DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 208, 240, 246, 274a, 299

[INS No. 1915–98; AG Order No. 2224–99]

RIN 1115–AF14

Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries

AGENCY: Immigration and Naturalization Service and Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule implements section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). It amends the Department of Justice (Department) regulations by offering certain beneficiaries of section 203 of NACARA who currently have asylum applications pending with the Immigration and Naturalization Service (Service), and their qualified dependents, the option of applying to the Service for suspension of deportation or cancellation of removal under the statutory requirements set forth in NACARA (''special rule cancellation of removal'').

Described in very general terms, both suspension of deportation and special rule cancellation of removal are forms of discretionary relief that, if granted, permit an individual subject to deportation or removal to remain in the United States as a lawful permanent resident alien. Integrating the processing of certain applications under NACARA into the Service's Asylum Program will provide an efficient process for considering the suspension of deportation and special rule cancellation of removal applications of most of the approximately 240,000 registered class members of the *American Baptist Churches* v. *Thornburgh* (*ABC*) litigation and certain other beneficiaries of NACARA who have asylum applications pending with the Service, as well as their qualified family members. The Immigration Court will retain exclusive jurisdiction over most suspension of deportation and special rule cancellation of removal applications submitted by NACARA beneficiaries who have been placed in deportation or removal proceedings.

This rule also codifies the relevant factors and standards for extreme hardship identified within existing case law, incorporates additional extreme hardship factors relevant to battered spouses and children, creates a rebuttable presumption of extreme hardship for NACARA-eligible *ABC* class members who submit completed applications, sets forth relevant eligibility criteria, creates procedures for adjudicating suspension of deportation and special rule cancellation of removal cases before the Service, and provides for the referral of certain cases to the Immigration Court.

DATES: *Effective date:* This interim rule is effective June 21, 1999.

Comment date: Written comments must be submitted on or before July 20, 1999.

ADDRESSES: Please submit written comments in triplicate to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1915–98 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: *For matters relating to the Immigration and Naturalization Service:* Joanna Ruppel, International Affairs, Department of Justice, Immigration and Naturalization Service, 425 I Street NW, ULLICO Bldg., third floor, Washington, DC 20536, telephone number (202) 305–2663. *For matters relating to the Executive Office for Immigration Review:* Chuck Adkins-Blanch, Acting General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041, telephone number (703) 305–0470.

SUPPLEMENTARY INFORMATION:

I. Background

What Is Section 203 of the Nicaraguan Adjustment and Central American Relief Act?

Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Pub. L. 105–100 (111 Stat. 2160, 2193) (as amended by the Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105–139 (111 Stat. 2644)), permits certain Guatemalans, Salvadorans, and nationals of former Soviet bloc countries to apply for suspension of deportation or cancellation of removal under special provisions set forth in that section.

How Did the Service Propose To Implement Provisions of Section 203 of NACARA?

On November 24, 1998, the Department of Justice published a proposed rule to implement certain aspects of section 203 of NACARA in the **Federal Register** at 63 FR 64895. The proposed rule would grant asylum officers jurisdiction to adjudicate certain NACARA cases, create a new NACARA application form, and outline the eligibility criteria for obtaining relief, as well as the process for submitting an application to the Service and processing procedures. The proposed rule would also codify the factors from relevant case law generally considered in evaluating extreme hardship claims. Comments were requested from the public by January 25, 1999.

In response to the proposed rule, the Department received over 400 comments from a wide range of community organizations, legal service providers, advocacy groups, members of Congress, the private bar, and individuals. The comments offered suggestions for revising and streamlining the adjudication and application process, providing alternative legal interpretations for certain eligibility issues, and advocating various policy interpretations with regard to implementation of section 203 of NACARA. The vast majority of comments, however, urged the Department to create a mandatory finding of extreme hardship for NACARA beneficiaries, particularly for those *ABC* class members who are eligible for relief under section 203 of NACARA.

Why Is the Service Issuing an Interim Rule With Requests for Comments?

The Department has reviewed all the comments submitted in response to its proposed rule carefully and, in deciding which comments to incorporate, has kept in mind the ameliorative purposes of NACARA. Many suggestions from the public have been incorporated, particularly with regard to streamlining the application form and clarifying certain aspects of the application and adjudication process. With respect to alternative legal interpretations of eligibility requirements and other substantive matters, the Department has made those changes that comport with the Immigration and Nationality Act (the Act) and NACARA.

Some of the substantive legal recommendations, however, exceed the scope of the law and could not be included in the interim rule. This is particularly true with regard to the

resolution of the extreme hardship issue. As will be explained in greater detail, the Department has determined that it would be inconsistent with both the Act and NACARA to adopt a conclusive finding of extreme hardship for all NACARA applicants, as well as for the more limited group of *ABC* class members. The Department has determined, however, that a more limited approach is most consistent with the requirement that suspension of deportation and cancellation of removal cases be adjudicated on a case-by-case basis. This rule, therefore, creates a rebuttable presumption of extreme hardship for those *ABC* class members who are eligible to apply for relief under section 203 of NACARA. The presumption will not apply to nationals from the former Soviet bloc countries or any NACARA dependents.

Because the adoption of a rebuttable presumption represents a significant shift from the proposed rule, the Department has determined that an additional comment period is needed. However, due to the substantial number of aliens eligible to apply for relief under section 203 of NACARA, the Department finds that there is good cause to avoid further delay in allowing applications by issuing this regulation as an interim rule. 5 U.S.C. 553.

How Are the Comments to the Proposed Rule Addressed in This Interim Rule?

Given the large number of comments and the variety of issues addressed, the discussion of the comments is divided into the general categories of jurisdiction, initial and substantive eligibility requirements, application procedures, adjudication procedures, and revisions to the form that will generally be used to request relief under section 203 of NACARA, Form I–881, ''Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105–100 (NACARA)).'' Within each category, the discussion contains a brief summary of relevant comments, the Department's responses, and the changes made to the rule or form.

Additionally, this interim rule at 8 CFR part 246 gives asylum office directors the same authority currently accorded district directors to rescind adjustment of status granted to an individual by an asylum officer in cases in which the individual is later found to have been ineligible for adjustment of status. This interim rule also outlines certain conditions and consequences of filing an application for NACARA relief at 8 CFR 240.63(d).

II. Discussion of Comments

Jurisdiction

Jurisdiction Over NACARA Applications

Several commenters requested that the Service be given initial jurisdiction over all applications for suspension of deportation and special rule cancellation of removal under NACARA. One comment stated that the Service should have jurisdiction over applications of individuals whose asylum applications were adjudicated under the terms of the *ABC* settlement agreement while NACARA was under legislative consideration, but before it passed, and also over individuals who have no mechanism for applying with the Service, such as those who registered for Temporary Protected Status (TPS), but never applied for asylum.

The Department will not change the jurisdictional scheme initially proposed, as it is the best way for ensuring timely resolution of NACARA applications. As explained in greater detail in the supplementary information published with the proposed rule, administrative efficiency is and has always been the Department's primary consideration in delineating jurisdiction. 63 FR 64895 (November 24, 1998). Distributing the NACARA caseload between the Executive Office for Immigration Review (EOIR) and the Service's Asylum Program increases the Department's ability to resolve cases quickly, because, in the vast majority of cases, a NACARA application will be heard by the agency that also has jurisdiction over an applicant's pending asylum application. For those persons with asylum claims currently pending before the Service, the rule permits concurrent adjudication of the asylum and NACARA applications. If an applicant is granted either asylum or NACARA relief, it will be unnecessary to refer his or her case to the Immigration Court. It would be administratively inefficient to transfer the cases of individuals currently in immigration proceedings, including *ABC* class members whose asylum applications have already been given a *de novo* adjudication by the Service, back to the Service solely for a NACARA adjudication and would delay the resolution of their cases.

The interim rule does include two exceptions to the general rule that individuals in proceedings before the Immigration Court may apply for relief under section 203 of NACARA only before the Immigration Court. The first exception covers those registered *ABC* class members whose proceedings before the Immigration Court or the Board of Immigration Appeals (Board) were administratively closed or continued, including those class members with final orders of deportation or removal who have filed and been granted NACARA motions to reopen under 8 CFR 3.43. An individual in this category is eligible to file a NACARA application with the Service if the individual is eligible for the benefits of the *ABC* settlement agreement, has not already had a *de novo* adjudication of the asylum claim by the Service pursuant to the agreement, and has not moved for and been granted a motion to recalendar proceedings before the Immigration Court or the Board to request suspension of deportation.

Under the second exception, a qualified family member of an individual who has a section 203 NACARA application pending with the Service, or who has been granted relief under that provision, may move to close the proceedings before the Immigration Court in order to apply with the Service. Administrative efficiency will likely be enhanced where family members have similar claims and there are strong policy reasons based on family unity to make this exception to the general jurisdiction rule.

The Department also declines to adopt the proposal that the Service be given jurisdiction over applications of individuals who have neither applied for asylum with the Service nor have been placed in immigration proceedings before the Immigration Court. The Department is concerned that such an expansion of the Service's jurisdiction would result in a large number of fraudulent applications being filed solely for the purposes of obtaining employment authorization, and thereby expose the Asylum Program to a recurrence of the same problems that necessitated asylum reform in 1995.

Concerns regarding fraud arise because an applicant for suspension of deportation or special rule cancellation of removal will be entitled to apply immediately for and be granted employment authorization. The determination of eligibility for employment authorization will necessarily be made by Service Center personnel based solely on a written application. However, an asylum office must accurately verify whether an individual is an *ABC* class member and registered for *ABC* benefits. Verification of *ABC* class membership and registration is a time consuming process that, because of limitations in the registration databases, often cannot be done without interviewing the individual. If the affirmative process is

not limited as set forth in the proposed rule, an individual who is not an *ABC* class member, or who is an unregistered class member, could easily submit a fraudulent application for relief under section 203 of NACARA and be granted employment authorization.

Restricting the availability of the affirmative NACARA process to certain categories of NACARA beneficiaries who have pending asylum applications with the Service and those who have a qualified relative whose asylum application has been adjudicated by the Service or is pending with the Service ensures that the Service has an existing record of the applicant or the applicant's qualified relative before he or she is able to apply for affirmative relief under section 203 of NACARA. This restriction minimizes the Asylum Program's vulnerability to fraud and avoids diverting resources from the adjudication process in order to verify the status of each new applicant claiming to be a registered *ABC* class member. This allows the Service to focus on resolving the status of the approximately 240,000 registered *ABC* class members who have asylum applications pending with the Service and their qualified relatives.

Process for Placing NACARA Beneficiaries Ineligible to Apply With the Service Into Removal Proceedings

One commenter requested that the regulations provide a mechanism for those who are not eligible to apply with the Service to receive charging documents placing them in removal proceedings where they may apply for special rule cancellation of removal before the Immigration Court.

The Department recognizes that registered *ABC* class members who never applied for asylum and who have not been placed in immigration proceedings are unable to apply for special rule cancellation of removal unless the Service places them in removal proceedings by issuing charging documents. An individual may request that the district office with jurisdiction place him or her in proceedings, but the Service retains prosecutorial discretion to determine the priority status of such a request. The Department is considering the possibility of having the asylum offices issue charging documents to registered *ABC* class members who request to be placed into proceedings and who provide sufficient information for the Service to issue the charges. The preparation and service of charging documents is labor intensive and would require diverting resources from the adjudication of applications filed by the large number of individuals who have asylum applications pending with the Service. Therefore, an asylum office's ability to issue charging documents upon request necessarily depends on the resources of the asylum office, the number of applications for suspension of deportation or special rule cancellation of removal initially filed by NACARA beneficiaries, the number of affirmative asylum applications the asylum office must adjudicate within the time limits imposed by statute, and other program requirements, such as the number of credible fear and reasonable fear interviews requested of the office. The Department will be in a better position to determine the feasibility of issuing charging documents upon request after the affirmative program has begun and allocation of resources based on the number of NACARA applications filed each month can be evaluated more accurately.

Jurisdiction—''Still Pending Adjudication by the Service''

Several commenters requested that the regulations clarify what is meant by ''still pending adjudication by the Service'' for purposes of determining who is eligible to apply with the Service.

Section 240.62(a) of the proposed rule provides for Service jurisdiction over certain applicants whose asylum applications are ''pending adjudication by the Service'' at the time the applicants apply for relief under NACARA. For the sake of clarity, the interim rule contains a definition of this phrase at § 240.60. An asylum application will be considered ''pending adjudication by the Service,'' if the Service has not served the applicant with a final decision or referred the application to the Immigration Court. This means that, unless the Service has served the applicant with a final decision to grant asylum or deny asylum, or has served the applicant with documents referring his or her application to the Immigration Court, the asylum application will be considered pending with the Service, even if a final decision has been made by the Service, but not yet served on the applicant.

Jurisdiction—Scope of ABC Class Members' Eligibility to File With the Service

Several commenters requested that the regulations clarify the statement ''otherwise met the asylum filing deadline pursuant to the *ABC* settlement agreement,'' contained in § 240.62(a). The commenters recommended that the phrase be interpreted to mean that certain *ABC* class members can still apply for asylum under the settlement agreement if the Service failed to serve them properly with required notices.

Paragraphs (a)(1) and (2) of § 240.62 give the Service jurisdiction over applications for suspension of deportation or special rule cancellation of removal filed by registered *ABC* class members who, in the Service's determination, are eligible for benefits of the settlement agreement and whose asylum applications are still pending adjudication by the Service. To be eligible for the benefits of the settlement agreement, a registered class member must have filed for asylum by a specified date. Consistent with the settlement agreement, the Service has allowed a very small number of Salvadoran class members who registered for *ABC* benefits, but missed the requisite asylum filing date, to apply for asylum under the terms of the settlement agreement. Such applications are permissible where the Service determines that it failed to send those individuals a copy of Notice 5, as required by the settlement agreement. Under the settlement agreement, the Service was obligated to send Notice 5, which informed class members that they had to apply for asylum on or before January 31, 1996, in order to retain benefits of the settlement agreement, to Salvadoran class members who had applied for TPS. To date, the Service has not excepted any other class members from the asylum filing deadlines for any other reason. However, the Department included the broad language in § 240.62(a)(1) and (2), ''or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement,'' to enable the Service to maintain jurisdiction over a class member who demonstrates that he or she did not meet the requisite filing deadline because of some fault of the Service, such as failure to serve certain required notices. The burden is on the class member, however, to establish that the Service was at fault.

The Department declines to adopt the definition recommended in the comments because it would not afford the necessary flexibility that may benefit the *ABC* class. The Department takes this action with the understanding that, pursuant to current practice and as documented in the *ABC* Procedures Manual that is used by field personnel in implementing the *ABC* settlement agreement, the Service will extend the asylum filing deadline if it determines that a Salvadoran class member who applied for temporary protected status was not properly sent Notice 5.

Initial Eligibility

Advance Parole and Eligibility to Apply for NACARA

Several commenters disagreed with the Department's determination that NACARA beneficiaries in deportation proceedings who had previously left the country and returned under a grant of advance parole are ineligible for NACARA relief. They argued that, while such persons may be ineligible for suspension of deportation, they should be eligible to apply for special rule cancellation of removal by virtue of their status of inadmissibility.

For aliens present in the United States, a grant of advance parole under section 212(d)(5) of the Act permits the individual to leave the United States temporarily with advance permission to return to the United States. Upon expiration of parole, however, the statute requires that an applicant must be ''dealt with in the same manner as that of any other applicant for admission to the United States.'' Consequently, an applicant who was previously considered deportable would be considered inadmissible for purposes of determining eligibility for any form of relief. As a practical matter, very few individuals in deportation proceedings were ever granted advance parole, but those who did receive permission to depart would have been subject, upon return, to termination of the deportation proceedings along with receipt of new charging documents placing them in exclusion proceedings. A very small number of *ABC* class members whose deportation proceedings were administratively closed pursuant to the settlement agreement received advance parole. Upon their return, they were then technically inadmissible to the United States rather than deportable. In the normal course of events, those persons denied asylum at their *de novo ABC* adjudication would have been placed in exclusion proceedings once their parole was terminated. Because *ABC* asylum adjudications did not begin until 1997 and were subsequently suspended in 1998, as a result of NACARA, many, if not all of these cases have not yet been adjudicated.

For purposes of a NACARA adjudication before the Service, this small group of *ABC* class members might be ineligible for suspension of deportation based solely on their change in status from deportable to inadmissible, if their deportation proceedings are still pending when their NACARA applications are adjudicated. Though temporary absences from the United States ordinarily would not automatically terminate or nullify previously commenced deportation proceedings, they likely would in this circumstance because these individuals became applicants for admission upon their return to the United States under advance parole, and the deportation charges contained in the show cause orders previously issued in their cases are no longer applicable. *See Matter of Brown,* 18 I & N Dec. 324 (BIA 1982). In these narrow set of circumstances, it is appropriate to consider the deportation proceedings against an individual who departed and returned to the United States under a grant of advance parole while those deportation proceedings were pending as having terminated as of the date of the person's departure from the United States. If the Service determines that such an applicant is eligible for relief under section 203 of NACARA, the applicant will be granted special rule cancellation of removal. If the applicant is not granted NACARA relief and is not granted asylum, the Service will issue charging documents placing the person into removal proceedings.

To the best of the Department's knowledge, only *ABC* class members will be affected by this provision. However, the rule permits asylum officers to follow the same procedure for any other applicant within their jurisdiction who received advance parole while in deportation proceedings.

Eligibility To Apply for NACARA in Exclusion Proceedings

Another issue raised by the commenters is whether section 203 of NACARA and the implementing regulations apply to NACARA beneficiaries who were in exclusion proceedings as of April 1, 1997, including those *ABC* class members who were in exclusion proceedings and had those proceedings administratively closed or continued by EOIR to allow the class members to pursue *de novo* adjudications of their asylum claims by the Service, as provided by the *ABC* settlement agreement. These commenters argued that Congress indicated its clear intent to make NACARA relief available to persons in exclusion proceedings, because the statute provides that NACARA's special rules apply ''regardless of whether the alien is in exclusion or deportation proceedings.* * *'' IIRIRA section 309(c)(5)(C)(i), as amended by section 203(a)(1) of NACARA. Several commenters suggested that the intent of Congress can be carried out by placing individuals currently in exclusion proceedings into removal proceedings by: (1) electing to proceed under new removal procedures in those cases where an evidentiary hearing in the exclusion process had not commenced prior to April 1, 1997, pursuant to section 309(c)(2) of IIRIRA; or (2) terminating exclusion proceedings where there has not been a final administrative decision and reinitiating them as removal proceedings, as provided for under section 309(c)(3) of IIRIRA.

Courts have consistently stated that suspension of deportation is unavailable to persons in exclusion proceedings, *see Matter of Torres,* 19 I & N 371, 372–73 (BIA 1986); *Landon* v. *Plasencia,* 459 U.S. 21, 26–27, 103 S.Ct. 321, 325–26, 74 L.Ed.2d 21 (1982) (''[T]he alien who loses his right to reside in the United States in a deportation hearing has a number of substantive rights not available to the alien who is denied admission in an exclusion proceeding'[including the right to] seek suspension of deportation.''), even if the person has been present in the United States for an extended period of time under a grant of parole. *Yuen Sang Low* v. *Attorney General of U.S.,* 479 F.2d 820, 822 (9th Cir.), *cert. denied,* 414 U.S. 1039 (1973). This principle has recently withstood statutory and constitutional challenges, despite the recognition that IIRIRA eliminated the distinction between deportation and exclusion for proceedings initiated on or after April 1, 1997, by replacing them with a single removal process. *See Patel* v. *McElroy,* 143 F.3d 56 (2nd Cir. 1998) (statutory challenge); *Skelly* v. *INS,* 168 F.3d 88 (2nd Cir. 1999) (constitutional challenge based on equal protection principles).

The general rule laid out in IIRIRA for the transition from exclusion and deportation procedures to a unified removal process is that, for ''an alien who is in exclusion or deportation proceedings as of [April 1, 1997],'' the amendments to the procedures for removing individuals from the United States instituted by IIRIRA ''shall not apply,'' and exclusion and deportation proceedings ''shall continue to be conducted without regard to such amendments.'' IIRIRA section 309(c)(1). The IIRIRA transitional rules dealing with suspension of deportation, as amended by section 203 of NACARA, are directed solely to outlining the circumstances under which the new cancellation of removal rules regarding continuous residence and physical presence, found in section 240A(d)(1) and (2) of the Act, apply to individuals who were placed in exclusion or deportation proceedings prior to April 1, 1997.

Under the transitional rules for suspension of deportation cases, section 309(c)(5)(A) of IIRIRA, as amended by NACARA, states that the rules regarding continuous residence and physical presence generally apply to orders to show cause regardless of when the orders to show cause are issued, thus making these rules applicable to requests for suspension of deportation. The first exception to this rule, located at section 309(c)(5)(B) of IIRIRA, as amended by NACARA, provides that the new continuous residence and physical presence rules found at section 240A(d)(1) and (2) of the Act will not apply to an order to show cause issued prior to April 1, 1997, when the Attorney General decides to terminate a pending exclusion or deportation proceeding under section 309(c)(3) of IIRIRA and reinitiate the proceeding under removal provisions. The exception described in section 309(c)(5)(C)(i) of IIRIRA, as amended by NACARA, states that these new rules regarding continuous residence and physical presence will not apply to NACARA beneficiaries who request suspension of deportation or cancellation of removal. While the first exception simply prevents the application of the new continuous residence and physical presence rules to an order to show cause in one particular situation, the second exception exempts NACARA beneficiaries from the continuous residence and physical presence rules whenever they file for suspension of deportation under the pre-IIRIRA section 244 of the Act, or for regular cancellation of removal under section 240A of the Act (additional rules establishing eligibility for NACARA special rule cancellation of removal are covered separately in section 309(f) of IIRIRA, as amended by NACARA), ''regardless of whether the alien is in exclusion or deportation proceedings before [April 1, 1997].'' IIRIRA section 309(c)(5)(C)(i), as amended by NACARA.

Contrary to showing a congressional intent that NACARA relief be made available to persons in exclusion proceedings, the phrase quoted above and cited in several comments simply indicates that Congress did not want the new continuous residence and physical presence rules to apply to NACARA beneficiaries who are eligible to apply for suspension of deportation or cancellation of removal no matter what charging documents, if any, may have been issued to them prior to April 1, 1997. This language makes clear that the initiation of exclusion proceedings against NACARA beneficiaries prior to April 1, 1997, does not result in the application of the new continuous residence and physical presence rules to their cases, acknowledging the possibility that such individuals may have their exclusion proceedings changed into removal proceedings under the transitional rules covered in section 309(c)(2) and (3) of IIRIRA.

None of these transitional rules dealing with suspension of deportation override the general transition rule that subjects a person placed into exclusion proceedings prior to April 1, 1997, to the rules governing exclusion that were in place before IIRIRA was enacted. IIRIRA section 309(c)(1). Included among those rules is the long-standing principle that persons in exclusion proceedings are ineligible to apply for suspension of deportation. As noted by certain comments, the IIRIRA transitional rules provide a way to allow such individuals to apply for special rule cancellation of removal under NACARA. This could be done by applying removal procedures to those cases in which an evidentiary hearing has not commenced as of April 1, 1997, as allowed under section 309(c)(2) of IIRIRA, or by terminating the exclusion proceedings and reinitiating proceedings under section 240 of the Act, as provided for under section 309(c)(3) of IIRIRA. For purposes of this interim rule, the Department declines to pursue these options at this time, but invites additional comments on this point.

Effect of ''Apprehended at Time of Entry'' Limit on Eligibility

Several commenters requested that the regulations define the term ''apprehended at time of entry'' to promote consistency in interpretation. The commenters also proposed the following definition: ''The phrase ''apprehended at time of entry'' means a person who was arrested at a United States port-of-entry between December 19, 1990, the preliminary approval date of the settlement agreement, and January 31, 1991, the date the court approved the settlement agreement.''

The interim rule will not be amended to include this definition. Section 203 of NACARA provides that a registered *ABC* class member who ''was not apprehended after December 19, 1990, at the time of entry,'' may apply for suspension of deportation or special rule cancellation of removal under the provisions enacted by NACARA. The language ''apprehended * * * at time of entry'' was derived from paragraph 2 of the *ABC* settlement agreement, which states, ''Class members apprehended at the time of entry after the date of preliminary approval of this agreement shall not be eligible for the benefits hereunder.'' *See American Baptist Churches* v. *Thornburgh*, 760 F. Supp. 796, 800 (N.D. Cal. 1991). The date of preliminary approval of the settlement agreement was December 19, 1990. There is no provision in either the settlement agreement or section 203 of NACARA limiting this provision to those registered class members apprehended at time of entry between December 19, 1990, and January 31, 1991, nor is there any provision that excludes from the applicability of this provision registered class members apprehended after January 31, 1991. The Service consistently has implemented the plain meaning of the language in the settlement agreement in denying *ABC* benefits to class members apprehended at the time of entry after December 19, 1990. There is no indication that Congress intended to redefine the exclusionary ground included in the settlement agreement or to limit the corresponding statutory provision only to registered class members apprehended at the time of entry prior to January 31, 1991. Therefore, the Department does not believe that the interpretation suggested in the comments is permitted by NACARA.

The Department has carefully considered the value of including a definition of ''apprehended at time of entry'' within the rule, but does not believe that it is appropriate to do so. The Service has issued and continues to provide policy guidance to its officers explaining that a class member who has been apprehended after the class member has effected an entry (consistent with the former ''entry doctrine'') cannot be considered to have been apprehended at the time of entry. Deriving guidance from the definition of ''entry'' under the Act, as it existed prior to April 1, 1997, and as developed by case law, the Service has instructed officers that the determination of whether an entry has been effected involves consideration of the following three factors: (1) whether the class member has crossed into the territorial limits of the United States; (2) whether the class member has been inspected or admitted by an immigration officer, or has actually and intentionally evaded inspection at the nearest inspection point; and (3) whether the class member crossed into the territorial limits of the United States free from official restraint, including free from surveillance. Because these factors necessarily are dependent on the individualized factors of each case, the Department has determined that it is more appropriate

to continue to provide internal guidance on the factors to consider in evaluating whether an entry has been effected than to attempt to codify a definition that would cover the wide variety of facts that may be present in an individual case.

Guatemalans and Salvadorans Filing for Asylum by April 1, 1990

Several commenters suggested that the proposed rule reads too narrowly the eligibility requirement contained at section 309(c)(5)(C)(i)(II) of IIRIRA, as amended by NACARA. This sections permits Salvadorans and Guatemalans who ''filed an application for asylum with the Immigration and Naturalization Service'' prior to April 1, 1990, to apply for relief under NACARA. Section 240.61(a)(2) of the proposed rule would limit eligibility to those persons who filed an application for asylum directly with the Service. The commenters note that the proposed rule fails to account for those persons who filed for asylum by April 1, 1990, before the Immigration Court. The comments argue that the critical factor in section 309(c)(5)(C)(i)(II) of the statute relates to asylum filing date, rather than the forum of filing. The comments further note that any application filed with the Immigration Court was necessarily served on the Service. They argue that a restrictive reading of the statute unnecessarily limits eligibility, and that filing for purposes of this section should be met whenever an applicant filed for asylum with the Department of Justice.

The Department agrees that section 309(c)(5)(C)(i)(II) of IIRIRA is subject to different interpretations. In drafting the proposed rule, the Department contrasted the wording of this section with that of section 309(c)(5)(C)(i)(V) of IIRIRA, as amended by NACARA, which permits certain nationals of former Soviet bloc countries to apply for relief under NACARA if they ''filed for asylum on or before December 31, 1991.'' The proposed rule reflected the Department's initial interpretation that subclauses (II) and (V) should be read together, such that subclause (II) should be read to limit eligibility to those who filed an affirmative asylum application with the Service, while an individual could be eligible for relief under subclause (V) as long as an asylum application was filed before either the Service or before the Immigration Court.

Although this interpretation is consistent with the literal wording of the statute, the Department recognizes that, in determining eligibility to apply for suspension of deportation or special rule cancellation of removal under NACARA, ''filed'' could be read more broadly to mean either submitted to or served on the Service. This interpretation is supported by several factors. First, it is more appropriate to track subclauses (I) and (II) rather than subclauses (II) and (V). Section 309(c)(5)(C)(i) of IIRIRA contains two provisions specifically relating to Salvadorans and Guatemalans. Subclause (I) permits Salvadorans and Guatemalans who entered the United States prior to September 19, 1990, and October 1, 1990, respectively, to file for NACARA relief if they registered for benefits under the *ABC* agreement by the dates specified in the agreement. Subclause (II) relates to Salvadorans and Guatemalans who filed for asylum by April 1, 1990, regardless of whether they also registered for *ABC* benefits. When subclause (I) and (II) are read together, the application of the statute creates inconsistent results unless subclause (II) is interpreted to cover both Service and EOIR asylum filings. For instance, a Salvadoran placed in immigration proceedings who filed an application for asylum with the Immigration Court by April 1, 1990 is, by definition, a member of the *ABC* class because he or she entered the United States prior to September 19, 1990. If he or she registered for *ABC* benefits, he or she would be eligible to apply for relief under subclause (I), even though he or she did not initially file the asylum application with the Service. Given that subclause (II) essentially concerns *ABC* class members who failed to register for *ABC* benefits, it is inconsistent with the ameliorative purposes of NACARA to limit eligibility solely to those persons who filed directly with the Service.

Second, NACARA makes use of either *ABC* registration deadlines or asylum filing deadlines to identify eligible aliens. A grant of asylum confers the same benefits regardless of whether the grant is conferred by an asylum officer or an Immigration Court. It is the act of filing for asylum or registering for *ABC* benefits, rather than the forum, that distinguishes subclause (II) applicants from those Salvadorans and Guatemalans in the United States who never applied for asylum or registered for *ABC* benefits.

Consequently, 8 CFR 240.61(a)(2) has been amended to include a Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application directly with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service.

Determining When an Application for Asylum is Filed

Though not included in the proposed rule, the Department has included in § 240.60 of this interim rule a definition for determining when a person is considered to have ''filed an application for asylum.'' This definition is necessary in order to determine eligibility to apply for relief under section 203 of NACARA. The definition will also be used to determine the date a dependent included in an asylum application is considered to have ''filed'' for asylum. Under this definition, any dependent spouse or child who was present in the United States and included in the principal's asylum application at the time it was filed will be considered to have filed an application for asylum on the date the principal's asylum application was filed. Any dependent who is added to the principal's asylum application after it was initially filed will be considered to have filed an application for asylum on the date the dependent was added to principal's asylum application.

Eligibility—NACARA Dependents

One commenter requested that the regulations specify that children and spouses can file for relief under NACARA after they have attained 7 years of continuous physical presence in the United States, even if they had not been continuously present in the United States for 7 years at the time the statute was enacted, or have not reached 7 years by the time the rule implementing section 203 of NACARA becomes effective.

The Department agrees with this interpretation. Both section 203 of NACARA and the interim rule allow children and spouses to apply for relief under NACARA, even if they had not been continuously physically present in the United States for 7 years at the time NACARA was enacted or implemented. To meet the physical presence requirement, the spouse or child must have 7 years of continuous physical presence in the United States (10 years, if certain inadmissibility or deportability grounds apply) as of the date the application for relief was filed. Unlike section 202 of NACARA, there is no deadline for applying for relief under section 203 of NACARA.

Eligibility of Dependents Who Have Turned 21 Years of Age Since NACARA Was Enacted

Several commenters expressed concern about children who have lost or will lose eligibility to apply for relief pursuant to section 309(c)(5)(C)(i)(III) of

IIRIRA, as amended by section 203(a) of NACARA, because they turned 21 years of age between November 19, 1997, the date NACARA was enacted, and the effective date of this regulation. Several commenters suggested that the regulations ''grandfather'' in all unmarried sons and unmarried daughters who have turned 21 years of age since November 19, 1997. The commenters compare the current situation to that faced by juveniles eligible for special immigration status under section 153 of the Immigration Act of 1990 (IMMACT 90), Pub. L. 101–649 (104 Stat. 4978), who aged out prior to the publication of regulations implementing that section of the law. Under the rule, juveniles who met the statutory requirements on the date the statute was enacted, but who had aged out prior to implementation of regulations, were permitted to apply for and receive special immigrant status.

Comparison to the rule implementing section 153 of IMMACT 90 is not persuasive, as the statutes and circumstances in question are not analogous. Regulations implementing section 153 of the Immigration Act of 1990, governing special eligibility provisions for juveniles to adjust to lawful permanent resident status, ''grandfathered'' in certain juveniles who met eligibility requirements on November 29, 1990. This was done because IMMACT 90 did not originally exempt special immigrant juvenile aliens from the normal statutory requirements for adjustment of status. Recognizing that most special immigrant juvenile alien adjustment applicants were statutorily ineligible for adjustment of status, for reasons unrelated to their age, Service offices were directed to accept and hold in abeyance applications filed by juveniles who appeared to meet the statutory requirements for special immigrant juvenile classification, but who may have been precluded based on statutory requirements for adjustment of status. This policy was adopted because the Service had put forward technical amendments that would exempt these applicants from many of the ineligibility grounds contained in sections 245 (a) and (c) of the Act. The technical amendments to the Act were enacted at the end of 1991. The supplementary information published as a final rule in the **Federal Register** on August 12, 1993, at 58 FR 42843, explained that the rule would apply the exemptions contained in the technical amendments to aliens who could establish that they otherwise met the eligibility criteria on November 29, 1990, ''to ensure that special immigrant juveniles are not precluded from obtaining lawful permanent residence because of the passage of time while the Service was awaiting Congressional action to amend the adjustment of status provisions * * *.''

Unlike the special immigrant cases, NACARA predicates eligibility for dependents of a NACARA principal applicant on a grant of suspension of deportation or cancellation of removal to the principal applicant. The Department may not extend eligibility to qualified individuals who were 21 years of age or older on the date of enactment of NACARA, or prior to promulgation of regulations implementing the affirmative application process because it exceeds the scope of eligibility permitted by the statute. In section 309(c)(5)(C)(i)(IV)(bb) of IIRIRA, as amended by NACARA, Congress explicitly linked the age of the unmarried son or daughter to the date the parent is granted suspension of deportation or cancellation of removal, not to the date the unmarried son or daughter's application is adjudicated or any other date.

In contrast to individuals covered by section 153 of IMMACT 90, nothing in NACARA precludes qualified children of NACARA beneficiaries from applying for relief once the parent or spouse has been granted suspension of deportation or special rule cancellation of removal. Any NACARA beneficiary who has a NACARA-eligible dependent nearing the age of 21 years old, and who has had an asylum application pending with the Service, has been afforded the opportunity to request an expedited adjudication of the asylum application. In such a case, if the asylum application were not granted, the applicant would be placed in removal proceedings where he or she could apply for relief under section 203 of NACARA with the Immigration Court. Alternatively, the parent could request that his or her pending asylum application be withdrawn in order to apply with the Immigration Court for both asylum and relief under section 203 of NACARA. In such cases, if the dependent was listed on the parent's asylum application and was included in the request for asylum, he or she would also be placed in proceedings and could file a NACARA application with the Immigration Court. The Service has outlined these options to the public in previous section 203 of NACARA information materials issued through the Service's Office of Public Affairs. (''Questions and Answers about NACARA and Cancellation of Removal,'' February 10, 1998; ''Nicaraguan Adjustment and Central American Relief Act of 1997,'' April 1, 1998; and ''Section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997,'' November 24, 1998.)

Initial Eligibility and ABC Class Members

One commenter stated that registered *ABC* class members who did not apply for asylum by the dates required to retain eligibility for benefits of the *ABC* settlement agreement should not be allowed to apply for relief under NACARA. The commenter argued that NACARA was intended to provide *ABC* class members with the opportunity to apply for suspension of deportation under the rules that existed before IIRIRA was enacted, and that if an *ABC* class member did not comply with the requirements of the *ABC* settlement agreement, the class member should not be allowed to apply for relief under NACARA.

Section 309(c)(5)(C)(i)(I) of IIRIRA, as amended by section 203(a) of NACARA, provides that any registered *ABC* class member who has not been apprehended, after December 19, 1990, at time of entry or convicted of an aggravated felony may apply for suspension of deportation or special rule cancellation of removal under the provisions enacted by NACARA. In contrast to sections 309(c)(5)(C)(i)(II) and (V) of IIRIRA, as amended by NACARA, there is no statutory language in section 309(c)(5)(C)(i)(I) of IIRIRA connecting eligibility to apply for relief under NACARA to the filing of an asylum application. Section 309(c)(5)(C)(i)(I) of IIRIRA contains no requirement that the registered class member have applied for asylum on any particular date, or ever have applied for asylum, but instead predicates eligibility to apply solely on nationality and entry date (which correspond to *ABC* class membership) and registration for *ABC* benefits. Therefore, the Department believes it would be improper to include in the regulations a substantive restriction on eligibility that is not reflected in the statute.

Substantive Eligibility

Eligibility-Continuous Physical Presence

Several commenters suggested revisions to § 240.64, regarding the calculation of continuous physical presence. With respect to § 240.64(b)(1), concerning continuous physical presence for suspension of deportation cases, the commenters suggested modifying the ''brief, casual, and innocent'' standard by defining single absences not exceeding 90 days or

aggregate absences not exceeding 180 days to be considered ''brief'' in order to parallel the standard used in cancellation of removal cases. The commenters further proposed that absences of greater duration should be evaluated on a case-by-case basis, and that the applicant should still be required to establish that any departure was casual or innocent.

With respect to § 240.64(b)(2), relating to special rule cancellation of removal, several commenters objected to the requirement that an applicant must establish that single absences of 90 days or less were brief, casual, and innocent. These commenters argued that such a requirement was inconsistent with the Act. Similarly, these commenters objected to the language contained in § 240.64(b)(3), which states that a departure incident to a final order of deportation or removal, or an order of voluntary departure, or with the intent to commit a crime terminates continuous physical presence. The commenters suggested amending the provision for special rule cancellation of removal to delete the mandatory finding and substitute language providing that such absences may be the basis for finding that continuous physical presence has been terminated.

The Department will adopt certain suggestions regarding the definition of a ''brief'' absence from the United States. As proposed, § 240.64(b)(1) reiterates former section 244(b)(2) of the Act, as in effect prior to IIRIRA, which establishes that for purposes of continuous physical presence, absences from the United States will be evaluated based on a determination of whether the absence was brief, casual, and innocent. Initially, the Department chose to adopt this language without further clarification in the rule, based on the body of case law interpreting this provision, as well as the greater flexibility inherent in the phrase ''brief, casual, and innocent.'' Because the concept of ''brief, casual, and innocent,'' however, goes to the nature of a departure, it is consistent with section 244(d)(2) of the Act, as in effect prior to IIRIRA, to provide some guidance within the rule regarding one or more of these factors. Given the use of the 90/180-day rule within the context of both cancellation of removal and special rule cancellation of removal, it is reasonable to adopt these timeframes for purposes of suspension of deportation under NACARA. To assist adjudicators and to ensure consistent determinations regarding the length of a departure, the Department will revise the rule to define a ''brief'' absence as one of 90 days or less or an aggregate of 180 days or less. Absences of greater duration will still be considered on a case-by-case basis in suspension cases in order to comply with the broader language of ''brief, casual, and innocent'' contained in the statute. All absences will be evaluated, however, to determine whether or not they were casual and innocent.

The Department will also amend § 240.64(b)(2) of the proposed rule relating to special rule cancellation of removal to reflect the definition of ''brief'' adopted in § 240.64(b)(1). It is not appropriate, however, to adopt the remaining suggestions relating to special rule cancellation of removal. The commenters suggest that it is contrary to the statute to disqualify a special rule cancellation of removal applicant based on the nature of his or her absences. Neither NACARA nor the Act, as amended by IIRIRA, precludes such an evaluation, and when the 90/180-day rule is read within the context of immigration reform under IIRIRA, it is apparent that Congress intended certain kinds of departures, such as those made in furtherance of criminal offenses, to terminate continuous physical presence. Similarly, through reinstatement under section 241(a)(5) of the Act, Congress severely limited the opportunity to seek relief for aliens who illegally reenter the United States after previously being removed, or departing voluntarily under final orders.

The interim rule resolves the apparent inconsistency by clarifying the effect of certain absences of 90 days or less in a manner consistent with suspension of deportation. Specifically, the second sentence of § 240.64(b)(2) retains the analytical framework of the brief, casual, and innocent standard to account for those situations in which a relatively brief absence nonetheless meaningfully interrupts continuous physical presence. The burden of proof remains on the applicant to establish the ''casual and innocent'' nature of such departures in order to conform with the burden of proof required under suspension of deportation. While § 240.64(b)(2) attempts to account for departures generally, § 240.64(b)(3) identifies specific departures that have long been considered to break continuous physical presence in the context of suspension of deportation adjudications. It is, therefore, both reasonable and necessary to place the same restrictions on special rule cancellation applicants.

Eligibility-Statutory Bars

Several commenters asserted that the regulations should not subject NACARA beneficiaries to bars to eligibility for suspension of deportation or special rule cancellation of removal, such as section 242B(e) of the Act, as in effect prior to April 1, 1997, and current section 240(b)(7) of the Act. The commenters maintain that Congress intended to waive substantive bars relating to eligibility. Citing section 203(c) of NACARA, which allows beneficiaries to file a motion to reopen ''[n]otwithstanding any limitation imposed by law,'' the commenters argue that the plain language of the statute indicates that the goal of section 203 of NACARA was to waive all limitations on relief. The commenters note that Congress excepted from this provision limitations premised on an alien's conviction of an aggravated felony. The commenters argue that, because there is no provision of law that bars an individual convicted of an aggravated felony from filing a motion to reopen, Congress must have intended this provision to apply to all other limitations to relief, not just to limitations on motions to reopen.

The regulatory requirements reflecting the statutory bars will remain unchanged. The Department's analysis of the statutory bars has been fully set out in both the supplemental information in the proposed rule, at 63 FR 64895, and in the supplemental information in the interim rule concerning NACARA motions to reopen, at 63 FR 31890. The parenthetical relating to aggravated felonies contained in section 203(c) of NACARA does not overcome the definitive statutory language indicating that the paragraph is directed at statutory limitations on motions to reopen. The parenthetical is more properly read as a reiteration of the basic eligibility requirement rather than a rejection of all other substantive eligibility requirements. This parenthetical in no way exempts NACARA beneficiaries from the statutory bars to suspension of deportation or cancellation of removal.

Eligibility-Battered Spouses and Children

A significant number of commenters requested that the Department address the special circumstances of battered spouses and children who are eligible for suspension of deportation under section 244(a)(3) of the Act, prior to IIRIRA, or cancellation of removal under section 240A(b)(2) of the Act. Those provisions permit the battered spouse and child(ren) of a United States citizen or lawful permanent resident spouse or parent to qualify for suspension of deportation or cancellation of removal by showing 3, rather than 7 years of continuous physical presence, good

moral character, and extreme hardship to the alien, the alien's child, or in the case of an alien who is a child, to the child's parent. Specifically, the commenters asked that the special criteria used to evaluate extreme hardship in adjustment of status self-petitions submitted by battered spouses and children should also be made explicitly applicable to those individuals seeking relief through suspension of deportation or cancellation of removal. The commenters noted that the Violence Against Women Act (VAWA), a component of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322 (108 Stat. 1902–1955), created provisions to aid battered immigrants whose ability to remain permanently in the United States may be threatened by abusive spouses or parents.

In the context of self-petitioning, provided for in sections 204(a)(1)(A)(iii) and (iv) and 204(a)(1)(B)(ii) and (iii) of the Act, the Service has issued guidance instructing adjudicators to consider certain factors when evaluating a claim of extreme hardship based on domestic abuse. These factors are:

(1) The nature and extent of the physical or psychological consequences of abuse;

(2) The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);

(3) The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);

(4) The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health, or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;

(5) The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and

(6) The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's child(ren) from future abuse.

The commenters requested inclusion of these factors in the regulation in order to ensure consistent application of these considerations, whether the applicant seeks relief through the self-petitioning process, under NACARA, or in the course of non-NACARA immigration proceedings. Many commenters expressed concern that omission of the factors would suggest that domestic violence issues were irrelevant in the context of suspension or cancellation adjudications. The commenters also noted that many applicants who had experienced domestic violence would be reluctant to raise such issues on their own, and that including these factors would assist attorneys and adjudicators in eliciting information, and would help applicants to understand that fears of domestic abuse or other repercussions were legitimate issues for the adjudicator to consider.

The commenters correctly note that the suspension and cancellation provisions pertaining to domestic abuse are part of a broader series of initiatives to protect battered spouses and children within the immigration laws. Most notably, sections 204(a)(1)(A) and (B) of the Act, as amended, permit victims of domestic violence to self-petition for adjustment of status so that their ability to reside permanently in the United States is not conditioned on submission of a petition on their behalf by the abusive spouse or parent. The criteria for adjustment of status under this provision is similar to that required in the suspension or cancellation context, except that the spouse or child must be able to establish 3 years of residence in the United States. To assist adjudicators in evaluating extreme hardship to these self-petitioners, the Service has issued guidance regarding the special nature of domestic abuse cases and the kind of hardship that may be present. *See* Supplementary Information to the interim rule, published on March 26, 1996, at 61 FR 13061, ''Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children;'' Memorandum for Terrance M. O'Reilly, Director, Administrative Appeals Office, from Paul Virtue, Office of General Counsel, '' 'Extreme Hardship' and Documentary Requirements Involving Battered Spouses and Children,'' (October 16, 1998), reprinted at 76 Interpreter Releases 162 (January 25, 1999).

Nothing in the proposed rule prohibits an applicant from raising the VAWA factors in support of a suspension of deportation or cancellation of removal application. The Department agrees, however, that the factors should be included in the interim rule to avoid confusion. The addition of these factors also affirms the Department's commitment to aiding victims of domestic violence and will assist adjudicators, attorneys, and applicants in eliciting and developing relevant facts.

Consequently, new § 240.58(c) lists the VAWA factors and also clearly states that these factors are relevant in any extreme hardship determination in the context of a request for suspension of deportation, whether or not it is within the context of section 244(a)(3) of the Act, as in effect prior to IIRIRA. Sections 240.64(c) and 240.20(c) of the interim rule will also reflect that domestic violence factors are relevant to the extreme hardship determination with regards to requests for special rule cancellation of removal and cancellation of removal under section 240A(b)(2) of the Act, respectively.

Rebuttable Presumption of Extreme Hardship for Certain NACARA Beneficiaries

Virtually all public commenters contained a request that the Department extend some form of a presumption of extreme hardship to principal NACARA applicants, including nationals of the former Soviet bloc. In particular, the majority of commenters asked the Department to extend a presumption to those Salvadorans and Guatemalans who are class members of the *ABC* lawsuit. Many of the commenters requested that evidence of class membership should be considered sufficient to establish extreme hardship based on the conditions in El Salvador and Guatemala, particularly after Hurricane Mitch. Additionally, commenters argued that the class had been protected for prolonged periods of time from deportation as a result of the *ABC* settlement agreement and other measures staying deportation, including TPS for Salvadorans, such that class members had established ties to the United States, a significant factor in evaluating hardship.

Some commenters discussed at great length factors the authors believed to be relevant to an extreme hardship determination for the *ABC* class. The commenters noted, for instance, that many class members have children who were either born in the United States or who came to this country at such a young age that they have little or no memory of El Salvador or Guatemala. The commenters also identified other factors, including the circumstances under which the class members fled

their countries, the quality of health care and educational opportunity in those countries, the psychological effects of returning to a country where an individual or a family member may have suffered persecution, the lack of sufficient employment opportunities in those countries, and the possibility of significant financial loss, as the commenters believe that many class members have purchased homes or started businesses in the United States. Many of the public comments also noted that a mandatory finding would enhance administrative efficiency by eliminating the need to make individual determinations of extreme hardship for the approximately 240,000 *ABC* class members who are eligible to apply for relief under section 203 of NACARA. As a further matter of administrative convenience, many commenters urged that the mandatory presumption should also be extended to nationals of the former Soviet bloc and all spouses, children, and unmarried sons and daughters over the age of 21 eligible for NACARA on the basis of a grant of relief to a parent or spouse (NACARA dependents).

One commenter objected to a presumption of extreme hardship on the grounds that it was contrary to NACARA and the Act, arguing that suspension of deportation or special rule cancellation of removal requires individualized determinations of extreme hardship in all cases.

The Department declines to adopt a blanket finding that all NACARA beneficiaries will suffer extreme hardship if they are deported or removed to their home countries, as such a finding would be contrary to the specific requirements of both NACARA and the Act, as well as the body of administrative and judicial interpretations that have been adopted regarding the meaning of ''extreme hardship.'' The Department has concluded, however, that strong factual evidence exists to support an evidentiary presumption of extreme hardship for those *ABC* class members who are eligible to apply for NACARA relief, as defined in § 240.61(a) or (b) of this interim rule. This conclusion is based on a determination that the *ABC* class shares certain characteristics that give rise to a strong likelihood that an *ABC* class member or qualified relative would suffer extreme hardship if the class member were deported or removed. Such a presumption may be rebutted by the Service if evidence in the record establishes that it is more likely than not that extreme hardship would not result from removal or deportation.

The creation of a presumption will not, however, eliminate the necessity of examining the evidence of extreme hardship in each case. An applicant will be required to submit a completed application that includes answers to questions relating to extreme hardship and to answer questions regarding hardship at the interview or hearing. Adjudicators will determine whether there is anything to disprove the presumption of extreme hardship and may ask additional questions at the interview or hearing, if necessary. The burden of proof will lie with the Service to overcome the presumption, if supported by evidence in the record. In this way, the likelihood that *ABC* class members will suffer extreme hardship is balanced against the necessity of a case-by-case evaluation of the individual application. Eligibility criteria for the presumption, and the burden and standard of proof that will apply in presumption cases, are described in new § 240.64(d).

As noted in the supplemental material in the proposed rule, extreme hardship is determined on a case-by-case basis, taking into account the particular circumstances of the individual applicant. *Matter of Hwang,* 10 I & N Dec. 448, 451 (BIA 1964). While each application must be assessed on its own merits, and each applicant must be found statutorily eligible before being considered for this discretionary form of relief, neither NACARA nor the Act limits the Attorney General's authority to create appropriate rules and procedures for determining eligibility for suspension of deportation or special rule cancellation of removal. The Attorney General may elect to create a rebuttable presumption of extreme hardship as part of the adjudication of such cases. Initially, the Department believed that including a list of relevant factors and general guidance regarding a determination of extreme hardship would be sufficient to address concerns raised by the public. The concerns outlined in comments to the proposed rule have led the Department to assess whether further measures, consistent with the statute, are appropriate based on the unique circumstances of NACARA beneficiaries. The Department has concluded that such measures would be appropriate and would further an interest in greater administrative efficiency.

Further examination of the issue yields two conclusions. First, certain factors routinely noted in evaluations of extreme hardship may serve as strong predictors of the likelihood of extreme hardship in a given case. For instance, under the relevant case law, the longer an individual has lived in the United States beyond the requisite 7 years, the more likely he or she is to develop significant ties to the United States, and the more likely it is that the adjudicator will find extreme hardship. *See Matter of O-J-O,* Int. Dec. 3280 (BIA 1996) (dissenting opinion listing all published suspension cases). Similarly, the longer an applicant lives in the United States under protection from deportation, the more likely it is that he or she has developed long-term ties to the United States. *See Matter of L-O-G,* Int. Dec. 3281 (BIA 1996).

Second, the unique immigration history and circumstances of the *ABC* class has given rise to a group of approximately 240,000 NACARA-eligible individuals who share the general predictors of extreme hardship described in the preceding paragraph, as well as other predictors that are unique to this class. The composition of the group itself is unusual, as it is composed of Salvadorans and Guatemalans who either entered the United States and filed for asylum prior to April 1, 1990, or entered the United States prior to September 19, 1990, or October 1, 1990, respectively, and registered for benefits under the terms of the *ABC* settlement. These individuals fled circumstances of civil war and political violence in their homelands during the 1980s, and some applied for asylum in the United States. In 1985, advocates for Guatemalan and Salvadoran refugees, church groups, and refugees themselves brought suit against the United States Government for allegedly discriminatory treatment of Guatemalan and Salvadoran asylum applicants. The Department settled the litigation in 1990, following significant developments in its asylum and refugee law and procedures, including the creation of a professionally trained asylum officer corps and Congress's grant of TPS to Salvadorans.

As a result of the settlement, *ABC* class members who complied with all registration requirements were entitled to remain in the United States until such time as they received either a *de novo* review of their asylum applications, or, for those whose cases had not been adjudicated previously, a determination under special procedures. For administrative reasons and because of provisions in the settlement agreement regarding asylum filing deadlines, these adjudications were postponed during the period of time in which Salvadorans, who comprise approximately 80 percent of the class, were protected from deportation under TPS (January 1, 1991, to June 30, 1992) and Deferred Enforced Departure (DED)

(June 30, 1992, to December 31, 1994). The special adjudications were further postponed to provide registered class members who had not yet applied for asylum an opportunity to do so under the terms of the settlement. Consequently, Guatemalans and Salvadorans who wished to continue to remain eligible for *ABC* benefits (and also free from the fear of deportation) were required to file an asylum application if they had not previously done so. Guatemalans had to have filed for asylum on or before January 4, 1995, while Salvadorans were required to have filed their applications no later than January 31, 1996 (with an administrative extension until February 16, 1996). Although *ABC* adjudications began in April 1997, they were suspended in February 1998 in order to permit those *ABC* class members with pending asylum applications to apply for NACARA relief with the Service.

Yet another shared characteristic pertaining to immigration history is the difficulty many Salvadorans and Guatemalans might have faced had they repatriated during the early 1990s. Although the Salvadoran government and opposition were engaged in peace negotiations throughout 1990 and 1991, the United States recognized the need to provide special protection to Salvadorans residing in the United States. Congress first gave Salvadorans protection through TPS, and then, even after peace accords had been signed, the President extended protection through DED until the end of 1994. While these special protections were only formally accorded to Salvadorans, registered Guatemalan class members also benefited from these protections because it was not administratively efficient to conduct *ABC* interviews solely for Guatemalans. Furthermore, the Guatemalan peace accords were not signed until 1996, making it less likely that Guatemalan class members in the United States would have sought to repatriate prior to that time.

The result of this unusual immigration history is the creation of a large class of individuals who share certain strong predictors of extreme hardship. By the time NACARA adjudications before the Service begin, all NACARA-eligible *ABC* class members will have been in the United States at least 9 years, while more than two-thirds will have lived here for a decade or more. Most NACARA-eligible *ABC* class members will also have lived in the United States for a prolonged period of time without fear of deportation, and will have done so continuously from the date of the settlement agreement to the present day, if they maintained their eligibility for *ABC* benefits by filing an asylum application by the relevant deadline. As previously noted, length of stay, coupled with some form of authorized presence, can be a strong indicator that an applicant is likely to suffer extreme hardship.

Additional characteristics of the *ABC* class appear to add to the likelihood of extreme hardship. All NACARA-eligible class members who applied for asylum were entitled to work authorization in conjunction with their asylum applications. Similarly, all Salvadorans protected under TPS and DED were also entitled to work lawfully while under that protection. Recognizing that the expiration of DED in 1994 could harm those Salvadoran class members who had not yet filed an asylum application to maintain their eligibility for the benefits of the *ABC* settlement because the deadline for filing had not yet passed, the Government extended DED-based work authorization for Salvadorans until April 30, 1996. As a practical matter, *ABC* class members with work authorization are more likely to have access to steady employment, career opportunities, and reasonable wages than someone working in the United States unlawfully. Thus, it is more likely that *ABC* class members are participating more fully in the economy and would experience extreme hardship upon deportation or removal. While work authorization alone may not be a clear predictor of extreme hardship, the fact that class members were entitled to receive it, when viewed in addition to their long-term and authorized presence in the United States, adds to the likelihood that they have built strong ties to this country and would suffer extreme hardship if returned to El Salvador or Guatemala. For those class members with steady employment in the United States, the possibility of extreme hardship might be further compounded by reportedly significant underemployment in Guatemala and El Salvador.

Consequently, *ABC* class members eligible for relief under section 203 of NACARA will be presumed to satisfy the requirements for extreme hardship upon submission of a completed Form I–881. Although the Department has carefully considered requests to include other NACARA-eligible applicants within the presumption, the facts do not appear to justify a presumption for those applicants. The *ABC* class is distinguished from other NACARA applicants by its distinct legal identity and the specific characteristics identified in this discussion. This interim rule will, therefore, continue to require applicants who are not *ABC* class members to bear the burden of proof in establishing extreme hardship. However, the Department recognizes that these predictive characteristics may be present in other cases. Accordingly, the rule will provide that evidence of an extended stay in the United States without fear of deportation and with the benefit of work authorization shall be considered relevant to the determination of whether deportation will result in extreme hardship.

The Form I–881 and Instructions have been modified to address these changes. The form will explain that an applicant who is either a registered member of the *ABC* class, as described in Part II (a) of the form, or a Salvadoran or Guatemalan who applied for asylum prior to April 1, 1990, as described in Part II (b) of the form, will be presumed to meet the extreme hardship requirement unless evidence in the record establishes that neither the applicant nor a qualified relative is likely to experience extreme hardship. To qualify for the presumption, an applicant must answer all questions on the Form I–881 regarding extreme hardship, but will not initially be required to attach documentary evidence to support his or her answers. The instructions will note, however, that the Service may request additional documents for any aspect of the application, including extreme hardship, at the time of the interview.

The lack of one or more factors will not lead to a conclusion that the presumption has been overcome. Instead, adjudicators will evaluate an application on the basis of whether, given the presumption, the application contains evidence of factors associated with extreme hardship (as set forth in § 240.58). Generally, the presumption will be overcome only under two circumstances. First, the presumption might be overcome in those cases where there is no evidence of factors associated with extreme hardship (for example, an applicant who has no family in the United States, no work history, and no ties to the community). Second, evidence contained in the record could significantly undermine the basic assumptions on which the presumption is based. For example, if an individual has acquired significant resources or property in his or her home country, the individual and his or her qualified family members may be able to return without experiencing extreme hardship, in the absence of other hardship factors in the case (such as a serious medical treatment for which there is no treatment in the home country).

The adjudicator must evaluate all the evidence in the record and weigh it accordingly in making a determination as to whether the presumption has been overcome. In the case of applications submitted to the Service, a determination that the presumption has been overcome will result in referral to the Immigration Court or dismissal of the application, while such a determination by an Immigration Court will result in denial of the application.

Eligibility—Other Comments Regarding Extreme Hardship

Several commenters requested that the Department modify § 240.58(b) by deleting the sentence, ''To establish extreme hardship, an applicant must demonstrate that deportation would result in a degree of hardship beyond that typically associated with deportation.'' The commenters argued that this phrase could allow an adjudicator to discount an individual's particular hardship claim if it was similar to that of other applicants from the same country.

The Department believes it is not appropriate to delete this sentence. The discussion of extreme hardship contained in § 240.58(b) is based on the general principles set forth in numerous administrative law opinions and federal case law. These cases routinely note that extreme hardship must be something greater than the kind of disruption in a person's life that is likely to occur whenever someone is deported. As the supplemental discussion in the proposed rule explained, hardship does not have to be unique to be extreme, but the effect of deportation or removal on the individual or a qualified relative must be sufficiently clear to show that the hardship would be extreme.

Several commenters asked the Department to modify the list of extreme hardship factors contained in § 240.58 by providing expanded definitions for each factor. For instance, the commenters requested that § 240.58(b)(4), regarding an alien's ability to find employment in the proposed country of removal, should be further modified to indicate that the employment must pay a living wage. Similarly, commenters requested that § 240.58(b)(9), regarding the psychological effect of removal, list specific types of psychological harm, such as that which may be caused by an inability to support one's family. Other suggestions included specifically discussing membership in the *ABC* class as a relevant immigration history factor, as well as including remittances sent to family members abroad as a relevant factor under contributions to a community in the United States or to the United States, the impact of an environmental disaster within the proposed country of removal, and the difficulty of readjusting to one's country of origin.

Section 240.58(b) contains a non-exclusive and broadly worded list of factors that have been found relevant by adjudicators when determining whether extreme hardship would result from an individual's deportation. The present rule specifically notes that the listed factors are those that have generally been recognized in case law, but that other factors that have not been listed may be particularly significant in an individual applicant's case. It would be difficult to list all of the factors that may arise in a particular case. Additionally, the attempt to do so could be counter-productive because, as the description of each factor becomes more detailed, it could restrict the focus of the inquiry to the more narrow description of each factor. Moreover, some of the suggested modifications, if included in the rule, would exceed the scope of the current understanding of extreme hardship and, therefore, exceed the intended purpose of codifying these factors. The broader language of the present rule permits greater flexibility for applicants and adjudicators and will allow the assessment of new factors to occur within the context of specific adjudications. As previously explained, the Department has made an exception only in the case of the factors related to VAWA, which have been independently developed in the course of the self-petitioning process and are already in use in immigration proceedings.

Eligibility—Discretion

Several commenters requested that § 240.64(a) provide that status as an *ABC* class member or as a recipient of TPS or DED be considered a discretionary factor that weighs positively in favor of granting relief. The commenters further requested that the regulations explicitly provide that such authorized presence in the United States will outweigh all but the most egregious adverse discretionary factors.

Although the fact that an applicant has received TPS or DED may be considered in the discretionary decision to grant suspension of deportation or special rule cancellation of removal, the Department believes that it should not be given any more weight than other discretionary considerations. Immigration history, including the receipt of TPS or DED, is an appropriate factor to consider when evaluating extreme hardship during the eligibility determination. As such, it is unnecessary to require an adjudicator to give additional weight to immigration history in making a final determination.

Eligibility—Evidence

Several commenters requested that the regulations provide that the applicant's credible testimony by itself may be sufficient to satisfy the eligibility requirements. Other commenters stated that the regulation must include reference to the use of ''any credible evidence'' in any case involving battered spouses and children under section 244(a)(3) of the Act, as in effect prior to IIRIRA, or section 240A(b)(2) of the Act.

The Department declines to provide that credible testimony may be sufficient to establish eligibility for suspension of deportation or special rule cancellation of removal. In contrast to an applicant for asylum for whom credible testimony may be sufficient to establish eligibility, an applicant for suspension of deportation or special rule cancellation of removal may reasonably be expected to provide corroborating evidence of certain eligibility criteria. An asylum applicant understandably may not be able to provide documentary evidence of the circumstances that caused flight, given the nature of the claim. However, an individual who has lived in the United States for at least 7 years should be able to provide, where necessary, some form of documentary evidence of physical presence in the United States and, where necessary, corroboration of community ties or other evidence establishing that removal would result in extreme hardship.

With respect to applicants for suspension of deportation or cancellation of removal who are eligible to apply for relief under the special standards of section 244(a)(3) of the Act, as in effect prior to IIRIRA, or section 240A(b)(2) of the Act, those statutory provisions already provide that credible testimony may be sufficient to establish material facts in a case. Because the interim rule affects these cases only with respect to extreme hardship, it is unnecessary and potentially confusing to carve out a special provision within the NACARA implementing rule to address this issue.

Application Process

Fee for Filing NACARA Application

Comments regarding the proposed fee structure ($215 for individual applications, with a $430 family cap) ranged from adopting the $100 fee required for an application filed with the Immigration Court to expanding the

family cap to include family members who do not submit their applications simultaneously. One commenter requested that the regulations explain the fee requirements for someone who already paid a $100 application fee to submit an application for suspension of deportation or cancellation of removal in Immigration Court proceedings, but then requested that the Immigration Court or Board administratively close the case to allow the individual to apply with the Service.

As explained in greater detail in the supplementary information to the proposed rule, the Service is required by statute to fund the processing of applications through user fees. No appropriations have been provided by Congress from tax dollars to adjudicate applications for relief under section 203 of NACARA. The cost to the Service to adjudicate applications must be funded from the Immigration Examinations Fee Account, which is the sole source of funding for the processing of immigration and naturalization applications and petitions, and for other purposes designated by Congress, such as the processing of asylum applications for which no fee is required. Having carefully studied the estimated costs of adjudicating applications under section 203 of NACARA, the Service calculated that a fee of $215 for a single applicant, or $430 for a family filing at the same time, is necessary to recover costs associated with processing the applications. Therefore, the filing fee cannot be lowered to $100.

Similarly, the benefit of the family cap cannot be extended to those persons who do not file simultaneously because the $430 family cap takes into account administrative cost savings achieved by processing and adjudicating multiple cases as a single unit. Permitting applicants who file separately to take advantage of the cap undermines the projected savings and creates additional administrative costs. The only way to account for those costs would be to increase the fee for individual applications or to increase the family cap. The current fee represents an appropriate balance between the need to cover the costs of adjudication and avoiding prohibitively expensive filing fees.

The Department believes the current language in the regulation addresses the fee requirements for applying with the Service. Regardless of any fees an individual has paid in the past in the course of immigration proceedings, each individual who submits an application with the Service will be required to pay the full $215 application fee or the $430 family fee, as applicable. This includes any NACARA beneficiary who has already paid $100 to pursue an application for suspension of deportation or special rule cancellation of removal in immigration proceedings.

There are two general categories of NACARA beneficiaries who may be in immigration proceedings that have been administratively closed to allow the beneficiary to apply for relief with the Service. The first category comprises dependents of NACARA beneficiaries who have applied for section 203 NACARA relief with the Service. An individual in the first category may or may not have already submitted a fee to EOIR, depending on whether the individual has applied for any relief that requires an application fee. In such cases, the individual may opt to remain within the jurisdiction of the Immigration Court, rather than pay a higher fee to apply with the Service.

The second category comprises individuals who had final orders of deportation or removal that were reopened to allow the individuals to apply for benefits under section 203 of NACARA, and who then move to administratively close the proceedings to apply for benefits with the Service. An applicant is not required to pay the $100 filing fee for a suspension of deportation or special rule cancellation of removal application submitted in order to perfect a motion to reopen. The applicant is required only to submit to EOIR a copy of the application and supporting documents that would be filed if the case is reopened. The applicant is not required to pay the application fee until after a motion to reopen has been granted and the applicant has thus been allowed to apply for relief. At that time, the applicant will have a choice to either pay the fee and submit the original application to EOIR for adjudication by an Immigration Court, or ask that the case be administratively closed so that the applicant may apply with the Service. If the applicant has already paid the $100 to apply with EOIR and wishes to apply with the Service, the applicant will nonetheless be required to pay the full $215 application fee.

Filing the Form I–881 With the Service To Perfect a NACARA Motion To Reopen

One commenter requested that the rule should permit an applicant who must file a motion to reopen under section 203(c) of NACARA to submit the Form I–881 directly to the Service before his or her case has been reopened. Proof of filing with the Service would then permit the Immigration Court to reopen the case. The Department declines to adopt this procedure because it is contrary to 8 CFR 3.43, which establishes the procedure for NACARA motions to reopen. Additionally, this proposal, if adopted, would create an inefficient process for the Service and might result in applicants paying fees to the Service for applications that are never adjudicated. The proposed procedure to allow an individual to first submit an application to the Service before an Immigration Court has granted a motion to reopen would lead to instances in which an applicant pays $215 to the Service, but then is not allowed to proceed on the application, because an Immigration Court denies the motion to reopen or denies the motion to close the case once it has been reopened.

Limited Submission of the Form EOIR–40 to the Service

Many commenters requested that the regulations allow the limited submission to the Service of an already completed Form EOIR–40, for those applicants who submitted the Form EOIR–40 in proceedings that have been administratively closed.

The Department agrees that it would be unnecessarily burdensome for an applicant who had submitted a completed Form EOIR–40 to the Immigration Court to then complete a Form I–881 in order to apply with the Service. Most of the information requested on the Form I–881 is also requested on the Form EOIR–40. However, the information on the first page of the Form I–881 is necessary for the Service to determine jurisdiction, eligibility to apply, and for completion of data entry when accepting the application. Therefore, an applicant who filed a Form EOIR–40 before the date that the Form I–881 is available may apply with the Service by submitting the Form EOIR–40 attached to a completed first page of the Form I–881.

Also, any applicant who is filing with the Service a Form I–881 or Form EOIR–40 (with page 1 of the Form I–881 attached), and was previously in proceedings before EOIR that have been administratively closed or continued should attach to the application a copy of the order to administratively close the proceedings issued by the Immigration Court or Board. This documentation requirement has now been added to the instructions to the Form I–881.

E. Adjudication

Procedure for Interview Before an Asylum Officer—Fingerprinting, Rescheduling of Fingerprint and Interview Appointments

There were several comments regarding provisions governing fingerprinting and the rescheduling of fingerprinting appointments and interviews. Several commenters requested that fingerprinting appointments should be scheduled at the designated Application Support Center (ASC) nearest to applicant's home. Others requested that the regulation specify that an applicant may submit a request to reschedule the interview or fingerprinting appointment and should also provide a procedure for rescheduling the interview or the fingerprinting appointment. The comments suggested that the regulation allow applicants to make the requests either in writing or by phone and that the Service should assign staff to answer the phone. One commenter requested that all notices to applicants explain the procedure for canceling and rescheduling fingerprinting appointments and interviews. Another commenter suggested that the regulations incorporate paragraph 13 of the *ABC* settlement agreement, which provides special procedures to reschedule interviews for class members eligible for *ABC* benefits. Many commenters suggested that the *ABC* settlement procedures governing failure to appear for interviews should be applied to all NACARA adjudications.

The Service recognizes that an applicant must sometimes reschedule interviews and fingerprint appointments and intends to accommodate all reasonable requests, as long as resources permit and applicants do not appear to be abusing the process for purposes of delay.

With respect to initial fingerprint appointments, each applicant will be scheduled for fingerprinting at the ASC having jurisdiction over the applicant's place of residence. Only certain ASCs presently have the capability to accept requests for rescheduling. For an applicant scheduled for a fingerprint appointment at an ASC with the capability of rescheduling fingerprint appointments, the appointment notice will provide the applicant with the information necessary to request a rescheduling. For an applicant scheduled for an appointment at ASCs without this capability, the applicant will automatically be rescheduled by the Service for another fingerprint appointment if the Service does not receive confirmation that the applicant appeared for fingerprinting during the time period designated on the appointment notice.

The proposed rule required an applicant to show good cause in order to reschedule a missed interview. In order to avoid conflicts with the *ABC* settlement requirements, language governing the rescheduling of interviews contained in § 240.68 of the proposed rule has been amended to mirror the language of paragraph 13 of the *ABC* settlement agreement. A reasonable excuse provided to the Service will be sufficient to obtain a rescheduling of the fingerprint appointment or NACARA interview. A request to reschedule an interview should be submitted in writing to the asylum office having jurisdiction over the case before the date of the interview, where the need to reschedule is known by the applicant prior to the interview date, or immediately after the scheduled interview when the circumstances that led the applicant to miss the interview could not be foreseen in advance. Any significant delay by an applicant in submitting a written request to reschedule an interview increases the risk that the Service will find the applicant's failure to appear for an interview as unexcused, thus resulting in dismissal of the NACARA application or referral of the application to EOIR.

It is the applicant's duty to provide the Service with a mailing address to which the fingerprint and interview notice can be delivered. For cases in which the Service fails to send the appointment notice to the applicant's current address, the regulation continues to treat the failure to appear for fingerprinting or interview that results from the Service error as excused, provided that the applicant properly submitted his or her current address to the Service prior to the date the notice was mailed. In such circumstances, the Service would move to regain jurisdiction, if the case has already been referred to EOIR.

The Service does not presently have the capability to take requests to reschedule fingerprint appointments or interviews over the phone, and believes that a written record of such requests is in the applicant's best interests, because it creates a record of the applicant's attempt to comply with application requirements. The Department also does not agree with the comment that applicants should not be sanctioned for failure to appear unless they have been notified of the interview by certified mail or personal service. An asylum interview can be sent by regular mail to an individual's last address properly provided to the Service. A failure to appear for the asylum interview without prior authorization may result in dismissal of the application or waiver of the right to an interview. 8 CFR 208.10.

One commenter requested that fingerprinting delays not be permitted to delay the adjudication and approval by the Service of an application for relief under section 203 of NACARA. The Service intends to make no change in its plan to schedule NACARA applicants for interviews on their applications for suspension of deportation or special rule cancellation of removal only after the Service has received a definitive response from the Federal Bureau of Investigation (FBI) that a full criminal background check has been completed. This will allow an asylum officer to make a decision on the eligibility for NACARA relief at the time of the interview and give the Service the ability to grant an applicant who has an approvable NACARA claim legal permanent resident status on the day of the interview, where appropriate. Unlike the affirmative asylum process, there will be no need to issue recommended approvals to applicants for NACARA relief while the Service awaits fingerprint clearance.

Recent improvements in fingerprint processing were designed to reduce delays and should not affect interview scheduling and the adjudication of applications for suspension of deportation or special rule cancellation of removal under NACARA. Among the improvements in fingerprint processing are the automatic scheduling of a second fingerprint appointment for an applicant whose fingerprints are rejected upon first submission to the FBI, and the notification of asylum offices when an applicant's fingerprint submission has been rejected by the FBI for a second time.

Consequences for Failure to Appear

Several commenters requested amendments to the provisions regarding the consequences for failure to appear for an interview. Many commenters maintained that dismissal of an application for failure to appear for fingerprinting is a disproportionate penalty and that, instead, the applicant should have to pay the $25 fingerprinting fee again and be rescheduled for another fingerprinting appointment. Several commenters proposed that the regulations be amended to require the Service to grant suspension of deportation or special rule cancellation if it is clear from the application that the application should be granted, even if the person fails to appear for an interview. However, if the applicant is not clearly eligible for relief

and has not shown ''good cause'' for failure to appear, the application, in the view of the commenters, should be referred to the Immigration Court and not dismissed.

The Department declines to adopt these suggestions for minimizing the consequences of failing to appear for fingerprinting or for an interview. A proper determination of eligibility for suspension of deportation or special rule cancellation of removal cannot be made without interviewing the applicant. Suspension of deportation and special rule cancellation of removal are discretionary forms of relief with several substantive requirements that cannot be evaluated based upon a paper record. Therefore, the Service cannot properly grant an application for relief under section 203 of NACARA if an applicant fails to appear for an interview.

The Department believes that it is appropriate to adopt procedures restricting access to the Service application process when individuals fail to comply with procedural requirements. To do otherwise would disrupt the system and create delays that unfairly penalize applicants who complied with the requirements. The provisions allowing referral or dismissal are not only reasonable, but also more generous than other immigration provisions that permit denial of applications for failure to comply with interviewing or fingerprinting requirements.

In almost all cases in which an applicant fails to appear for an interview or fingerprinting appointment, the Service will refer the application to an Immigration Court for a decision. Therefore, the applicant will still have the opportunity to apply for suspension of deportation or special rule cancellation of removal before the Immigration Court.

The Service will not refer an application to the Immigration Court when the applicant does not appear inadmissible or removable. In such cases, the Service will dismiss the application without prejudice so that it does not remain pending indefinitely with the Service. If the application were to remain pending indefinitely with the Service, the applicant would continue to be eligible for employment authorization, even though he or she was not pursuing the application. To avoid such a procedural loophole, the Service must be able to dismiss the application. If the applicant still wishes to pursue relief under section 203 of NACARA and is otherwise still eligible to file for relief with the Service, he or she could file a new application.

Consequences for Failing to Bring an Interpreter

One commenter stated that the failure to bring an interpreter to the interview should not be treated as a failure to appear for the interview and that, instead, the case should be rescheduled.

As in the case of asylum interviews, the Service intends to include in the interview notice notification that the applicant is required to bring an interpreter to the interview if the applicant is not fluent in English. Therefore the applicant will be given notice of the need to bring a qualified interpreter to the interview.

It has been the practice of the Asylum Program to reschedule all asylum interviews in which an applicant fails, for the first time, to bring an interpreter to the interview or, for the first time, brings an incompetent interpreter to the interview. The Service intends to continue this practice with interviews conducted pursuant to NACARA, as long as resources permit the liberal rescheduling policy. However, to retain the administrative flexibility necessary to continue processing a large number of applications should a large number of applicants begin to appear for interviews without interpreters, the Department does not believe it appropriate to mandate such rescheduling by regulation.

Access to Interpreters

Several commenters requested that the Service provide Spanish speaking-asylum officers at various points in the NACARA interview and decision-issuing process to relieve applicants of the burden of having to provide interpreters and to help applicants understand the decisions they receive. The Service is unable to change the present requirement that an applicant provide his or her own interpreter if unable to proceed in English. The Service has neither the qualified staff nor the resources to provide Spanish-speaking asylum officers at all steps of the NACARA process.

F. Decisions by the Service

Concessions of Inadmissibility and Deportability

One commenter requested that the Service not ask a NACARA applicant to sign a concession of inadmissibility or deportability until the last stage of the decision-making process, after fingerprints have cleared. One commenter requested that the explanation given to the applicant regarding the consequences of certain decisions an applicant will need to make regarding concession of inadmissibility and deportability and whether to continue to pursue a pending asylum request should not be delayed until the day the applicant returns to receive the decision.

The Department agrees with these comments. Section 240.70(b) of the interim rule provides that, ''[i]f the Service has made a preliminary decision to grant the applicant suspension of deportation under this subpart, the applicant shall be notified of that decision and will be asked to sign an admission of deportability or inadmissibility.'' This is the last step before an individual is granted relief, because no preliminary decision may be made until after the fingerprints have been cleared. Pursuant to § 240.67(a) of the rule, an applicant subject to the fingerprinting requirements will be interviewed only after the individual has complied with the fingerprinting requirements, and the Service has received a definitive response from the FBI that a full criminal background check has been completed.

PART III, section (F) of the instructions to Form I–881 presently contains an explanation of the requirement that an applicant sign an admission of inadmissibility or deportability before he or she can be granted suspension of deportation or special rule cancellation of removal by the Service. The Service also intends to present the applicant with a further explanation of the requirement to admit inadmissibility or deportability, as well as the opportunity to continue to pursue a request for asylum or to withdraw the asylum application should the application for suspension or special rule cancellation be approved at the time of the interview. The Service will also continue to consider the feasibility of providing this important information to the applicant prior to the interview.

Timing of Approval of NACARA Application

Many commenters requested that the regulations permit an asylum officer to grant an application at the time of interview. The Department intends to do so in appropriate cases. The interim rule, at § 240.70(a), will permit an asylum officer to grant an application at the time of the interview. The Service will have the discretion to determine the circumstances under which it is appropriate for an asylum officer to grant an application at the time of the interview.

Notice of Reasons for Referral or Dismissal

Many commenters requested that the regulations require the Service to justify

the reason for not granting suspension of deportation or special rule cancellation of removal. One comment stated that the Service should, at a minimum, include in a decision a list of factors considered in evaluating whether removal would result in extreme hardship.

The Department agrees that the referral or dismissal letter served on an applicant should include notification of the reason or reasons for the decision, and the Service intends to include such notification in all referral and dismissal letters. The decision will not contain a list of all the factors considered in evaluating whether removal would result in extreme hardship. Rather, the contents of such letters will model the referral letters issued after an asylum interview, briefly indicating the basis for the decision. This process will allow the Service to adjudicate NACARA applications in an efficient and timely fashion, while also requiring the deciding officer to give the applicant an explanation for why the claim is being referred to the Immigration Court. Section 240.70(d) and (e) now provides that the applicant will be given written notice of the statutory or regulatory basis for the referral or dismissal.

Presumed Withdrawal of an Asylum Application

Several commenters requested that the proposed revisions to 8 CFR 208.14, relating to the presumption of abandonment of an asylum application when the applicant is granted legal permanent resident status, be revised to give an applicant granted adjustment of status to lawful permanent resident 60 days, rather than the proposed 30 days, to decide whether to pursue a pending asylum application, and that the regulations should also require the Service to provide written notice in Spanish and English advising the applicant of the deadline and its significance.

The revisions to 8 CFR 208.14 are primarily aimed at addressing those circumstances in which an applicant for asylum adjusts his or her status to that of lawful permanent resident by some other means while the asylum application is pending. The revised § 208.14 will not apply to the majority of applicants under section 203 of NACARA, because the vast majority of those applicants are eligible for benefits of the *ABC* settlement agreement. As such, the processing of their asylum applications is largely governed by the 1990 asylum regulations, which do not contain a similar provision allowing the Service to presume that an asylum application is abandoned. This revised provision will apply only to lawful permanent resident applicants who are not eligible for *ABC* benefits, such as those who adjust status under section 202 of NACARA or through other means such as relative petitions.

The Department believes that it is unnecessary to increase the notice period to 60 days. If an individual needs additional time to consult with counsel, he or she may submit a request for additional time. If an individual's application is presumed withdrawn, but the individual still wishes to pursue asylum in the United States, even though he or she has lawful permanent resident status, the individual may submit a new asylum application to the Service for adjudication.

The Department agrees that the written notice should be required and has incorporated that requirement into § 208.14. However, the notice will not be translated into any other languages.

Distinction Between ABC and NACARA Adjudications

Several commenters stated that the regulations should recognize the Service's obligations under paragraph 15 of the *ABC* settlement agreement regarding preliminary asylum recommendations and should apply those provisions to all NACARA beneficiaries.

Paragraph 15 of the *ABC* settlement agreement provides very specific procedural requirements for making preliminary and final decisions on eligibility for asylum. For example, it specifies procedures for sending asylum assessments to the Department of State and requires the Service to provide a written notice of intent to deny an asylum application prior to issuing a final adverse decision. It is limited to asylum applicants who meet the criteria for eligibility for *ABC* benefits as provided in the settlement and is not relevant to the adjudication of applications under section 203 of NACARA, which is an application for a completely separate form of relief. While the interview for asylum eligibility and relief under NACARA may be combined, the decision-making process is distinct. The parties to the settlement agreement—the Service, EOIR and the Department of State—remain bound by the provisions of the settlement agreement and will continue to comply with all aspects of the settlement agreement in adjudicating asylum requests filed by *ABC* class members who are eligible for the benefits of the settlement agreement. The Department declines to incorporate the settlement agreement requirements governing the processing of *ABC* asylum applications into regulations governing procedures for the unrelated benefit of suspension of deportation and special rule cancellation of removal, or extending the *ABC* settlement agreement provisions governing asylum adjudication to applicants not covered by the settlement agreement.

Effect of Mandatory Pick-up on ABC Agreement

Several commenters assert that § 240.70(a), which requires applicants to return to an asylum office to receive a decision, violates the *ABC* settlement agreement because the settlement agreement does not require this.

The Department disagrees with this interpretation of the *ABC* settlement agreement. First, § 240.70(a) provides for service of a decision on eligibility for suspension of deportation or special rule cancellation of removal, and the *ABC* settlement agreement has no bearing on any process relating to Service adjudication of a request for suspension of deportation or special rule cancellation of removal. Second, neither the *ABC* settlement agreement nor the 1990 regulations, which also govern adjudication of *ABC* asylum applications, contains any provisions governing the service of a final decision on eligibility for asylum. Therefore, the Department believes that requiring an *ABC* applicant to return to the Asylum Office to receive an asylum decision would not be inconsistent with the settlement agreement. It would make little sense to require an individual to return to an Asylum Office to receive a decision on the NACARA application, but to prohibit the Asylum Office from informing the applicant of any final or preliminary decision on the asylum application while the applicant is at the Asylum Office. It would be much more efficient for both the Service and the applicant for the Service to deliver both decisions at once, where appropriate.

Restriction of Asylum Officer's Authority

Another commenter requested that the regulations provide that no final decision may be made by a Service officer, but can be made only by an Immigration Court. The commenter also stated that applicants must be made aware of the right to appeal a decision to the Board of Immigration Appeals.

The Department declines to adopt the recommendation that the regulations require that the final decision can be made only by an Immigration Court. If an asylum officer were not given authority to issue a final grant of suspension of deportation or special

rule cancellation of removal, there would be no benefit to allowing NACARA beneficiaries to apply with the Service for relief under section 203 of NACARA. The rule, however, does not give asylum officers authority to deny relief under section 203 of NACARA. If an asylum officer determines that an applicant is not eligible for a grant of suspension of deportation or special rule cancellation of removal and has not been granted asylum, the asylum officer must refer the application to an Immigration Court for adjudication. The exception would be those cases in which the applicant does not appear inadmissible or deportable and therefore could not be placed in removal proceedings. In such rare instances, the application would be dismissed.

The Department does not believe it is necessary for the rule to require that an applicant be made aware of the right to appeal a decision to the Board of Immigration Appeals, because 8 CFR 3.3 already provides that a party affected by a decision who is entitled to appeal an Immigration Court's decision to the Board of Immigration Appeals must be given notice of the right to appeal.

G. Miscellaneous Comments

Employment Authorization

Several commenters requested that the regulations specify where to file an application for employment authorization. The Department declines to provide this procedural information in the regulation. It is more appropriate that such procedural information, which is subject to change, be provided in the instructions to the application used to obtain the benefit. The instructions to the Form I–881 have been amended to state that an individual who does not have employment authorization and is eligible for employment authorization under 8 CFR 274.12(c)(10) should submit a completed Form I–765, with his or her completed Form I–881, to the Service Center that has jurisdiction over the Form I–881.

Extension of Deadline to Perfect NACARA Motion to Reopen

One commenter requested that the deadline to complete a motion to reopen be extended. On January 14, 1999, EOIR announced that it would extend the deadline for supplementing NACARA motions to reopen that were submitted on or before September 11, 1998. Under 8 CFR 3.43, as amended, NACARA motions to reopen must be supplemented with an application and supporting documents no later than 150 days after the effective date of the rule implementing section 203 of NACARA. 64 FR 13663 (March 22, 1999). Because the statute limited the initial filing period, the September 11, 1998, deadline for submitting initial motions cannot be extended. The Service has agreed to consider joining in motions to reopen in certain cases for NACARA applicants who were prima facie eligible for relief as of September 11, 1998, and who can establish a valid reason for failing to submit a timely motion to reopen.

H. Comments on the Form I–881 and Instructions

The public comments on the Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal, ranged from requests for simple word changes and comments of significant complexity, to a request that the Form EOIR–40 be used for NACARA applications instead of the Form I–881.

In response to the comment that suggested that the Form EOIR–40 be used for NACARA applications for suspension of deportation or special rule cancellation of removal instead of creating a new form, the Department believes that the Form I–881 is useful in (1) drawing out the basis for an applicant's claim to eligibility for NACARA section 203 relief, and (2) providing NACARA applicants who may submit the application for suspension of deportation or special rule cancellation of removal to the Service without the aid of an attorney or representative some guidance as to the type of factors that are relevant to the determination of extreme hardship. Despite the decision by the Attorney General to establish a rebuttable presumption of extreme hardship for certain NACARA beneficiaries, applicants will still need to provide responses to the questions in the Form I–881 directed towards the extreme hardship issue in order to qualify for suspension of deportation or special rule cancellation of removal.

Certain Changes to the form or instructions reflect substantive changes made to the regulation. For example, both PART 1(C) of the Instructions and Part 2(b) of the Form I–881 are amended to read ''A Guatemalan or Salvadoran national who filed an application for asylum on or before April 1, 1990,'' in light of the Department's decision, previously discussed, to adopt a broader interpretation of the eligibility language in section 309(c)(5)(C)(i)(II) of IIRIRA, as added by section 203 of NACARA. The Department has deleted language that limited eligibility to those Guatemalan or Salvadoran nationals who filed their asylum applications by April 1, 1990, directly with the Service.

In response to several comments, PART II (C) of the Instructions is amended to indicate the fee required when submitting the Form I–881. Many comments also requested that the Service accept a Form EOIR–40 instead of a Form I–881 when an applicant has already filed the Form EOIR–40 with EOIR. As stated earlier, the Service will accept a previously filed Form EOIR–40 as a NACARA application, so long as the applicant fills out page 1 of the Form I–881 and attaches it to the front of the Form EOIR–40 for data entry purposes. At PART III(C) and PART IV, the Instructions are amended to clarify when the Form I–881 must be used and when the Form EOIR–40 may be used.

Several commenters requested that the language in the Instructions and the Form I–881 be amended regarding the type of evidence of tax payments that should be submitted, and asked that evidence of tax payments be accepted at the interview or hearing and not required to be attached to the application, pointing out the difficulty of obtaining this information quickly. PART V of the Instructions and Part 4, question 4 of the Form I–881 now provide that an applicant may submit any evidence of filing a tax return, including Internal Revenue Service computer printouts, and does not specify that the evidence should be a tax return. The Instructions indicate that the Form I–881 may be supplemented at the time of interview or hearing. The Department declines to amend this section or other sections that request documentation be attached to the Form I–881, because the Service Center will not reject the application of an applicant who does not have records of tax payments or other documentation at the time he or she submits the Form I–881, and the applicant may submit this information at the time of the interview or hearing.

At PART VI of the Instructions for the Form I–881, language has been added in response to a commenter requesting information on where a person should apply for employment authorization. The Instructions now note that an individual who wishes to work, who does not have employment authorization, and is eligible for employment authorization under 8 CFR 274.12(c)(10), should submit a completed Form I–765 with his or her completed Form I–881 to the Service Center that has jurisdiction over the Form I–881.

Part 4 of the Form I–881 includes a change in the order of the subdivisions in that Part in response to a number of

comments requesting a more logical flow of the elicited information. Several other changes have been made in Part 4 of the Form I–881 in response to comments. Section 1 has been amended to clarify that periods of ''unpaid employment'' may include work as a homemaker, intern, etc. In section 2, the order of the types of assets has been changed. In response to a number of comments, the term ''motor vehicles'' replaces ''autos,'' and a column for spouse's assets is now included. Also, the section now requests that information on assets owned by ''self'' include those assets jointly owned with ''spouse or others.''

Several commenters urged that the question relating to receipt of public benefits, contained at Part 4, question 3 of the form, be deleted or limited to requesting information regarding only the receipt of cash benefits. The commenters stated that the case law permits but does not require that the receipt of public benefits be considered as a discretionary factor. The commenters argued that the presence of such a question on the form would have a chilling effect on the legitimate access and use of programs promoting public health and well-being by NACARA beneficiaries and their United States citizen family members.

The Department initially included the question on the form to avoid surprise to an applicant who might be asked about receipt of public benefits at the hearing or interview, and to give the applicant an opportunity to prepare a statement of the circumstances that led to the receipt of public benefits. However, in light of forthcoming guidance from the Department regarding the broader public charge issues, the question will be deleted from the Form I–881. Omission of the question, however, does not mean that an adjudicator cannot raise the issue in the course of an interview or hearing in appropriate cases. In the context of suspension of deportation or cancellation of removal, questions about receipt of public benefits are not necessarily meant to draw inferences against an applicant. A full and accurate understanding of an applicant's financial condition is always relevant to the determination to grant or deny relief. In light of the ongoing review by the Department, and the possibility that this question may discourage people from applying for benefits to which they are entitled, the Department has decided that the limited value of reducing the element of surprise is outweighed by broader public health concerns.

Parts 6 and 7 of the Form I–881, which request information about the applicant's parents and children, have been switched from their previous order, as requested by several commenters. In addition, the request for information about children's weekly earnings and whether the applicant supports his or her children financially has been deleted as overly burdensome. Question 3 in this Part, which elicits information about the applicant's support of family members, has been deleted. Also, Part 8 of the previous version of the Form I–881, where information about the applicant's community ties was requested, has been deleted, and a question regarding community ties has been incorporated into Part 9 on Extreme Hardship.

In response to a number of suggestions to shorten or simplify the hardship section of the Form I–881, the spaces between questions have been eliminated and the form requests the applicant to provide explanations to the answers on a separate sheet of paper. Additionally, as requested in some comments, this section has been modified to request ''yes/no'' answers to questions regarding extreme hardship. The questions elicit the same type of information as the questions on the original version of the Form I–881. Question 11 has been added to Part 9 of the Form I–881 to elicit information regarding community ties. Finally, this part explains that applicants who meet the eligibility requirements for NACARA suspension of deportation or special rule cancellation of removal listed in (a) or (b) of Part 2 on page 1, and thus are entitled to a rebuttable presumption of extreme hardship, do not need to submit documentation with their application to support their claim of extreme hardship. This is also stated in PART II(A) and PART V of the Instructions.

At PART II(A), the Instructions are amended to include a reference to ''page 8'' of the form, with the explanation that page 8 may be used as an additional sheet. Page 8 of the Form I–881 has been added to provide applicants with a blank sheet of paper to allow them to supplement or explain responses provided in other parts of the form, such as the hardship section previously described. In addition, Part 10 of the previous version of Form I–881, Miscellaneous Information, is now Part 8.

Requested Changes not Incorporated into the Form I–881

Additional lines for requested information have been added, and the order of questions has been changed where possible and appropriate, as requested by the commenters and explained previously. However, due to space limitations and in an effort to avoid making the form longer, not all requests to move sections or add spaces could be accommodated. For example, the number of lines provided to list places of residence has not been increased (an applicant must attach additional sheets if more space is needed to complete the section).

One commenter requested that a row for debts and other liabilities be added to the information requested about an applicant's assets in Part 4, section 2 of the form. The Department does not believe it is necessary to add a row requesting information about debts and liabilities of an applicant. When requesting information about the value of any motor vehicles or real estate owned by applicant and his or her spouse, Part 4, section 2 of the Form I–881 specifically asks that the value listed should be ''minus any amount owed'' on the property. It is sufficient that the individual list only the equity owned in the assets.

One commenter suggested that the introductory paragraph in Part 9 of the form be changed to make it easier for the applicant to complete the form. This commenter proposed that the introductory paragraph list the factors considered in establishing extreme hardship, followed by a single open-ended question asking for an explanation of all hardship factors relevant to the applicant's claim.

As noted previously, Part 9 now asks for responses to ''yes/no'' questions and explanations for those responses. Each question elicits information about a particular hardship factor, except for the last question in the section, which asks for other hardship the applicant would suffer if removed from the United States. Specific questions eliciting information about each particular extreme hardship factor alert the applicant to the kind of information that is relevant to demonstrate extreme hardship. The last question is open-ended and gives the applicant the opportunity to expand upon circumstances not covered by previous questions. The Department believes that the present format, where particular hardship questions are followed by an open-ended hardship question, best elicits information required for the adjudicator to make a determination on extreme hardship.

Several commenters argued that the information requested in Part 8 of the form, Miscellaneous Information, should be limited to the applicable statutory period of good moral character.

As explained in an earlier response to comments on the form that is on file with the Director, Policy Directives and Instructions Branch, questions that request information beyond the 7-year and 10-year periods for continuous physical presence are relevant to the adjudication of suspension of deportation and special rule cancellation of removal claims, because this information may be considered in the exercise of discretion. Other questions in this part relate to eligibility requirements that have no time limits. For example, there are questions in the Miscellaneous Information part of the form relating to whether the applicant has been admitted to the United States as a crewman after June 30, 1964, or has had the status of exchange visitor. Because the statute explicitly excludes individuals who obtained such status from a grant of suspension of deportation or cancellation of removal, this information is relevant to the eligibility determination, regardless of whether the applicant held such status more than 10 years ago.

Finally, several commenters noted that the Department's estimate of 12 hours to complete the form would prove inadequate. Because this is a new form, it is difficult to estimate the number of hours needed to complete it. As noted in the earlier response (and because of a wide discrepancy in completion times in our sample study), the time to complete this form will vary significantly. For those applicants who have readily available required documents and information, the time to complete the form will be substantially less than the 12-hour estimate. For some applicants, the time to gather the information for the form will be significantly greater than the 12-hour estimate. For the vast majority of the individuals who do not need to provide documentation to demonstrate extreme hardship, the present time estimate seems sufficient.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because of the following reason: This rule would provide new administrative procedures for the Service to consider applications from certain Guatemalans, Salvadorans, nationals of former Soviet bloc countries, and their qualified relatives who are applying for suspension of deportation or special rule cancellation of removal and, if granted, to adjust their status to that of lawful permanent resident. It will have no effect on small entities, as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866: Regulatory Planning and Review

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

Executive Order 12612: Federalism

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National government and the States, or on the distribution of power and responsibility among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988: Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Family Assessment

The Attorney General has reviewed this regulation and has determined that it may affect family well-being as that term is defined in section 654 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, Div. A. Accordingly, the Attorney General has assessed this action in accordance with the criteria specified in section 654(c)(1). In this rule, the factors that may be considered in evaluating whether deportation or removal would result in extreme hardship include the safety and stability of the family.

Paperwork Reduction Act

This rule requires applicants to provide biographical data and information regarding eligibility for relief under section 203 of NACARA on Form I–881. This requirement is considered an information collection that is subject to review by OMB under the Paperwork Reduction Act of 1995 (PRA). The Service issued a 60-day notice in the **Federal Register** on May 8, 1998, at 63 FR 25523, requesting comments on this new information collection. No comments were received during that initial 60-day comment period. On July 23, 1998, the Service issued a notice in the **Federal Register**, at 63 FR 39596, extending the comment period by 30 days. On November 24, 1998, the Service issued a 30-day notice in the **Federal Register**, at 63 FR 64895, and OMB subsequently approved the Form I–881. The OMB control number for this collection is contained in 8 CFR 299.5, Display of control numbers. As discussed in the supplementary information to this rule, comments were received and considered, and certain changes were made to the proposed Form I–881 in light of those comments.

Since a delay in issuing this interim rule could create a further delay with respect to allowing aliens to apply for relief under section 203 of NACARA, the Service is using emergency review procedures for review and clearance by OMB in accordance with the PRA. If granted, the emergency approval is only valid for 180 days. Comments concerning the information collection should be directed to: Office of Information and Regulatory Affairs, OMB Desk Officer for the Immigration and Naturalization Service, Office of Management and Budget, Room 10235, Washington, DC 20503.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations

(Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 240

Administrative practice and procedure, Immigration.

8 CFR Part 246

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. In § 103.1, the last sentence in paragraph (g)(3)(ii) is revised to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(g) * * *

(3) * * *

(ii) *Asylum officers.* * * * Asylum officers are delegated the authority to hear and adjudicate credible fear of persecution determinations under section 235(b)(1)(B) of the Act, applications for asylum and for withholding of removal, as provided under 8 CFR part 208, and applications for suspension of deportation and special rule cancellation of removal, as provided under 8 CFR part 240, subpart H.

* * * * *

3. In § 103.7, paragraph (b)(1) is amended by adding the entry for ''Form I–881'' to the listing of fees, in proper numerical sequence, to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

Form I–881. For filing an application for suspension of deportation or special rule cancellation of removal (pursuant to section 203 of Public Law 105–100):

— $215 for adjudication by the Service, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time shall be $430.

— $100 for adjudication by the Immigration Court (a single fee of $100 will be charged whenever applications are filed by two or more aliens in the same proceedings). The $100 fee is not required if the Form I–881 is referred to the Immigration Court by the Service.

* * * * *

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

4. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282, 8 CFR part 2.

5. Section 208.14 is amended by revising the section heading and by adding a new paragraph (f), to read as follows:

§ 208.14 Approval, denial, referral, or dismissal of application.

* * * * *

(f) If an asylum applicant is granted adjustment of status to lawful permanent resident, the Service may provide written notice to the applicant that his or her asylum application will be presumed abandoned and dismissed without prejudice, unless the applicant submits a written request within 30 days of the notice, that the asylum application be adjudicated. If an applicant does not respond within 30 days of the date the written notice was sent or served, the Service may presume the asylum application abandoned and dismiss it without prejudice.

PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

6. The authority citation for part 240 is revised to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681); 8 CFR part 2.

In subpart B, § 240.20 is amended by adding a new paragraph (c), to read as follows:

§ 240.20 Cancellation of removal and adjustment of status under section 240A of the Act.

* * * * *

(c) For cases raised under section 240A(b)(2) of the Act, extreme hardship shall be determined as set forth in § 240.58 of this part.

8. In subpart F, a new § 240.58 is added to read as follows:

§ 240.58 Extreme hardship.

(a) To be eligible for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, the alien must meet the requirements set forth in the Act, which include a showing that deportation would result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence. Extreme hardship is evaluated on a case-by-case basis, taking into account the particular facts and circumstances of each case. Applicants are encouraged to cite and document all applicable factors in their applications, as the presence or absence of any one factor may not be determinative in evaluating extreme hardship. Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision. Evidence of an extended stay in the United States without fear of deportation and with the benefit of work authorization, when present in a particular case, shall be considered relevant to the determination of whether deportation will result in extreme hardship.

(b) To establish extreme hardship, an applicant must demonstrate that deportation would result in a degree of hardship beyond that typically associated with deportation. Factors that may be considered in evaluating whether deportation would result in extreme hardship to the alien or to the alien's qualified relative include, but are not limited to, the following:

(1) The age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;

(2) 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;

(3) The health condition of the alien or the alien's children, spouse, or parents and the availability of any required medical treatment in the country to which the alien would be returned;

(4) The alien's ability to obtain employment in the country to which the alien would be returned;

(5) The length of residence in the United States;

(6) The existence of other family members who are or will be legally residing in the United States;

(7) The financial impact of the alien's departure;

(8) The impact of a disruption of educational opportunities;

(9) The psychological impact of the alien's deportation;

(10) The current political and economic conditions in the country to which the alien would be returned;

(11) Family and other ties to the country to which the alien would be returned;

(12) Contributions to and ties to a community in the United States, including the degree of integration into society;

(13) Immigration history, including authorized residence in the United States; and

(14) The availability of other means of adjusting to permanent resident status.

(c) For cases raised under section 244(a)(3) of the Act, the following factors should be considered in addition to, or in lieu of, the factors listed in paragraph (b) of this section.

(1) The nature and extent of the physical or psychological consequences of abuse;

(2) The impact of loss of access to the United States courts and criminal justice system (including, but not limited to, the ability to obtain and enforce orders of protection, criminal investigations and prosecutions, and family law proceedings or court orders regarding child support, maintenance, child custody, and visitation);

(3) The likelihood that the batterer's family, friends, or others acting on behalf of the batterer in the home country would physically or psychologically harm the applicant or the applicant's child(ren);

(4) The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or not reasonably accessible in the home country;

(5) The existence of laws and social practices in the home country that punish the applicant or the applicant's child(ren) because they have been victims of domestic violence or have taken steps to leave an abusive household; and

(6) The abuser's ability to travel to the home country and the ability and willingness of authorities in the home country to protect the applicant and/or the applicant's children from future abuse.

(d) Nothing in § 240.58 shall be construed as creating any right, interest, or entitlement that is legally enforceable by or on behalf of any party against the United States or its agencies, officers, or any other person.

9. Part 240 is amended by adding Subpart H to read as follows:

Subpart H—Applications for Suspension of Deportation or Special Rule Cancellation of Removal Under Section 203 of Pub. L. 105–100

Sec.

Subpart H—Applications for Suspension of Deportation or Special Rule Cancellation of Removal Under Section 203 of Pub. L. 105–100

§ 240.60 Definitions.

As used in this subpart the term:

ABC means *American Baptist Churches* v. *Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

ABC class member refers to:

(1) Any Guatemalan national who first entered the United States on or before October 1, 1990; and

(2) Any Salvadoran national who first entered the United States on or before September 19, 1990.

Asylum application pending adjudication by the Service means any asylum application for which the Service has not served the applicant with a final decision or which has not been referred to the Immigration Court.

Filed an application for asylum means the proper filing of a principal asylum application or filing a derivative asylum application by being properly included as a dependent spouse or child in an asylum application pursuant to the regulations and procedures in effect at the time of filing the principal or derivative asylum application.

IIRIRA means the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub. L. 104–208 (110 Stat. 3009–625).

NACARA means the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Pub. L. 105–100 (111 Stat. 2160, 2193), as amended by the Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105–139 (111 Stat. 2644).

Registered ABC class member means an ABC class member who:

(1) In the case of an *ABC* class member who is a national of El Salvador, properly submitted an ABC registration form to the Service on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or

(2) In the case of an *ABC* class member who is a national of Guatemala, properly submitted an *ABC* registration form to the Service on or before December 31, 1991.

§ 240.61 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart H applies to the following aliens:

(1) A registered *ABC* class member who has not been apprehended at the time of entry after December 19, 1990;

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service.

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia;

(4) An alien who is the spouse or child of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section;

(5) An alien who is:

(i) The unmarried son or unmarried daughter of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section and is 21 years of age or older at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (a)(1), (a)(2), or (a)(3) of this section; and

(ii) Entered the United States on or before October 1, 1990.

(b) This subpart H does not apply to any alien who has been convicted at any time of an aggravated felony, as defined in section 101(a)(43) of the Act.

§ 240.62 Jurisdiction.

(a) *Office of International Affairs.* Except as provided in paragraph (b) of this section, the Office of International Affairs shall have initial jurisdiction to grant or refer to the Immigration Court or Board an application for suspension of deportation or special rule cancellation of removal filed by an alien described in § 240.61, provided:

(1) In the case of a national of El Salvador described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 31, 1996 (with an administrative grace period extending to February 16, 1996), or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(2) In the case of a national of Guatemala described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 3, 1995, or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(3) In the case of an individual described in § 240.61(a)(2) or (3), the individual's asylum application is pending adjudication by the Service;

(4) In the case of an individual described in § 240.61(a)(4) or (5), the individual's parent or spouse has an application pending with the Service under this subpart H or has been granted relief by the Service under this subpart.

(b) *Immigration Court.* The Immigration Court shall have exclusive jurisdiction over an application for suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA, by an alien who has been served Form I–221, Order to Show Cause, or Form I–862, Notice to Appear, after a copy of the charging document has been filed with the Immigration Court, unless the alien is covered by one of the following exceptions:

(1) *Certain ABC class members.* (i) The alien is a registered *ABC* class member for whom proceedings before the Immigration Court or the Board have been administratively closed or continued (including those aliens who had final orders of deportation or removal who have filed and been granted a motion to reopen as required under 8 CFR 3.43);

(ii) The alien is eligible for benefits of the *ABC* settlement agreement and has not had a *de novo* asylum adjudication pursuant to the settlement agreement; and

(iii) The alien has not moved for and been granted a motion to recalendar proceedings before the Immigration Court or the Board to request suspension of deportation.

(2) *Spouses, children, unmarried sons, and unmarried daughters.* (i) The alien is described in § 240.61(a) (4) or (5);

(ii) The alien's spouse or parent is described in § 240.61(a)(1), (a)(2), or (a)(3) and has a Form I–881 pending with the Service; and

(iii) The alien's proceedings before the Immigration Court have been administratively closed, or the alien's proceedings before the Board have been continued, to permit the alien to file an application for suspension of deportation or special rule cancellation of removal with the Service.

§ 240.63 Application process.

(a) *Form and Fees.* Except as provided in paragraph (b) of this section, the application must be made on a Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Public Law 105–100 (NACARA)), and filed in accordance with the instructions for that form. An applicant who submitted to EOIR a completed Form EOIR–40, Application for Suspension of Deportation, before the effective date of the Form I–881 may apply with the Service by submitting the completed Form EOIR–40 attached to a completed first page of the Form I–881. Each application must be filed with the filing and fingerprint fees as provided in § 103.7(b)(1) of this chapter, or a request for fee waiver, as provided in § 103.7(c) of this chapter. The fact that an applicant has also applied for asylum does not exempt the applicant from the fingerprinting fees associated with the Form I–881.

(b) *Applications filed with EOIR.* If jurisdiction rests with the Immigration Court under § 260.62(b), the application must be made on the Form I–881, if filed subsequent to June 21, 1999. The application form, along with any supporting documents, must be filed with the Immigration Court and served on the Service's district counsel in accordance with the instructions on or accompanying the form. Applications for suspension of deportation or special rule cancellation of removal filed prior to June 21, 1999 shall be filed on Form EOIR–40.

(c) *Applications filed with the Service.* If jurisdiction rests with the Service under § 240.62(a), the Form I–881 and supporting documents must be filed at the appropriate Service Center in accordance with the instructions on or accompanying the form.

(d) *Conditions and consequences of filing.* Applications filed under this section shall be filed under the following conditions and shall have the following consequences:

(1) The information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings;

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature establishes a presumption that the applicant is aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

(3) An application that does not include a response to each of the questions contained in the application, is unsigned, or is unaccompanied by the required materials specified in the instructions to the application is incomplete and shall be returned by mail to the applicant within 30 days of receipt of the application by the Service; and

(4) Knowing placement of false information on the application may subject the person supplying that information to criminal penalties under title 18 of the United States Code and to civil penalties under section 274C of the Act.

§ 240.64 Eligibility—general.

(a) *Burden and standard of proof.* The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief.

(b) *Calculation of continuous physical presence and certain breaks in presence.* For purposes of calculating continuous physical presence under this section, section 309(c)(5)(A) of IIRIRA and section 240A(d)(1) of the Act shall not apply to persons described in § 240.61. For purposes of this subpart H, a single absence of 90 days or less or absences

which in the aggregate total no more than 180 days shall be considered brief.

(1) For applications for suspension of deportation made under former section 244 of the Act, as in effect prior to April 1, 1997, the burden of proof is on the applicant to establish that any breaks in continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States. For purposes of evaluating whether an absence is brief, single absences in excess of 90 days, or absences that total more than 180 days in the aggregate will be evaluated on a case-by-case basis. An applicant must establish that any absence from the United States was casual and innocent and did not meaningfully interrupt the period of continuous physical presence.

(2) For applications for special rule cancellation of removal made under section 309(f)(1) of IIRIRA, as amended by NACARA, the applicant shall be considered to have failed to maintain continuous physical presence in the United States if he or she has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. The applicant must establish that any period of absence less than 90 days was casual and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States.

(3) For all applications made under this subpart, a period of continuous physical presence is terminated whenever an alien is removed from the United States under an order issued pursuant to any provision of the Act or the alien has voluntarily departed under the threat of deportation or when the departure is made for purposes of committing an unlawful act.

(4) The requirements of continuous physical presence in the United States under this subpart shall not apply to an alien who:

(i) Has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(ii) At the time of the alien's enlistment or induction, was in the United States.

(c) *Factors relevant to extreme hardship.* Except as described in paragraph (d) of this section, extreme hardship shall be determined as set forth in § 240.58.

(d) *Rebuttable presumption of extreme hardship for certain classes of aliens.* (1) *Presumption of extreme hardship.* An applicant described in paragraphs (a)(1) or (a)(2) of § 240.61who has submitted a completed Form I–881 to either the Service or the Immigration Court shall be presumed to have established that deportation or removal from the United States would result in extreme hardship to the applicant or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) *Rebuttal of presumption.* A presumption of extreme hardship as described in paragraph (d)(1) of this section shall be rebutted if the evidence in the record establishes that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. In making such a determination, the adjudicator shall consider relevant factors, including those listed in § 240.58.

(3) *Burden of proof.* In those cases where a presumption of extreme hardship applies, the burden of proof shall be on the Service to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States.

(4) *Effect of rebuttal.* (i) A determination that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States shall be grounds for referral to the Immigration Court or dismissal of an application submitted initially to the Service. The applicant is entitled to a *de novo* adjudication and will again be considered to have a presumption of extreme hardship before the Immigration Court.

(ii) If the Immigration Court determines that extreme hardship will not result from deportation or removal from the United States, the application will be denied.

§ 240.65 Eligibility for suspension of deportation.

(a) *Applicable statutory provisions.* To establish eligibility for suspension of deportation under this section, the applicant must be an individual described in § 240.61; must establish that he or she is eligible under former section 244 of the Act, as in effect prior to April 1, 1997; must not be subject to any bars to eligibility in former section 242B(e) of the Act, as in effect prior to April 1, 1997, or any other provisions of law; and must not have been convicted of an aggravated felony or be an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997 (relating to Nazi persecution and genocide).

(b) *General rule.* To establish eligibility for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except the provisions specified in paragraph (c) of this section, and must establish:

(1) The alien has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date the application was filed;

(2) During all of such period the alien was and is a person of good moral character; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) *Aliens deportable on criminal or certain other grounds.* To establish eligibility for suspension of deportation under former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, an alien who is deportable under former section 241(a) (2), (3), or (4) of the Act, as in effect prior to April 1, 1997 (relating to criminal activity, document fraud, failure to register, and security threats), must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for deportation;

(2) The alien has been and is a person of good moral character during all of such period; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien, or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) *Battered spouses and children.* To establish eligibility for suspension of deportation under former section 244(a)(3) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except under former section 241(a)(1)(G) of the Act, as in effect prior to April 1, 1997 (relating to marriage fraud), and except under the provisions specified in paragraph (c) of this section, and must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 3

years immediately preceding the date the application was filed;

(2) The alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and

(3) During all of such time in the United States the alien was and is a person of good moral character; and

(4) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

§ 240.66 Eligibility for special rule cancellation of removal.

(a) *Applicable statutory provisions.* To establish eligibility for special rule cancellation of removal, the applicant must show he or she is eligible under section 309(f)(1) of IIRIRA, as amended by section 203 of NACARA. The applicant must be described in § 240.61, must be inadmissible or deportable, must not be subject to any bars to eligibility in sections 240(b)(7), 240A(c), or 240B(d) of the Act, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in section 241(b)(3)(B)(I) of the Act (relating to persecution of others).

(b) *General rule.* To establish eligibility for special rule cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, the alien must establish that:

(1) The alien is not inadmissible under section 212(a)(2) or (3) or deportable under section 237(a)(2), (3) or (4) of the Act (relating to criminal activity, document fraud, failure to register, and security threats);

(2) The alien has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in extreme hardship to the alien, or to the alien's spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence.

(c) *Aliens inadmissible or deportable on criminal or certain other grounds.* To establish eligibility for special rule cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by section 203 of NACARA, the alien must be described in § 240.61 and establish that:

(1) The alien is inadmissible under section 212(a)(2) of the Act (relating to criminal activity), or deportable under paragraphs (a)(2) (other than section 237(a)(2)(A)(iii), relating to aggravated felony convictions), or (a)(3) of section 237 of the Act (relating to criminal activity, document fraud, and failure to register);

(2) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for removal;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in exceptional and extremely unusual hardship to the alien or to the alien's spouse, parent, or child, who is a United States citizen or an alien lawfully admitted for permanent residence.

§ 240.67 Procedure for interview before an asylum officer.

(a) *Fingerprinting requirements.* The Service will notify each applicant 14 years of age or older to appear for an interview only after the applicant has complied with fingerprinting requirements pursuant to § 103.2(e) of this subchapter, and the Service has received a definitive response from the FBI that a full criminal background check has been completed. A definitive response that a full criminal background check on an applicant has been completed includes:

(1) Confirmation from the FBI that an applicant does not have an administrative or criminal record;

(2) Confirmation from the FBI that an applicant has an administrative or a criminal record; or

(3) Confirmation from the FBI that two properly prepared fingerprint cards (Form FD–258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

(b) *Interview.* (1) The asylum officer shall conduct the interview in a non-adversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for suspension of deportation or special rule cancellation of removal. If the applicant has an asylum application pending with the Service, the asylum officer may also elicit information relating to the application for asylum in accordance with § 208.9 of this chapter. At the time of the interview, the applicant must provide complete information regarding the applicant's identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General.

(2) The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(3) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and a language in which the applicant is fluent. The interpreter must be at least 18 years of age. The following individuals may not serve as the applicant's interpreter: the applicant's attorney or representative of record; a witness testifying on the applicant's behalf; or, if the applicant also has an asylum application pending with the Service, a representative or employee of the applicant's country of nationality, or, if stateless, country of last habitual residence. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 240.68.

(4) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(5) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in the officer's discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, and except as otherwise provided by the asylum officer, the applicant shall be informed of the requirement to appear in person to receive and to acknowledge receipt of the decision and any other accompanying material at a time and place designated by the asylum officer.

(6) The asylum officer shall consider evidence submitted by the applicant with the application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may

grant the applicant a brief extension of time following an interview, during which the applicant may submit additional evidence.

§ 240.68 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprinting.

(a) Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. A written request to reschedule will be granted if it is an initial request and is received by the Asylum Office at least 2 days before the scheduled interview date. All other requests to reschedule the interview, including those submitted after the interview date, will be granted only if the applicant has a reasonable excuse for not appearing, and the excuse was received by the Asylum Office in writing within a reasonable time after the scheduled interview date.

(b) Failure to comply with fingerprint processing requirements without reasonable excuse may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer.

(c) Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section 265 of the Act and Service regulations, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment.

§ 240.69 Reliance on information compiled by other sources.

In determining whether an applicant is eligible for suspension of deportation or special rule cancellation of removal, the asylum officer may rely on material described in § 208.12 of this chapter. Nothing in this subpart shall be construed to entitle the applicant to conduct discovery directed toward records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State.

§ 240.70 Decision by the Service.

(a) *Service of decision.* Unless the asylum officer has granted the application for suspension of deportation or special rule cancellation of removal at the time of the interview or as otherwise provided by an Asylum Office, the applicant will be required to return to the Asylum Office to receive service of the decision on the applicant's application. If the applicant does not speak English fluently, the applicant shall bring an interpreter when returning to the office to receive service of the decision.

(b) *Grant of suspension of deportation.* An asylum officer may grant suspension of deportation to an applicant eligible to apply for this relief with the Service who qualifies for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, who is not an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997, and who admits deportability under any law of the United States, excluding former section 241(a)(2), (3), or (4) of the Act, as in effect prior to April 1, 1997. If the Service has made a preliminary decision to grant the applicant suspension of deportation under this subpart, the applicant shall be notified of that decision and will be asked to sign an admission of deportability or inadmissibility. The applicant must sign the admission before the Service may grant the relief sought. If suspension of deportation is granted, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that suspension of deportation is granted.

(c) *Grant of cancellation of removal.* An asylum officer may grant cancellation of removal to an applicant who is eligible to apply for this relief with the Service, and who qualifies for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, and who admits deportability under section 237(a), excluding paragraphs (2), (3), and (4), of the Act, or inadmissibility under section 212(a), excluding paragraphs (2) or (3), of the Act. If the Service has made a preliminary decision to grant the applicant cancellation of removal under this subpart, the applicant shall be notified of that decision and asked to sign an admission of deportability or inadmissibility. The applicant must sign the concession before the Service may grant the relief sought. If the Service grants cancellation of removal, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that cancellation of removal is granted.

(d) *Referral of the application.* Except as provided in paragraphs (e) and (f) of this section, and unless the applicant is granted asylum or is in lawful immigrant or non-immigrant status, an asylum officer shall refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court for adjudication in deportation or removal proceedings, and will provide the applicant with written notice of the statutory or regulatory basis for the referral, if:

(1) The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA;

(2) The applicant does not appear to merit relief as a matter of discretion;

(3) The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal under this subpart, but does not admit deportability or inadmissibility; or

(4) The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure was not excused by the Service, unless the application is dismissed.

(e) *Dismissal of the application.* An asylum officer shall dismiss without prejudice an application for suspension of deportation or special rule cancellation of removal submitted by an applicant who has been granted asylum, or who is in lawful immigrant or non-immigrant status. An asylum officer may also dismiss an application for failure to appear, pursuant to § 240.68. The asylum officer will provide the applicant written notice of the statutory or regulatory basis for the dismissal.

(f) *Special provisions for certain ABC class members whose proceedings before EOIR were administratively closed or continued.* The following provisions shall apply with respect to an *ABC* class member who was in proceedings before the Immigration Court or the Board, and those proceedings were closed or continued pursuant to the *ABC* settlement agreement:

(1) *Suspension of deportation or asylum granted.* If an asylum officer grants asylum or suspension of deportation, the previous proceedings before the Immigration Court or Board shall be terminated as a matter of law on the date relief is granted.

(2) *Asylum denied and application for suspension of deportation not approved.* If an asylum officer denies asylum and does not grant the applicant suspension of deportation, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation. In the case where jurisdiction rests with the Board, an

application for suspension of deportation that is referred to the Board will be remanded to the Immigration Court for adjudication.

(g) *Special provisions for dependents whose proceedings before EOIR were administratively closed or continued.* If an asylum officer grants suspension of deportation or special rule cancellation of removal to an applicant described in § 240.61(a)(4) or (a)(5), whose proceedings before EOIR were administratively closed or continued, those proceedings shall terminate as of the date the relief is granted. If suspension of deportation or special rule cancellation of removal is not granted, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation or special rule cancellation of removal. In the case where jurisdiction rests with the Board, an application for suspension of deportation or special rule cancellation of removal that is referred to the Board will be remanded to the Immigration Court for adjudication.

(h) *Special provisions for applicants who depart the United States and return under a grant of advance parole while in deportation proceedings.* Notwithstanding paragraphs (f) and (g) of this section, for purposes of adjudicating an application for suspension of deportation or special rule cancellation of removal under this subpart, if an applicant departs and returns to the United States pursuant to a grant of advance parole while in deportation proceedings, including deportation proceedings administratively closed or continued pursuant to the *ABC* settlement agreement, the deportation proceedings will be considered terminated as of the date of applicant's departure from the United States. A decision on the NACARA application shall be issued in accordance with paragraph (a), and paragraphs (c) through (e) of this section.

PART 246—RESCISSION OF ADJUSTMENT OF STATUS

10. The authority citation for part 246 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1255, 1256, 1259; 8 CFR part 2.

11. Section 246.1 is amended by revising the first sentence to read as follows:

§ 246.1 Notice.

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case, or it appears to an asylum office director that a person granted adjustment of status by an asylum officer pursuant to 8 CFR 240.70 was not in fact eligible for adjustment of status, a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. * * *

§ 246.2 [Amended]

12. Section 246.2 is amended by adding the phrase ''or asylum office director'' immediately after the phrase ''district director.''

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

13. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

14. Section 274a.12 is amended by revising the first sentence in paragraph (c)(10), to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(10) An alien who has filed an application for suspension of deportation under section 244 of the Act (as it existed prior to April 1, 1997), cancellation of removal pursuant to section 240A of the Act, or special rule cancellation of removal under section 309(f)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub. L. 104–208 (110 Stat. 3009–625) (as amended by the Nicaraguan Adjustment and Central American Relief Act (NACARA)), title II of Pub. L. 105–100 (111 Stat. 2160, 2193) and whose properly filed application has been accepted by the Service or EOIR. * * *

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PART 299—IMMIGRATION FORMS

15. The authority citation for part 299 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103; 8 CFR part 2.

16. Section 299.1 is amended in the table by adding the entry for Form ''I–881'' in proper numerical sequence, to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
*	*	* * * * * *
I–881	5–01–99	Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Pub. L. 105–100 (NACARA))
*	*	* * * * * *

17. Section 299.5 is amended in the table by adding the entry for Form ''I–881'' in proper numerical sequence, to read as follows:

§ 299.5 Display of control numbers.

* * * * *

INS form No.	INS form title	Currently assigned OMB control No.
*	* * * * * *	*
I–881	Application for Suspension of Deportation or Special Rule Cancellation of Removal (pursuant to section 203 of Pub. L. 105–100 (NACARA)).	1115—0227

INS form No.	INS form title	Currently assigned OMB control No.
* * * * * * *		

Dated: May 14, 1999.

Janet Reno,

Attorney General.

[FR Doc. 99–12643 Filed 5–20–99; 8:45 am]

BILLING CODE 4410–10–P