (Apr. 1, 1998).

52. *Id.*

53. INA, *supra* note 10, §§ 212(a)(2)(A)(I), 237(a)(2)(A).

54. *Id.* § 212(a)(2)(B).

55. *Id.* § 212(a)(2)(C).

56. *Id.* § 212(a)(2)(D).

57. *Id.* § 212(a)(2)(A)(iii).

58. INA, *supra* note 10, § 237(a)(2)(C).

related grounds;⁵⁹ and (8) deportability for a domestic violence conviction or for falsification of United States citizenship to obtain benefits in this country, as stipulated in the INA.⁶⁰

Some grounds of inadmissibility may have a waiver available if the applicant can meet the statutory requirements.⁶¹ Another way of overcoming these bars may be through post-conviction relief if the requisite family relationship does not exist or if the practitioner determines that a waiver is unavailable. The problems with post-conviction relief are that it is sometimes very costly and may take years to resolve. With the time limitations for NACARA, this may not be a viable option for the applicant.

Should the alien not be barred by one of the criminal or security grounds listed above, he or she must establish the following: (1) continuous physical presence in the United States for seven years; (2) good moral character; (3) extreme hardship to herself or himself and to a spouse, child or parent who is a United States citizen or lawful permanent resident; and, (4) merits the exercise of discretion.⁶² The reader should refer to the many Board of Immigration Appeal cases regarding suspension of deportation as a guide in preparing the supporting documentation for the NACARA application. Of particular interest would be the holdings in *Matter of Anderson*,⁶³ *Matter of O-J-O*,⁶⁴ *Matter of Ige*,⁶⁵ and *Matter of Pilch*.⁶⁶

C. *Continuous Physical Presence and Stop-Time Rules*

Continuous physical presence for NACARA suspension of deportation or cancellation of removal is met even if the applicant has been absent from the United States. These absences cannot exceed more than 90 days during a single period or a total of more than 180 days.⁶⁷ It is recommended that the applicant should not travel outside of the United States during the pending NACARA application.

The Service is unlikely to grant advance parole to individuals in deportation or removal proceedings as well as individuals with asylum applications pending at the asylum office. The ten-year bar will apply to these individuals. In addition, anyone with an asylum application returning

59. *Id.* § 212(a)(3).

60. *Id.* § 237(a)(3), 237(2)(E)(I), (ii).

61. *Id.* § 212(h), 212(i).

62. IIRIRA § 309(f), *created by* NACARA § 203(b).

63. 16 I & N Dec. 596 (BIA 1978).

64. Int. Dec. 3280 (BIA 1994).

65. 20 I & N Dec. 880 (BIA 1994).

66. Int. Dec. 3298 (BIA 1996).

67. IIRIRA § 309(f)(1)(B) (as *amended by* NACARA § 203(b)(iii) which incorporates the term continuous physical presence).

to their home country must show a compelling reason for their return or their claim will be dismissed.

NACARA abolished the stop-time rules relating to continuous physical presence as created by IIRIRA with regards to the protected groups. These stop-time rules terminate continuous physical presence when triggered by a certain act, such as the service of a notice to appear or the commission of certain offenses.⁶⁸ Time also stops if the alien exceeds the period of time required by law to be outside of the United States. These stop-time rules were interpreted to apply to the service of orders to show cause by the INS.⁶⁹

The interim rules provide that an alien covered by the NACARA amendments is exempted from the stop-time rules and can apply for either suspension of deportation or cancellation of removal so long as all the other requirements of the Act are met. Furthermore, the new heightened standards for cancellation of removal will not be applied in these cases, and the aliens need only meet the less stringent standards of suspension of deportation in all of these cases.⁷⁰

D. *Applying for Suspension of Deportation/Cancellation of Removal under NACARA*

If an individual has been placed in deportation or removal proceedings and is eligible for NACARA benefits, he or she should request the opportunity to apply for suspension of deportation or cancellation of removal in those proceedings and the matter will be adjudicated by an Immigration Judge.⁷¹

If an applicant has been ordered deported or removed and becomes eligible for this form of relief, the applicant is entitled to file one motion to reopen to apply for NACARA benefits.⁷² NACARA requires that a time period be designated for filing these motions to reopen beginning no later than sixty days after the enactment of NACARA and extending for a period not to exceed 240 days.⁷³ The Executive Office for Immigration Review (EOIR) designated the period from January 16, 1998 through September 11, 1998 for the filing of motions to reopen by eligible aliens for NACARA.⁷⁴ The initial notice published by EOIR dated January 21, 1998,

68. INA §§ 239 (a), 212(a)(2), (4).

69. See *Matter of N-J-B*, Int. Dec. 3309 (BIA 1997).

70. Motion to Reopen; Suspension of Deportation and Cancellation of Removal, 63 Fed. Reg. 31,890-95 (June 11, 1998).

71. Questions and Answers, Nicaraguan Adjustment and Central American Relief Act, Immigration and Naturalization Service, p.6 (Apr. 1, 1998).

72. IIRIRA § 309(c)(5), amended by NACARA § 203(c).

73. *Id.* § 309(c)(5), amended by NACARA § 203(b) as further amended by § 203(g).

74. Executive Office for Immigration Review; Motion to Reopen; Suspension of Deportation and Cancellation of Removal, Notices, 63 Fed. Reg. 3154 (Jan. 21, 1998).

required that the alien file the motion to reopen and clearly state Special NACARA Motion on the motion and on any envelope containing the motion.⁷⁵

In its January notice, EOIR also required that the application for relief be attached to the motion if one had never been filed or, if an application for suspension of deportation or cancellation of removal had been filed with the Immigration Judge, a copy of said application should be attached to the motion along with the \$110.00 motion to reopen fee.⁷⁶ However, these rules have been modified, and pursuant to the June 11, 1998, EOIR interim rules on NACARA motions to reopen and applications for suspension of deportation and special cancellation of removal, the applications do not have to be attached and the \$110.00 fee is waived.⁷⁷ Aliens will have until February 8, 1999 to file the application for suspension of deportation or cancellation of removal with all supporting evidence.⁷⁸

At the time that the motion is being filed, the alien should inform the court that a completed application is forthcoming.⁷⁹ The interim rules clearly specify who is eligible to file a motion to reopen under NACARA and what is the specific requirement for these motions to reopen. Should the alien fail to file the application by February 8, 1999, the motion will be deemed abandoned and the alien will have lost his or her only opportunity to seek this form of relief before the Immigration Judge.⁸⁰ These motions to reopen should be filed with the Office of the Immigration Judge having had the last jurisdiction over the case.⁸¹ If they are not, the office receiving them will forward the same to the court having correct jurisdiction.⁸² The Service will have forty-five days from the date of service of the completed motion to respond to the motion.⁸³

75. *Id.*

76. *Id.*

77. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893.

78. *Id.*

79. *Id.* at 31,893.

80. *Id.* at 31,894. On January 14, 1999, EOIR published a News Release extending the deadlines for supplementing NACARA Motions to Reopen beyond the February 8, 1999 deadline previously set. The new deadline has not yet been set. See News Release, Dept. of Justice, Jan. 14, 1999; see also Addendum to Operating Policy and Procedures Memorandum 98-3 (June 25, 1998); Regulation Implementing Motions to Reopen for Suspension of Deportation/Cancellation of Removal under NACARA and other NACARA cases, Memorandum, EOIR (Jan. 21, 1999).

81. *Id.*

82. *EOIR Sets Procedures for NACARA aliens to File Motions to Reopen*, 75 INT. REL. 832 (June 15, 1998).

83. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893.

Although the EOIR has always had jurisdiction over suspension of deportation cases, it is understood that with regards to NACARA, its jurisdiction is not exclusive. According to the interim rule, the Attorney General has delegated authority to INS asylum officers to adjudicate certain NACARA beneficiaries for suspension of deportation and cancellation of removal.⁸⁴ Those who will be processed through the Asylum Office are aliens who have a pending asylum application with that office including all persons who submitted an ABC asylum application even if they have never been interviewed or contacted by the asylum office. These rules also provide that ABC class members who have a final order of deportation, must also file a motion to reopen and have their suspension applications reviewed by asylum officers.⁸⁵ If class members had their cases administratively closed at a prior date, no motion to reopen is required, because no final order exists in their case.⁸⁶

If ABC class members are currently in proceedings before the Immigration Judge, they may request administrative closure at the time that the motion to reopen is filed or after the motion has been granted. These cases may be closed pending the promulgation of the regulations regarding the adjudication of suspension of deportation or special cancellation of removal before the INS.⁸⁷ It is also assumed from a reading of the interim rules that qualifying applicants who registered for ABC or TPS and who have never filed applications for political asylum will have their applications for relief decided by the Asylum office as well.

NACARA beneficiaries who currently have asylum applications pending with the Asylum Unit may also apply for suspension of deportation with that office. The concern with beneficiary NACARA applications is that the present interim rules require that the principal be granted relief first before the beneficiary can file his or her application. The asylum office is not expected to begin processing these applications until some time in 1999 after the regulations have been issued. It has been recommended that practitioners file motions to reopen for these beneficiaries, try to push these applications before the beneficiaries twenty-first birthday where-ever possible.⁸⁸

84. Proposed Regulation, §§ 103(g)(3)(ii), 103.7(b)(1), 208.14, 240.58 - 240.70, 274a.12, 299, for INA § 203, as published by the Department of Justice on November 24, 1998. The public comment period closed January 24, 1999.

85. Executive Office for Immigration Review; Motion to Reopen, *supra* note 36, at 31,893; Prop. Reg. Sec. 240.67.

86. *Id.*

87. Asylum officers have been given this authority as provided in Prop. Reg. 240.62 and 240.67.

88. *Id.*

E. *Required Forms for Suspension of Deportation/Cancellation of Removal under NACARA*

To apply for NACARA suspension of deportation or special rule cancellation of removal, an application Form I-881 must be completed. This document has yet to be published in its final form. A draft has been sent to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995.⁸⁹ The same form will be used before the INS and the EOIR. It has been estimated that approximately 300,000 applicants will use this form.⁹⁰ In addition, the application for employment authorization (I-765) should also be submitted. Currently the Immigration Court is processing these cases using a Form EOIR 42-B for those in removal proceedings and EOIR 40 for those in deportation proceedings.

F. *Evidentiary Requirements for NACARA Applicants*

In order to properly document a suspension of deportation or cancellation of removal case, the alien must gather a series of documents to prove nationality, continuous physical presence, good moral character, family ties and extreme hardship. The most difficult factor to overcome is extreme hardship. It is recommended that the applicant sit down with the person who prepared the application and review his or her personal immigration history and discuss the equities he or she has. This writer refers the reader to the documentation suggestions in Part I, Subsections A and B of this article and to the BIA cases cited in this section as a starting point. The person that prepared the document will do well to study suspension of deportation case law to guide his or her client in this process.

It is highly recommended that the application packages include current country condition reports from the alien's native country. These reports go directly to the issue of extreme hardship to the applicant as well as to any family member who is a lawful permanent resident or United States citizen. One must keep in mind that not all NACARA beneficiaries may appear to be eligible candidate for suspension of deportation or special cancellation of removal at the onset. The interim rules are very specific. The applicant must establish prima facie eligibility.⁹¹ As such, good planning and organization is imperative.

G. *Other Options for NACARA Applicants*

Not all of these beneficiaries may be able to meet the requirements for a grant of suspension of deportation and special cancellation of removal.

89. Mark Silverman, et al., *NACARA'S Provision for Guatemalans and Salvadorans: An Update*, 75 INT. REL. 865, 870 (June 19, 1998).

90. *INS sends NACARA Form to OMB*, 75 INT. REL. 701 (May 18, 1998). See also Prop. Reg. Sec. 103.7 for INS application fees.

91. *Id.*

In the alternative, practitioners should not waive the possibility of a pursuing the request for political asylum in some cases. An analysis of the strength of the political asylum claim in contrast to the equities of the suspension of deportation/cancellation claims should be conducted to ensure that the best choices are made on behalf of the clients. These individuals fled their countries at a time of political turmoil. A great many of these people suffered tremendously as a result of the political strife in their countries. One must question these persons in detail to ensure that the complete history has been presented.⁹²

Furthermore, asylum has certain benefits that other forms of relief may not offer. If the applicant is granted asylum and his spouse and children have remained in their native country, the applicant can file a Form I-730 to apply for his or her family as derivative asylees. If the asylee needs public benefits, under this status, he or she may qualify for these benefits, which as an LPR they are not entitled to.⁹³

IV. CONCLUSION

NACARA was a response to the unfair immigration bill enacted last year, which threatened to uproot hundreds of thousands of people who came to this country in search of freedom. It is certainly far from perfect. It failed to treat similarly situated groups the same. The President stated as such.⁹⁴ Although not a perfect bill, it will make a dramatic difference in the lives of many and will hopefully lead to further corrections to the 1997 Immigration Act.

92. Prop. Reg. Sec. 240.64.

93. See, e.g., Silverman et al., *supra* note 889, at 871.

94. *Statement on Congressional Action on Immigration Legislation*, Monthly Compilation on Presidential Documents (Nov. 17, 1997).