September 22, 2014

RELEASE OF FOIA DOCUMENTS RELATED TO REINSTATEMENT

In February 2014, the National Immigration Project of the National Lawyers Guild and the Immigrant Rights Project and Human Rights Project of the American Civil Liberties Foundation filed a Freedom of Information Act (FOIA) request with the Department of Homeland Security (DHS) seeking information pertaining to individuals who receive orders reinstating prior removal, deportation or exclusion orders pursuant to 8 U.S.C. § 1231(a)(5).

U.S. Citizenship and Immigration Services (USCIS) recently responded to the request with the attached documents. In general, these documents consist of mainly of training materials and legal memoranda related to: (1) USCIS jurisdiction to adjudicate asylum and benefits applications when a person potentially is subject to reinstatement; and (2) individuals who are ABC class members or NACARA applicants potentially subject to reinstatement.

Highlights of this FOIA production include:

- Statistics evidencing a twelve-fold increase in the numbers of individuals with reinstatement orders referred to USCIS for reasonable fear interviews, from 648 in 2008 to 8,117 in 2013.

- Evidence that “an individual who is granted voluntary departure and leaves the United States before the expiration of the voluntary departure period” is not subject to reinstatement. – Bates p. 14.

- Agency acknowledgment that the decision to reinstate is discretionary.
  “Whether a prior order will be reinstated is under the purview of the ICE Special Agent in Charge (SAC).” – Bates p. 14.

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1 To date, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have not responded to the FOIA request.
“If the ICE SAC declines to pursue reinstatement of the prior order, the Asylum Office continues to process the asylum application.” – Bates p. 15, 48

- Reliance on *Chay Ixot v. Holder*, 646 F.3d 1231 (9th Cir. 2011) for the proposition that USCIS may adjudicate relief applications of individuals subject to reinstatement if the individual filed the application prior to April 1, 1997 and that, if USCIS denies the application, whether DHS then can issue a reinstatement order is an open question. – Bates p. 20, 25, 35

- Evidence that at least one USCIS Field Office (Lawrence) instructs USCIS adjudicators to refer persons subject to § 1231(a)(5) to both ICE and an Assistant U.S. Attorney (presumably for prosecution under 8 U.S.C. § 1326). – Bates p. 23

- The existence of a draft Reasonable Fear Procedures Manual – Bates p. 49

- The agency should “[c]heck before applying [§ 1231(a)(5)] to VAWA, T, and U nonimmigrants.” – Bates p. 109
MAY 19 2009

Memorandum

TO: USCIS Leadership

FROM: Michael Aytes
Acting Deputy Director

SUBJECT: Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of Gonzalez v. DHS, 508 F.3d. 1227 (9th Cir. 2007)

1. Purpose

This memorandum supersedes and rescinds entirely the March 31, 2006 memorandum entitled, "Effect of Perez-Gonzalez v. Ashcroft on adjudication of Form I-212 applications filed by alien who are subject to reinstated removal orders under INA § 241(a)(5)" (the "Perez-Gonzalez" memorandum).

2. Relevant Authorities

Section 245(a) of the Immigration and Nationality Act (INA) permits certain aliens to adjust their status to permanent residence in the United States, rather than apply for an immigrant visa abroad. Aliens who entered the United States without being inspected and admitted or paroled (entries without inspection, or EWIs) or who are presently not in lawful immigration status (present without inspection, or PWIs) generally are ineligible for adjustment. See section 245(a) and (c) of the INA; 8 U.S.C. 1255(a) and (c). Section 245(i) of the INA provides an exception to the adjustment bars for certain aliens who were the beneficiaries of visa petitions or labor certification applications filed on or before April 30, 2001. See section 245(i) of the INA, 8 U.S.C. 1255(i). Aliens seeking section 245(i) adjustment, however, must still show they are admissible to the United States. Section 245(i)(2)(A) of the INA, 8 U.S.C. § 1255(i)(2)(A).

Section 212(a)(9)(C) of the INA renders inadmissible any alien who enters, or attempts to enter, without admission after a prior immigration violation. Under section 212(a)(9)(C)(i)(I) of the INA, an alien is inadmissible if the alien’s entry or attempted entry without admission occurs after the alien has accrued, in the aggregate, more than one year of unlawful presence. If the alien’s entry or attempted entry without admission occurs after the alien has been ordered
removed, the alien is inadmissible under section 212(a)(9)(C)(i)(II) of the INA. It is possible for an alien to be inadmissible under both provisions.

3. **Litigation History**

In 2004, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) holding that an alien is entitled to a decision on a Form I-212, Applications for Permission to Reapply for Admission into the United States After Deportation or Removal, filed before the reinstatement and execution of a prior removal order by Immigration and Customs Enforcement (ICE). As a result, on March 31, 2006, USCIS issued the Perez-Gonzalez memorandum which outlined how to adjudicate Form I-212 requests in light of the date of the alien’s last departure from the United States; the date of ICE’s reinstatement of a prior removal order (if applicable); and the Circuit in which the case arose.

On November 13, 2006, USCIS was enjoined by the district court in *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash., 2006) from following the March 13, 2006 field guidance and adjudicating cases in light of this guidance. As a result, USCIS placed a hold on all cases affected by the preliminary injunction.

In 2006, the Board of Immigration Appeals (BIA) issued an opinion in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), holding that an applicant who is inadmissible under section 212(a)(9)(C)(i)(II) of the INA is ineligible for a waiver of inadmissibility because the alien is required to apply for permission to reenter the United States and can only make such application after 10 years has elapsed from the date of last departure. 1 *Id.* at 876. The Board issued a similar ruling in *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) holding that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the INA is ineligible for adjustment under section 245(i) of the INA. 2

In November 2007, the Ninth Circuit overturned its holding in *Perez-Gonzalez*. See *Gonzales v. Dep’t of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007). In *Gonzales*, the Ninth Circuit held that it was bound by the Board of Immigration Appeals' (BIA) interpretation of section 212(a)(9)(C) of the INA in *Matter of Torres-Garcia*, notwithstanding the Circuit’s earlier panel decision in *Perez-Gonzalez*. The Ninth Circuit also vacated the 2006 injunction issued by the district court. The Court’s mandate took effect January 23, 2009.

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1 The Board also noted that the regulations at 8 CFR 212.2, governing consent to reapply were promulgated prior to enactment of IIRIRA section 301(b), Pub. L. 104-208, which created new section 212(a)(9) of the INA and thus did not implement the new IIRIRA provisions. *Matter of Torres-Garcia*, 23 I&N Dec. at 876. The BIA also stated that even if these regulations were applicable they could not be interpreted “in a manner that would allow an alien to circumvent the statutory 10-year limitation on section 212(a)(9)(C)(ii) waivers by simply reentering unlawfully before requesting the waiver.” *Id.*

2 The Board also, by reference to its decision in *Matter of Torres-Garcia*, concluded that finding that an alien who is inadmissible under 212(a)(9)(C)(i)(I) of the INA is subject to the 10-year rule for consent to reapply. *Matter of Briones*, 24 I&N Dec. at 358-59.
4. **Field Guidance**

A. **General**

All section 245(i) adjustment cases that were previously placed on hold in light of the November 2006 injunction should now be adjudicated in accordance with the guidance contained in this memorandum and the current processing guidelines for consent to reapply applications. These instructions are prospective and apply to all section 245(i) adjustment of status applications and section 212(a)(9)(C)(ii) Form I-212 filings that are currently pending or will be filed in the future with USCIS, regardless of the Circuit in which the case arose or is adjudicated.  

B. **Aliens Seeking Consent to Reapply Prior to Expiration of Required 10-year Period as Specified Under Section 212(a)(9)(C)(ii) of the INA**

If an alien is inadmissible under section 212(a)(9)(C)(i)(I) or (II) of the INA (reentry or attempted reentry without admission after having accrued 1 year of unlawful presence, in the aggregate, or after executing a removal order), the alien's application for consent to reapply cannot be approved unless the alien is outside the United States and at least 10 years have elapsed from the date of last departure. The 10-year period commences from the alien's date of last departure from the United States after becoming inadmissible under section 212(a)(9)(C)(i) of the INA.

A Form I-212 should be denied in any case where the alien:

1. is in the United States after subsequent reentry without admission; or
2. is abroad but has not been outside the United States for a period of at least 10 years since the date of last departure.

Adjudicators should cite to *Matter of Briones* for cases involving inadmissibility under section 212(a)(9)(C)(i)(I) of the INA (reentry after aggregate of 1 year unlawful presence) and *Matter of Torres-Garcia* for cases involving inadmissibility under section 212(a)(9)(C)(i)(II) of the INA (reentry after execution of a removal order). Denials should include the following language:

"You were removed from the United States under a removal order for (insert).
You departed the United States on (date) after having accrued 1 year of...

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2. Thus, for cases arising in the Ninth and Tenth Circuit, adjudicators should follow the BIA decisions *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), and *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). This guidance also does not affect requests for consent to reapply or adjustment applications that were previously approved based on the original 2006 Perez-Gonzalez memorandum guidance.

4. Note if an alien has returned or attempted to return without admission after removal or sufficient unlawful presence, the alien incurs a new basis for inadmissibility each time he or she returns or attempts to return without admission. Thus, the alien must leave the United States and remain abroad for another 10-year period. Also, *Matter of Torres-Garcia* and *Matter of Briones* make clear that "nunc pro tunc" (retroactive) and advance (prospective) approval provisions formerly contained in 8 CFR 212.2 do not apply to consent requests under section 212(a)(9)(C)(ii) of the INA. 23 I&N Dec. at 875; 24 I&N Dec. at 358.
unlawful presence, in the aggregate if applicable) and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i) [insert appropriate subclause (I) or (II)] of the Immigration and Nationality Act (the Act). Under section 212(a)(9)(C)(ii) of the Act, you are required to obtain consent to reapply for admission to the United States. Consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted if: (1) you have left the United States, (2) are currently abroad, and (3) are seeking admission to the United States at least 10 years after the date of your last departure. [Insert Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006); or Matter of Briones, 24 I&N Dec. 355 (BIA 2007), whichever is applicable].

Our records indicate that you do not meet the requirements for consent to reapply because you (insert either “currently are in the United States after reentering illegally and you have not departed since your return or prior to filing your application” or “reentered the United States illegally on [insert date] and departed [insert date] but 10 years have not elapsed since the date of your last departure”, whichever is appropriate). Accordingly, your application is denied.”

C. Aliens Inadmissible Under Section 212(a)(9)(C)(i) of the Act and Subject to Removal Orders Reinstated Prior to Filing of Form I-212

Adjudicators should deny Form I-212s filed by aliens who are:

(1) inadmissible under section 212(a)(9)(C)(i)(II) of the INA only, or both section 212(a)(9)(C)(i)(I) and (II); and
(2) subject to a reinstated removal order under section 241(a)(5) of the INA that occurred prior to the filing date of the Form I-212.

The denial notice should include the following language:

“You were removed from the United States under a removal order [insert “and you also departed the United States on (date) after having accrued 1 year of unlawful presence, in the aggregate if applicable] and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i)(II) [or insert “under section 212(a)(9)(C)(i)(I) and (II) if applicable] of the Immigration and Nationality Act (the Act). On (date), U.S. Immigration and Customs Enforcement (ICE) reinstated the removal order entered against you. This reinstatement makes you ineligible for “any relief” under the immigration laws. Section 241(a)(5) of the Act, 8 U.S.C. section 1231(a)(5). Section 241(a)(5) of the Act bars approval of the applicant’s Form I-212. Delgado v. Mubasey, 516 F.3d 65, cert. denied 129 S.Ct. 299 (2009); Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004); Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004); Padilla v. Ashcroft, 334 F.3d 921 (9th Cir. 2003). You filed the application after ICE reinstated the removal order. Accordingly, the application is denied.”
D. Aliens Inadmissible Under Section 212(a)(9)(C)(i) of the INA and Subject to Removal Orders Reinstated at the Time of Adjudication of the Form I-212

Adjudicators should deny Form I-212s filed by aliens who are:

1. inadmissible under section 212(a)(9)(C)(i) of the INA only, or both section 212(a)(9)(C)(I) and (II); and
2. subject to a reinstated removal order under section 241(a)(5) at the time of adjudication of the Form I-212.

The denial should include the following language:

"You were removed from the United States under a removal order [insert "and you also departed the United States on [date] after having accrued 1 year of unlawful presence, in the aggregate" if applicable] and illegally returned on or about (date). You are therefore inadmissible under section 212(a)(9)(C)(i)(II) [or insert "under section 212(a)(9)(C)(i)(I) and (II)" if applicable] of the Immigration and Nationality Act (the Act). On (date), U.S. Immigration and Customs Enforcement (ICE) reinstated the removal order entered against you. This reinstatement makes you ineligible for "any relief" under the immigration laws. Section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). Section 241(a)(5) of the Act bars approval of an applicant's Form I-212. Delgado v. Mukasey, 516 F.3d 65, cert. denied 129 S.Ct. 299 (2009); Berrum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004); Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004); Padilla v. Ashcroft, 334 F.3d 921 (9th Cir. 2003)."

[Insert the following paragraph below for cases involving inadmissibility under section 212(a)(9)(C)(i)(I) and (II) of the Act]

"Additionally, because of your illegal return to the United States on or about (date), you are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. You are required to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act before you can seek admission to the United States. Consent to reapply under section 212(a)(9)(C)(ii) of the Act may be granted only if: (1) you have left the United States and are currently abroad and (2) are seeking admission more than ten (10) years after the date of your last departure. Matter of Torres-Garcia, 23 I&N Dec. 866 (BIA 2006); Matter of Briones, 24 I&N Dec. 355 (BIA 2007). Our records indicate that you do not meet the requirements for consent to reapply as listed above.

Accordingly, your Form I-212 is denied."
E. Aliens Inadmissible Under Section 212(a)(9)(C)(i)(II) With No Reinstatement of a Prior Removal Order At the Time of the Adjudication of Form I-212

If the alien is present in the United States, but ICE chooses not to reinstate the removal order at the time of the adjudication of Form I-212, adjudicators should follow the guidance provided in section B of this memorandum.

F. Adjudications of Form I-212s for Aliens Eligible to File for Consent to Reapply

If an alien inadmissible under section 212(a)(9)(C)(i) of the INA is abroad for the requisite period of 10 years since the alien's last departure, the alien may properly apply for consent to reapply. Adjudicators should exercise their discretion and analyze the alien's eligibility for relief considering both positive and negative factors as guided by current published precedent. The alien's inadmissibility under section 212(a)(9)(C)(i) of the INA is, itself, a negative factor that USCIS may properly consider in determining whether to exercise discretion favorably.

G. VAWA Self-Petitioners Inadmissible Under Section 212(a)(9)(C)(i) of the INA

Aliens who qualify as VAWA self-petitioners under section 204(a)(1)(A)(vii) or (B) of the INA but are inadmissible under section 212(a)(9)(C)(i) of the INA may seek a waiver of inadmissibility under section 212(a)(9)(C)(iii) of the INA, rather than consent to reapply by filing Form I-212 under section 212(a)(9)(C)(ii) of the INA. This waiver is not subject to the 10-year absence requirement that applies in consent to reapply cases. Also, VAWA self-petitioners who are inadmissible only under section 212(a)(9)(C)(i)(I) of the Act based on reentry after prior unlawful presence in the United States in an aggregate of 1 year are not subject to reinstatement under section 241(a)(5) of the Act, because there was no prior removal order. Approval of a waiver under section 212(a)(9)(C)(iii) of the INA, therefore, could lead to approval of a section 245(i) adjustment application. 5

Adjudicators encountering cases involving VAWA self-petitioners who are inadmissible under section 212(a)(9)(C)(i) of the INA should coordinate adjudication through appropriate channels and guidelines in place for handling VAWA cases.

5 NOTE: VAWA self-petitioners who are inadmissible under section 212(a)(9)(C)(i)(II) of the INA are subject to reinstatement based on a prior removal order. Adjudicators should follow the guidance in Sections C, D, and E above related to adjudication of cases involving reinstated (or potential reinstatement of) removal orders.

5
6. **Contact Information**

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, in the Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

**Attachments:**

(b)(5)
(b)(5)
### III.S. REINSTATEMENT OF A PRIOR ORDER

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<tr>
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<td>Sections: 1,2,3</td>
<td>Sections:</td>
</tr>
</tbody>
</table>

If an applicant returns to the United States illegally after having been removed from the United States, or if an applicant departed voluntarily while under an order of removal, deportation, or exclusion, the individual is subject to a reinstatement of the prior order. This does not include an individual who is granted voluntary departure and leaves the United States before expiration of the voluntary departure period. An individual who has had a prior order of removal, deportation, or exclusion reinstated is not eligible for relief from removal under the INA, including asylum, but may seek withholding of removal under section 241(b)(3) of the INA or deferral of removal under Article 3 of the Convention Against Torture.

A grant of withholding or deferral of removal is not considered relief since the individual may still be removed to a third country. Additionally, an individual subject to reinstatement of a previous removal order may be eligible for relief under the Legal Immigration Family Equity Act (LIFE Act). Section 1505(c) of the LIFE Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000), provides that an individual who is otherwise eligible for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) shall not be barred from applying for such relief by operation of section 241(a)(5) of the INA (reinstatement). This means that a NACARA § 203 applicant or potential NACARA § 203 applicant who was deported, excluded, or removed from the United States or who otherwise left the United States while under a final order and then reentered the United States illegally may still apply for and be granted relief under NACARA § 203, if eligible. See Michael Pearson, Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries, Policy Memorandum (Washington, DC: 23 February 2001).

Whether a prior order will be reinstated is under the purview of the ICE Special Agent in Charge (SAC).

#### 1. Determining Whether an Applicant is Subject to Reinstatement of a Prior Order

Often, the Asylum Office becomes aware that an applicant is subject to reinstatement of a prior order when it receives an IDENT FBI response or when verifying identity in US-VISIT. An AO may also discover this information at the time of the interview, or shortly thereafter, when the Asylum Office receives an A-file after an interview has been conducted on a T-file.

When Asylum Office personnel determine that the applicant is subject to a reinstatement of a prior order, the Asylum Office must contact the ICE SAC having jurisdiction over the applicant’s place of residence to determine whether he or she will pursue a reinstatement of the prior order. The processing of the asylum application stops until the Asylum Office is notified either that the prior order has been reinstated or that the SAC will not reinstate the order. For this reason, the Asylum Office must ensure that it is contacted when the SAC reaches a decision.

http://ecn.uscis.dhs.gov/team/raio/Asylum/ASMOPS/AAPMwiki/Pages/III.S.%20Reinstat... 3/20/2014
If the Asylum Office discovers the applicant is subject to a reinstatement of a prior order at the time of the interview, local procedures dictate whether there is immediate follow-up with the local ICE Investigations office. The AO may serve a Mail-Out Notice (Appendix 12) on the applicant if a Pick-Up Notice would normally be required. If the applicant has already been served the Pick-Up Notice and the information is discovered a sufficient period of time before the pick-up date, Asylum Office personnel send the applicant a Notice of Change in Decision Service from Pick-Up to Mail-Out (Appendix 33). Otherwise, the IIO/CR informs the applicant that his or her decision is not ready for service at the time he or she appears on the pick-up date.

2. ICE SAC Action

The ICE SAC and the Asylum Office coordinate the transfer of the A-file throughout the reinstatement process. If the ICE SAC declines to pursue reinstatement of the prior order, the Asylum Office continues to process the asylum application.

If the ICE SAC decides to pursue reinstatement of a prior order, he or she issues to the applicant a Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The applicant is given an opportunity to respond to the written notice before a final determination is made.

3. Asylum Office Action When a Prior Order is Reinstated

Once the prior order has been reinstated, the applicant is not permitted to apply for asylum or other relief from removal under the INA.

The applicant is eligible to apply for withholding or deferral of removal under Section 241(b)(3) of the INA and under the Convention Against Torture. The fact that an individual applied for asylum does not automatically entitle him or her to a “reasonable fear” interview. Pursuant to reasonable fear procedures, a “reasonable fear” interview is conducted only if the applicant is specifically referred to an Asylum Office by the office that reinstated the order. If the Asylum Office issued a Recommended Approval letter, a reasonable fear interview is automatic.

Once a DHS Officer serves Form I-871 on an applicant, the Asylum Office administratively closes the asylum application on the CLOS screen in RAPS using close code “CO-Reinstatement” regardless of whether a “reasonable fear” interview will be conducted. If the ICE SAC refers an applicant for a reasonable fear interview, an AO interviews the applicant and adjudicates the claim pursuant to reasonable fear procedures. The AO enters data on the case into APSS in accordance with reasonable fear procedures.

a. Cases with no decision, cases with a decision other than Recommended Approval, and Recommended Approvals for which the Recommended Approval Letter has not been issued

When the Asylum Office receives a copy of Form I-871, Asylum Office personnel:

- Administratively close the case in RAPS. The reason for the closure is “Reinstatement” (CO). Indicate that an NTA/referral will NOT be issued to the applicant (Place “N” in the “Send to IJ” field).
- Prepare a Dismissal of Asylum Application (Reinstatement of a Prior Order) (Appendix 29).
- Serve the letter by either regular or certified mail, depending upon local Asylum Office policy.

http://ecn.uscis.dhs.gov/team/raio/Asylum/ASMOPS/AAPMwiki/Pages/III.S.%20Reinstat... 3/20/2014
b. Recommended Approval Letter has been Issued

When the Asylum Office receives a copy of Form I-871, Asylum Office personnel:

- Administratively close the case in RAPS. The reason for the closure is "Reinstatement" (CO). Indicate that an NTA/referral will NOT be issued to the applicant. (Place “N” in the “Send to IJ” field.)
- Prepare a Cancellation of Recommended Approval (Reinstatement of a Prior Order) (Appendix 28).
- Serve the letter by either regular or certified mail, depending upon local Asylum Office policy.

The SAO coordinates with the local ICE district office in order to arrange for the service of an M-488, Information about Reasonable Fear Interview, and schedule a "reasonable fear" interview.

Start of Page
The USCIS Asylum Division has records responsive to section A, questions 8 and 9.

8. The USCIS Asylum Division has received the below number of referrals for reasonable fear interviews of individuals with reinstatement orders. USCIS does not track who receives withholding of removal after a reasonable fear interview.

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<th></th>
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<th>CY09</th>
<th>CY10</th>
<th>CY11</th>
<th>CY12</th>
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<td>4,663</td>
<td>8,117</td>
<td>1,230</td>
<td>21,593</td>
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</table>

Source: USCIS Asylum Division, Asylum Pre-Screening System (APSS), APCLS144, March 10, 2014.

9. See section III.S. Reinstatement of a Prior Order, of the Affirmative Asylum Procedures Manual for instructions if an affirmative asylum applicant appears to be subject to reinstatement of removal. (See attached.) Also available publically at www.uscis.gov/asylum.
Jurisdictional Issues for USCIS Adjudications and the Removal Process

USCIS Office of the Chief Counsel

OCC-012-01-JUIP

August 2011
Reinstatement and Executed Order

Reinstatement of Removal Orders – INA § 241(a)(5)

- An alien who has reentered the U.S. *illegally* after
  - having been previously removed (including “deported” or “excluded”), or
  - departed voluntarily while under an order of removal (a “self-deport”)

- The prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, and the alien is ineligible for *any relief* under the Immigration and Nationality Act.
Reinstatement – cont’d

USCIS may not adjudicate any application that qualifies as relief where an alien’s prior order of removal has been reinstated, except:

- If the application for relief was filed prior to the effective date of IIRIRA, April 1, 1997. *Chay Ixcot v. Holder*, 646 F.3d 1213, (9th Cir. 2011).

- USCIS will adjudicate the application.
  
  - Under *Ixcot*, whether DHS may reinstate the removal order after USCIS has denied an application filed before 4/1/1997 remains an open question. 646 F.3d at 1213, n. 15.
Reinstatement – cont’d

- Referral to ICE DRO for reinstatement is *not* appropriate in these cases, at least not unless the application is denied on the merits.

If the applicant entered the U.S. illegally after having been previously removed, deported or excluded:

- Notify a supervisor and consult with OCC counsel to determine if referral to ICE DRO for reinstatement is appropriate.
Alternate Means of Removal

- **Voluntary Departure – INA § 240B**
  - Allows alien to leave the U.S. voluntarily within a specified period of time

- **Withdrawal of application for admission – INA § 235(a)(4)**
  - Generally occurs at a port of entry, may occur in conjunction with denial of adjustment of status if alien is an applicant for admission
  - Generally requires that there be no fraud involved and at CBP officer’s discretion

- **Reinstatement of removal – INA § 241(a)(5)**
  - Limited to aliens previously removed from the United States who are again found in the United States without permission.
  - Refer to ICE and AUSA

- **Administrative Removal – INA § 238(b)**
  - Used for aggravated felons who are not LPRs
  - Refer to ICE

- **Expedited Removal – INA § 235(b)(1)**
  - Occurs at the Port of Entry for those inadmissible under INA §§ 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) only
Reinstatement and Executed Order

Reinstatement of Removal Orders – INA § 241(a)(5)

- An alien who has reentered the U.S. *illegally* after
  - having been previously removed (including “deported” or “excluded”), or
  - departed voluntarily while under an order of removal (a “self-deport”)

- The prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, and the alien is ineligible for *any relief* under the Immigration and Nationality Act.
Reinstatement (cont’d)

USCIS may not adjudicate any application that qualifies as relief where an alien’s prior order of removal has been reinstated, except:

- If the application for relief was filed prior to the effective date of IIRIRA, April 1, 1997. *Chay lxcot v. Holder*, 646 F.3d 1213, (9th Cir. 2011).

- USCIS will adjudicate the application.
  - Under *lxcot*, whether DHS may reinstate the removal order after USCIS has denied an application filed before 4/1/1997 remains an open question. 646 F.3d at 1213, n. 15.
Reinstatement (cont’d)

- Referral to ICE ERO for reinstatement is *not* appropriate in these cases, at least not unless the application is denied on the merits.

- If the applicant entered the U.S. illegally after having been previously removed, deported or excluded:
  - Notify a supervisor and consult with OCC counsel to determine if referral to ICE ERO for reinstatement is appropriate.
Alternate Means of Removal

- **Voluntary Departure – INA § 240B**
  - Allows alien to leave the U.S. voluntarily within a specified period of time

- **Withdrawal of application for admission – INA § 235(a)(4)**
  - Generally occurs at a port of entry, may occur in conjunction with denial of adjustment of status if alien is an applicant for admission
  - Generally requires that there be no fraud involved and at CBP officer's discretion

- **Reinstatement of removal – INA § 241(a)(5)**
  - Limited to aliens previously removed from the United States who are again found in the United States without permission.
  - Refer to ICE and AUSA

- **Administrative Removal – INA § 238(b)**
  - Used for aggravated felons who are not LPRs
  - Refer to ICE

- **Expedited Removal – INA § 235(b)(1)**
  - Occurs at the Port of Entry for those inadmissible under INA §§ 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) only
Alternate Means of Removal

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  - Allows alien to leave the U.S. voluntarily within a specified period of time

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- Expedited Removal – INA § 235(b)(1)
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Training Objectives

- This course presents a discussion of issues related to USCIS jurisdiction over pending cases, with particular attention to cases that are in removal proceedings and cases with outstanding orders of removal, deportation or exclusion.

- Given a field situation, the Officer will be able to identify whether or not USCIS has the ability to adjudicate a pending application or petition or whether EOIR or some other agency has jurisdiction over the application or petition.
EOIR Outstanding Order

If there is an outstanding order of removal, deportation or exclusion:

- Notify a supervisor and contact ICE ERO to verify and determine if ICE will execute the outstanding warrant.

- Consult with USCIS counsel to determine whether the application/petition before USCIS can/should be adjudicated, notwithstanding the outstanding order of removal.

- If USCIS adjudicates the application/petition favorably, it will notify ICE ERO of the favorable adjudication.

Enforcement and Removal Operations (ERO)

Note that there are different types of removal orders (the orders will be entered on different forms). For example, a voluntary departure order which becomes an order of removal after expiration of the voluntary departure period or failure to pay a bond, reinstatement of a removal order, administrative removal order, expedited removal order, summary removal order, judicial removal order, stipulated order of removal, withholding of removal and VWP order of removal.
Reinstatement and Executed Order

Reinstatement of Removal Orders – INA § 241(a)(5)

- An alien who has reentered the U.S. *illegally* after
  - having been previously removed (including "deported" or "excluded"), or
  - departed voluntarily while under an order of removal (a "self-deport")
- The prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, and the alien is ineligible for *any relief* under the Immigration and Nationality Act.

Relief for reinstatement purposes includes, but is not limited to, applications for:
Form I-485: Adjustment of Status
Form I-589: Asylum
Form I-212: Permission to reapply for admission
Form I-601: Waiver
Reinstatement (cont’d)

USCIS may not adjudicate any application that qualifies as relief where an alien’s prior order of removal has been reinstated, except:

- If the application for relief was filed prior to the effective date of IIRIRA, April 1, 1997. Chay Ixcot v. Holder, 646 F.3d 1213, (9th Cir. 2011).

- USCIS will adjudicate the application.
  
  Under Ixcot, whether DHS may reinstate the removal order after USCIS has denied an application filed before 4/1/1997 remains an open question. 646 F.3d at 1213, n. 15.

This is Ninth Circuit law only. Cite to: --- F.3d ----, 2011 WL 2138234, C.A.9, June 01, 2011 (NO. 09-71597). In Chay, the alien filed his asylum application in 1993 and USCIS finally adjudicated it in 2009, denying it and referring Chay to ICE ERO for reinstatement. The Ninth Circuit court held that referral to reinstatement was in error.

In a Supreme Court case, Fernandez-Vargas v. Gonzales, 126 S.Ct. 2422 (2006), an alien illegally reentered the U.S. in 1982 after having been deported. Alien took no action to file for relief prior to April 1, 1997 but waited until 2001 to apply for adjustment of status. The Supreme Court held that he was subject to reinstatement even though he reentered the U.S. prior to IIRIRA’s effective date and the application of section 241(a)(3) of the Act (barring relief) did “not affect any right of, or impose any burden on, the continuing violator of the INA."
Reinstatement (cont’d)

- Referral to ICE ERO for reinstatement is *not* appropriate in these cases, at least not unless the application is denied on the merits.

- If the applicant entered the U.S. illegally after having been previously removed, deported or excluded:
  - Notify a supervisor and consult with OCC counsel to determine if referral to ICE ERO for reinstatement is appropriate.
Issuing a Notice to Appear

USCIS Office of the Chief Counsel
Why Issue an NTA?

- Alien is inadmissible to or deportable from the United States
- Exercise of discretion is not warranted
- Necessary to secure alien’s removal from the United States
- Alternate means of removal not applicable
  - Voluntary Departure
  - Withdrawal of application for admission
  - Reinstatement
  - Administrative removal
  - Expedited Removal
Other Methods of Removal

- Voluntary Departure – INA § 240B
- Administrative Removal – INA § 238(b)
- Reinstatement of Removal – INA § 241(a)(5)
- Withdrawal of Application for Admission – INA § 235(b)(4)
An ABC class member may be under the exclusive jurisdiction of EOIR if he or she is not eligible for ABC benefits and has been properly placed in deportation, exclusion, or removal proceedings (which requires service of charging documents on the individual and filing of those charging documents with EOIR.) For example, a class member may have applied for asylum after the applicable filing cut-off date and been placed in removal proceedings after a reform asylum interview. EOIR also has exclusive jurisdiction if the class member was convicted of an aggravated felony or was apprehended at the time of entry after December 19, 1990, and has been placed in proceedings before the Immigration Court. In addition, EOIR has exclusive jurisdiction if the applicant withdraws his or her affirmative asylum request and has been placed in removal proceedings. (See Sections XXX, Aggravated Felons, XXXI, Class Members Apprehended at the Border at the Time of Entry, and XXXIV, Withdrawals of Asylum Application by ABC Class Members, for instruction on how to proceed in these cases.)

D. Cases with Final Orders of Deportation or Exclusion

1. Generally

Under the provisions of the settlement agreement, the INS stayed the deportation of ABC class members with final orders of deportation or exclusion in order to allow them to exercise their rights under the agreement. Registered ABC class members who have outstanding final orders have the right to a de novo asylum adjudication by an asylum officer so long as they applied for asylum by the requisite cut-off date. If the class member failed to file an asylum application or register by the relevant date, or the applicant is denied asylum by an asylum officer after a de novo ABC asylum interview, the applicant has no right to further deportation, exclusion or removal proceedings. Instead, the file should be transferred to the Deportations Branch of the DHS District with jurisdiction over the individual’s place of residence in order to arrange his or her deportation or removal. (See Appendix P.)

Reminder: If the ABC-registered class member filed and was granted a motion to reopen in order to file a NACARA application, he or she is no longer subject to that final order of deportation.

2. Individuals who depart the U.S. while under a final order and reenter the U.S. illegally (reinstatement of prior orders)

If an individual is removed or departs from the U.S. after the issuance of a final order, the order is generally considered to have been executed and is no longer outstanding. An exception may apply if the individual received
advance parole while in temporary protected status. If an individual returns to the United States illegally after having been removed from the United States, or departed voluntarily while under an order of removal, deportation or exclusion, the individual may be subject to reinstatement of the prior order. 8 CFR § 241.8. Pursuant to section 241(a)(5) of the INA, once the previous order is reinstated, the individual is not eligible to apply for relief under the INA. However, the Legal Immigration Family Equity Act of 2000 (LIFE) specifically provides that an individual who is otherwise eligible for relief under NACARA shall not be barred from applying for such relief by operation of section 241(a)(5). This means that a NACARA applicant who was deported, excluded or removed from the United States, or otherwise left the United States while under a final order, and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible.

a. ABC asylum application pending

DHS has not yet determined whether an ABC-registered class member’s eligibility for benefits under the settlement agreement is affected by the applicability of the reinstatement provision. Until further guidance is issued to the field, Asylum Offices should not adjudicate the asylum application of any ABC-eligible applicant who may be subject to reinstatement. If the NACARA application is granted and the applicant wishes to pursue the asylum application as well, process the NACARA grant and place the asylum application on hold. If the applicant is not eligible for relief under NACARA, place both the NACARA application and the asylum application on hold. Further guidance on this issue will be provided shortly.

b. Non-ABC asylum application pending

A non-ABC asylum application (for example, an application filed by an ABC class member on or before April 1, 1990, who did not register for benefits or a Former Soviet Bloc national (FSB) applicant whose asylum application filed on or before December 31, 1991 is still pending), is affected by the reinstatement provisions. Therefore, if the applicant has a non-ABC asylum application pending, the asylum application should be administratively closed in RAPS under “C4” as being under the jurisdiction of the immigration judge. If NACARA relief is approved and the asylum application is not withdrawn, notice should be given to the applicant along with the NACARA approval letter informing him or her that the asylum application has been closed because the applicant appears

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6 An individual with an outstanding final order who 1) is given authorization to travel abroad while in temporary protected status (1/1/91 through 6/30/92) and 2) returns in accordance with this authorization may not have executed the final order by his or her departure from the U.S. See, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Sec. 304.

7 Although technically the asylum application would not be under the jurisdiction of the IJ, we do not yet have a code in RAPS to indicate that the person is precluded from seeking asylum based on section 241(a)(5) of the INA.
to be subject to section 241(a)(5) of the INA. If NACARA relief is not
granted, the notice should be given with the I-881 referral letter. See
Appendix BC.

If the applicant has a derivative asylum application pending and is not
eligible for ABC benefits, the dependent should be removed from the
principal’s asylum application in RAPS, and the Asylum Office should
give notice to both the principal asylum applicant and the dependent of the
action taken. See Appendix BD. Note that, if the principal asylum
application is granted NACARA relief and withdraws the asylum
application, the dependent will no longer have a pending derivative asylum
application and therefore no notice regarding possible application of
section 241(a)(5) is necessary.

VI. OVERVIEW OF ELIGIBILITY TO APPLY FOR SUSPENSION OF
DEPORTATION OR SPECIAL RULE CANCELLATION OF REMOVAL
UNDER NACARA

Individuals described in the categories below are eligible to apply for suspension of
deportation or special rule cancellation of removal under NACARA, unless 1) convicted
of an aggravated felony or 2) subject to an outstanding final order of deportation or
removal (see subsection G below). Note: A person in exclusion proceedings cannot
apply for relief of suspension of deportation or special rule cancellation of removal with
either CIS or EOIR; however, that person may have his or her de novo asylum interview
heard by the Asylum Office. An individual who is eligible to apply may qualify under
more than one category. In addition, not all individuals eligible to apply for benefits
under section 203 of NACARA are eligible to apply with CIS. Some must apply with the
Immigration Court. Jurisdiction over NACARA applications is discussed in Section VII.

A. Guatemalans who

1. First entered the United States on or before October 1, 1990, and
registered for ABC benefits by submitting an ABC registration form to the
former INS on or before December 31, 1991, or affirmatively filed an I-
589 application between December 19, 1990 and December 31, 1991 and
have not been apprehended at time of entry after December 19, 1990; or

2. Filed an application for asylum on or before April 1, 1990.

B. Salvadorans who

1. First entered the United States on or before September 19, 1990; and
registered for ABC benefits by either submitting an ABC registration form
to the former INS or applying for Temporary Protected Status (TPS) on or
before October 31, 1991 or affirmatively filed an I-589 application
between December 19, 1990 and October 31, 1991, and have not been
apprehended at time of entry after December 19, 1990; or
iii. **applicant previously in proceedings that were administratively closed or continued**

If the *ABC* asylum applicant was previously in proceedings that were administratively closed or continued, the applicant would be issued the following if the NOID is not overcome:

- **I-589 ABC final denial letter (Appendix R(1))** (original for service on applicant, copy for A-file and for the attorney or representative, if applicable)

Also, if the applicant’s NACARA application was not approved, but the applicant has not yet been issued a written decision because a final decision was not reached on the asylum claim at the time of decision pick-up, the applicant will need to be issued the following:

- **NACARA Referral Letter - Applicant Previously in Proceedings (Appendix AS(2))** (original for service on applicant, copy for A-file and for the attorney or representative, if applicable)

There may be cases in which the principal and some or all of the included dependents are in different procedural status. For example, a principal may have previously been in proceedings, but her dependent children were not. In such cases, the denial letter should be amended to identify any applicants who are being placed in removal proceedings and those who are not.

iv. **applicant subject to final order of deportation or removal**

If the *ABC* asylum applicant had previously been issued a final order of deportation or removal that has not been executed or reopened, the applicant would be issued the following if the NOID is not overcome:

- **I-589 ABC final denial letter (Appendix R(2))** (original for service on applicant, copy for A-file and for the attorney or representative, if applicable)

An individual with an outstanding final order is not eligible to file for NACARA unless the person first files and gets approved a NACARA Motion to Reopen or the Final Order has been executed by a departure from the United States. A departure by a Salvadoran while in TPS status from 1/1/91

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Because your [spouse/child], [Name], [A-number], who was listed on your asylum application as a dependent, does not appear deportable or removable, we are not placing him or her in Immigration Court proceedings along with you.

Since the dependent is not included in the decision and is not being referred to the Immigration Judge, prior to recording the referral of the principal and any out-of-status dependents in RAPS, the Asylum Officer prints the CSTA and I-589 screens of the in-status dependent, places the screen prints on the non-record side of the dependent’s and the principal’s A-file, then removes the in-status dependent via the MOD REL command (PF9) on the principal’s I-589 screen.

### ii. Dependent is under the jurisdiction of EOIR

The AO uses the standard Referral Notice; however, the name and A-number of the dependent is not included on the Notice. The AO also issues a Denial of Derivative Status (Appendix 19).

Since the dependent is not included in the decision and is not being referred to the Immigration Judge, prior to recording the referral of the principal and any out-of-status dependents in RAPS, the Asylum Officer prints the CSTA and I-589 screens of the in-status dependent, places the screen prints on the non-record side of the dependent’s and the principal’s A-file, then removes the in-status dependent via the MOD REL command (PF9) on the principal’s I-589 screen.

### c. Final Denial

This section applies to a principal applicant who is being issued a Final Denial letter because he or she is in a valid status.

#### i. Dependent is removable or parole is to be terminated

If the principal applicant is in valid status but the dependent is removable or parole will be terminated, the AO issues to the principal applicant the standard Final Denial letter, with the A-number of the dependent listed on the letter. See Section III.N.3, Dependents Who Are Parolees, for guidance in such cases. An Asylum Office Director has prosecutorial discretion to place a dependent before the Immigration Court if the dependent is deportable or removable. Among the factors to be considered are 1) the likelihood the Immigration Court that would have jurisdiction over the removal proceedings would accept the charging documents as sufficient to institute proceedings, 2) the age of the dependent(s), 3) whether the dependent has an application upon which he or she would be able to seek relief in front of the Immigration Judge, 4) whether the dependent has a criminal record, and 5) office resources. If there are serious concerns for considering the dependent a danger to the U.S. community based on criminal convictions or a threat to the security of the U.S. (e.g., terrorist activity), the Director should exercise discretion to place the dependent in removal proceedings.

#### ii. Dependent in a valid status or parole is not and will not be terminated

A principal applicant who was paroled to apply for asylum, but is found ineligible for asylum is issued a Final Denial – Parole letter (Appendix 58). If the dependent is in a valid status or maintains valid parole, the name and A-number of the dependent are not included on the Final Denial letter. The AO also inserts the following paragraph directly before the paragraph on employment authorization:

"Because your [spouse/child], [Name], [A-number], who was listed on your asylum application as a dependent, does not appear deportable or removable, we are not placing him or her in Immigration Court proceedings along with you."
10. **Dependent Subject to Reinstatement**

If a dependent appears to be subject to reinstatement of a prior removal, deportation or exclusion order, Asylum Office personnel coordinate with the ICE SAC for a determination of whether the order will be reinstated.

While this determination is being made, the Asylum Office may continue processing the case. If the application will be denied or referred, the decision may be processed, with a memorandum to the file indicating that the file is being reviewed by the SAC for possible reinstatement of a prior order. A final approval cannot be issued until the determination is made whether to reinstate the order. Asylum Office personnel may issue a recommended approval pending the determination by the SAC. To determine whether a dependent may be subject to reinstatement of a prior order, refer to procedures below in Section III.S.1, *Determining Whether an Applicant is Subject to Reinstatement of a Prior Order.*

If the SAC reinstates the prior order, Asylum Office personnel remove the dependent from the principal’s application and issue a *Denial of Derivative Status* letter along with the applicable decision letter to the principal applicant.

11. **Dependent Subject to Mandatory Bar to Asylum**

Most mandatory bars to a grant of asylum apply independently to any spouse or child who is included in an asylum applicant's request for asylum. 8 C.F.R. 208.21(a) (referring to INA Section 208(b)(2)(A)(i)-(v) for applications filed on or after April 1, 1997, or under 8 C.F.R. 208.13(c)(2)(i)(A), (C), (D), (E), or (F) for applications filed before April 1, 1997). The mandatory bars that apply independently to dependents are persecution of others, conviction of a particularly serious crime, commission of a serious nonpolitical crime, security risk, and terrorist – all bars other than firm resettlement. In some instances, a principal applicant may be granted asylum and a dependent denied or referred because he or she is subject to a mandatory bar.

When an Asylum Office learns that a mandatory bar applies to a dependent, the Asylum Officer interviews the dependent in sworn statement/Q&A format. *See Section II.I.9, Note-taking by the AO During an Asylum Interview, Asylum Officer Basic Training Materials, Interviewing Part II: Note-Taking.* If the evidence indicates that a ground for mandatory denial or referral exists, then the applicant has the burden of proving by a preponderance of the evidence that the ground does not apply. For substantive information on the application of mandatory bars, see Asylum Officer Basic Training Materials, *Mandatory Bars to Asylum and Discretion.*

If, after the interview, it is determined that the dependent is subject to a mandatory bar, the Asylum Officer:
If an applicant returns to the U.S. illegally after having been removed from the U.S., or departed voluntarily while under an order of removal, deportation or exclusion, the individual is subject to a reinstatement of the prior order. This does not include an individual who is granted voluntary departure and leaves the U.S. before expiration of the voluntary departure period. An individual who is subject to a reinstatement of a prior order is not eligible for any relief under the INA, including asylum, but may seek withholding of removal under section 241(b)(3) of the INA or deferral of removal under Article 3 of the Convention Against Torture.

Whether a prior order will be reinstated is under the purview of the ICE Special Agent in Charge (SAC).

1. Determining Whether an Applicant is Subject to Reinstatement of a Prior Order

Often, the Asylum Office becomes aware that an applicant is subject to reinstatement of a prior order when it receives an IDENT FBI response or when verifying identity in US-VISIT. An AO may also discover this information at the time of the interview, or shortly thereafter, when the Asylum Office receives an A-file after an interview has been conducted on a T-file.

When Asylum Office personnel determine that the applicant is subject to a reinstatement of a prior order, the Asylum Office must contact the ICE SAC having jurisdiction over the applicant’s place of residence, to see whether he or she will pursue a reinstatement of the prior order. The processing of the asylum application stops until the Asylum Office is notified either that the prior order has been reinstated or that the SAC will not reinstate the order. For this reason, the Asylum Office must ensure that it is contacted when the SAC reaches a decision.

If the Asylum Office discovers the applicant is subject to a reinstatement of a prior order at the time of the interview, local procedures dictate whether there is immediate follow-up with the local ICE Investigations office. The AO may serve a Mail-Out Notice (Appendix 12) on the applicant if a Pick-Up Notice would normally be required. If the applicant has already been served the Pick-Up Notice, Asylum Office personnel send the applicant a Notice of Change in Decision Service from Pick-Up to Mail-Out (Appendix 33), if the information is discovered a sufficient period of time before the pick-up date. Otherwise, the IIO/CR informs the applicant that his or her decision is not ready for service at the time he or she appears on the pick-up date.

2. ICE SAC Action

The ICE SAC and the Asylum Office coordinate the transfer of the A-file throughout the reinstatement process. If the ICE SAC declines to pursue reinstatement of the prior order, the Asylum Office continues to process the asylum application.

If the ICE SAC decides to pursue reinstatement of a prior order, he or she issues to the applicant a Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The applicant is given an opportunity to respond to the written notice before a final determination is made.

3. Asylum Office Action When a Prior Order is Reinstated

Once the prior order has been reinstated, the applicant is not permitted to apply for asylum or any other benefit under the INA.
The applicant is eligible to apply for withholding or deferral of removal under Section 241(b)(3) of the INA and under the Convention Against Torture. The fact that an individual applied for asylum does not automatically entitle him or her to a “reasonable fear” interview. Pursuant to the reasonable fear case procedures, a “reasonable fear” interview is conducted only if the applicant is specifically referred to an Asylum Office by the office that reinstated the order. If the Asylum Office issued a Recommended Approval letter, a reasonable fear interview is automatic.

Once a DHS Officer serves Form I-871 on an applicant, the Asylum Office administratively closes the asylum application on the CLOS screen in RAPS using close code “CO-Reinstatement” regardless of whether a “reasonable fear” interview will be conducted. If the ICE SAC refers an applicant for a reasonable fear interview, an AO interviews the applicant and adjudicates the claim pursuant to reasonable fear procedures. The AO enters data on the case into APSS in accordance with reasonable fear procedures.

a. **Cases with no decision, cases with a decision other than Recommended Approval, and Recommended Approvals for which the Recommended Approval Letter has not been issued**

When the Asylum Office receives a copy of Form I-871, Asylum Office personnel:

- Administratively close the case in RAPS. The reason for the closure is “Reinstate” (CO). Indicate that an NTA/referral will NOT be issued to the applicant (Place “N” in the “Send to IL” field).
- Prepare a Dismissal of Asylum Application (Reinstatement of a Prior Order) (Appendix 29).
- Serve the letter by either regular or certified mail, depending upon local Asylum Office policy.

b. **Recommended Approval Letter has been Issued**

When the Asylum Office receives a copy of Form I-871, Asylum Office personnel:

- Administratively close the case in RAPS. The reason for the closure is “Reinstate” (CO). Indicate that an NTA/referral will NOT be issued to the applicant. (Place “N” in the “Send to IL” field).
- Prepare a Cancellation of Recommended Approval (Reinstatement of a Prior Order) (Appendix 28).
- Serve the letter by either regular or certified mail, depending upon local Asylum Office policy.

The SAO coordinates with the local ICE district office in order to arrange for the service of an M-488, Information about Reasonable Fear Interview, and schedule a “reasonable fear” interview.

**T. RESCHEDULE REQUESTS**

All requests to reschedule must be made by the applicant in writing by either sending a letter to the Asylum Office or completing a Case Reschedule History (Appendix 9) at the Asylum Office. Asylum Office staff may not honor a request to reschedule received telephonically. If a telephonic request is received, Asylum Office personnel notify the caller of the requirement to make the request in writing by mail, fax or in person, that the request must include the reason for the request and any associated evidence, and that the written request must be received less than 15 days after the interview date.

1. **Requests to Reschedule Interview**
As a matter of Asylum Division policy, the Asylum Office reschedules an interview if it is the applicant’s first request for a rescheduling, and the request is received prior to the interview date.

If a request to reschedule an interview is made on or after the interview date, or if the interview has already been rescheduled on one (1) occasion, the applicant must establish that the request for a rescheduling is due to “good cause.”

a. Evaluating a Reschedule Request

“Good cause” may be defined as a “reasonable excuse for being unable to appear for an asylum interview.” What may be a reasonable excuse for one applicant may not be reasonable when looking at the circumstances of another applicant. Therefore, it is extremely important to review the excuses and requests for a rescheduling on a case-by-case basis before determining whether the request to reschedule will be honored.

An Asylum Office must reschedule an asylum interview if the applicant presents exceptional circumstances for his or her inability to appear or the interview notice was not mailed to the most recent address provided by the applicant and received by USCIS prior to issuance of the interview notice, regardless of how many times the applicant may have previously requested a rescheduling of an interview.

If the Asylum Office honors the request to reschedule, Asylum Office personnel update the Remove Case from Schedule (REMC) command, indicating the rescheduling is at the request of the applicant. RAPS will schedule a new interview and generate an Interview Notice according to the automatic scheduling priorities. The clock will stop until the applicant appears for the next interview.

b. Abuse of Rescheduling Policy

Local Asylum Office policy dictates how each office will handle multiple requests for rescheduling, when it appears that the requester is either causing undue delay of the interview, or is abusing the office’s rescheduling policy. If Asylum Office personnel determine that USCIS will not honor a future excuse and request for a rescheduling of the asylum interview, the Asylum Office may use the sample Rescheduling of an Asylum Interview letter (Appendix 31).

In addition, the Case Reschedule History (Appendix 9) form contains a line at the bottom of the page where an Asylum Office can record how many times the case has been rescheduled. Each Asylum Office may determine whether to use this section of the form or delete it.

2. Applicant Requests to Reschedule Pick-up Date

If an applicant informs an AO that he or she cannot appear on the date and time indicated on the Pick-up Notice, the AO informs the applicant of the consequences of his or her failure to appear (i.e., if the applicant is to be referred, the clock will stop until the applicant appears before the IJ). If the applicant has special circumstances, he or she may, be given a pick-up date that is not within the usual timeframe of decision service if the following criteria are met:
• The applicant presents a reasonable excuse why he or she is unable to appear on the date and time given to other applicants interviewed that day.
• The SAO concurs in the decision to give the applicant a special pick-up date.

If the AO gives the applicant a special pick-up date, it must be prior to the regularly scheduled pick-up date, or a date that will ensure that the Asylum Office complies with its “60-day referral clock.” Unless exceptional circumstances are established, the Asylum Office will not honor a request to reschedule a pick-up date after one has been issued.

If Asylum Office personnel entered the pick-up date in RAPS prior to the interview and that date was changed by the AO and SAO at the time of the interview, the date previously-entered into RAPS will need to be removed and a new date entered using the Pick-Up Scheduling (PUSH) command.

3. Canceling a Pick-up Date at the Fault of USCIS

Once the Asylum Office issues a Pick-up Notice, Asylum Office personnel must serve the decision on the appointed date and time. An Asylum Office cannot cancel a pick-up date unless extraordinary circumstances are present. An SAO determines the circumstances on a case-by-case basis.

If the Asylum Office must cancel a pick-up date, the applicant must be notified in advance, if possible. If there is sufficient time before the applicant is scheduled to appear at the Asylum Office, Asylum Office personnel send the applicant a Notice of Change in Decision Service from Pick-up to Mail-out (Appendix 33). A copy of the Notice remains in the applicant’s file. Asylum Office personnel also remove the pick-up date in RAPS by accessing the Pickup Scheduling (PUSH) Screen.

U. RESCISSION OF AN ASYLUM APPROVAL

There may be instances when an Asylum Office learns that an applicant was either under the jurisdiction of EOIR or outside of the U.S. at the time of the asylum approval. However, lack of jurisdiction over an asylum application is not grounds for termination under 8 C.F.R. 208.24. When the Asylum Office did not have jurisdiction to hear the claim, the Asylum Office must move to reconsider the asylum approval pursuant to 8 C.F.R. 103.5(a)(5)(ii) in order to pursue rescission of asylum status.

1. Issue Motion to Reconsider

If the Asylum Office did not have jurisdiction over the asylum application at the time of approval, the Asylum Office sends the asylee a Motion to Reconsider (Appendices 35 or 36) letter, pursuant to 8 C.F.R. 103.5(a)(5)(ii). Asylum Office personnel use the letter that corresponds to the reason for rescission, which is either that the applicant was in proceedings before EOIR or was outside of the U.S. at the time of the final approval. If the applicant was under the jurisdiction of EOIR with another A-number, Asylum Office personnel consolidate the A-files and the A-numbers. Asylum Office personnel attach to the Motion to Reconsider any unclassified documents that were relied upon to determine that USCIS did not have jurisdiction over the asylum application at the time of the final approval.

If the Asylum Office did not have jurisdiction over a derivative application, but did have jurisdiction over the principal’s application, Asylum Office personnel should direct the letter to the dependent with a copy sent to the principal applicant. The clause at the end of the first paragraph, “as well as the grant of asylum to any dependent included in your asylum application,” should be deleted.

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When issuing the *Motion to Reconsider*, Asylum Office personnel enter the date that USCIS initiated the *Motion to Reconsider* in the MTR INITIATED BY USCIS – DATE field on the Motion to Reopen or Reconsider (MTRC) screen. An update indicating “MTR ISSUED FOR CASE BY USCIS” will appear on the Case History (CHIS) screen.

2. **Wait 45 days or until response is received, whichever comes first**

The asylee is given 45 days from the date of the motion (30 days + 15 days for receiving and reviewing the mail) to respond to the *Motion to Reconsider*.

If the Asylum Office receives a response to the *Motion to Reconsider*, Asylum Office personnel enter a Y in the REBUTTAL/ WAIVER RECVD field and the date that the Asylum Office received the response in the IF YES, DATE RECVD field on the Motion to Reopen or Reconsider (MTRC) screen. An update indicating “REBUTTAL/WAIVER RECEIVED” will appear on the Case History (CHIS) screen.

If the Asylum Office does not receive a response to the *Motion to Reconsider*, Asylum Office personnel enter an N in the REBUTTAL/WAIVER RECVD field on the MTRC screen.

3. **Review response, if any, and issue letter affirming or rescinding grant**

If the asylee submits a timely response to the motion, and it rebuts the reasons provided for the proposed rescission, Asylum Office personnel send the asylee an *Affirmation of Asylum Grant After Motion to Reconsider* (Appendix 38) affirming the asylum grant. Asylum Office personnel also update the DECISION and DECISION DATE fields on the Motion to Reopen or Reconsider (MTRC) screen, using the decision code C1 – ASYLUM GRANT AFFIRMED. An update indicating “ASYLUM GRANT AFFIRMED BY USCIS” will appear on the Case History (CHIS) screen.

If the Asylum Office does not receive a timely response or the response fails to overcome the reasons to rescind, Asylum Office personnel take the actions described below to rescind the asylum grant.

If there are derivative asylees who obtained asylee status through an I-730, their status must also be rescinded. They may be added to the applicant’s case in RAPS prior to these actions using the I730 command.

   a. **Recession based on EOIR jurisdiction**

Asylum Office personnel take the following actions to rescind an asylum grant based on EOIR jurisdiction:
• Send the former asylee a Notice of Rescission of Asylum Grant (Appendix 37), notifying him or her that the grant of asylum has been rescinded. If the asylee received asylum as a derivative, remove the sentence “the grant of asylum to any dependent included in your asylum application is also rescinded” from the rescission notice.

• Take the following steps in RAPS in this order:
  - Enter the decision code C2 – ASYLUM GRANT RESCINDED in the DECISION field and the date of the decision in the DECISION DATE field on the MTRC screen. This will automatically delete the final grant decision. An update indicating “ASYLUM GRANT RESCINDED BY USCIS” will appear on the CHIS screen.
  - Administratively close the asylum application. The reason for the closure is “IJ JURISDICTION” (C4). Indicate that an NTA/referral will NOT be issued to the applicant. (Place an “N” in the “Send to IJ” section.)
  - Transfer the file to the ICE Office of the Principal Legal Advisor (OPLA) if the former asylee is currently in proceedings or to ICE Investigations or DRO (depending upon local procedures) if the former asylee has a final order.

b. Rescission based on applicant’s lack of physical presence in U.S.

If it is determined that the applicant was not in the United States at the time of the asylum approval, USCIS lacked jurisdiction to approve asylum, and the prior grant of asylum must be rescinded. However, the actions to take after rescission will depend on whether the applicant received advance parole or not, whether the applicant traveled back to the country of feared persecution, and whether the absence from the United States affects the applicant’s substantive claim. There may be some circumstances in which the applicant will be required to file a new I-589, but, in other cases, it may be appropriate to grant the I-589 again, with a new approval date. Until final guidance is provided on these rare cases, please contact the HQASM Operations team for guidance if you intend to rescind a grant of asylum based on an applicant’s absence from the U.S. at the time of approval. HQASM Operations will provide instruction for the language to incorporate in the Notice of Rescission of Asylum Grant (Appendix 37), based on the particular circumstances of the case, as well as further actions to take on the applicant’s case.

c. Rescission grounds apply only to dependent

If the rescission grounds apply only to a dependent, only the asylee status of the dependent is rescinded. Asylum Office personnel follow the steps outlined in Sections III.W.a and III.W.b in order to rescind a dependent’s asylee status. The CURRENT STATUS field on the Case Status (CSTA) screen for the principal will indicate “Prin Granted, Dep Rescinded” if only the dependent’s asylee status is rescinded. An update indicating “DEPN GRANT RESCINDED BY USCIS” will appear on the CHIS screen.

V. TERMINATION OF AN ASYLUM APPROVAL

1. Overview of Termination Proceedings

   a. Grounds for Termination of Asylum Status

The Asylum Office initiates a proceeding to terminate asylum status granted by USCIS when prima facie evidence indicates that at least one (1) of the following circumstances is present:
The Ninth Circuit held today that a reinstated removal order is not a final order for purposes of judicial review until the "reasonable fear" & withholding of removal proceedings are complete. Ortiz-Alfar v. Holder, --- F.3d ----, No. 10-73057 (9th Cir. Aug. 27, 2012) ("In order to preserve judicial review over petitions challenging administrative determinations made pursuant to 8 C.F.R. § 208.31(e) or (g), we hold that where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withhold
MEMORANDUM FOR: REGIONAL DIRECTORS
   GENERAL COUNSEL
   DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
   IMMIGRATION SERVICES
   DIRECTOR, INTERNATIONAL AFFAIRS

FROM: Michael Pearson
   Executive Associate Commissioner
   Office of Field Operations

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

On December 21, 2000, President Clinton signed into law the Legal Immigration Family Equity Act (the "LIFE Act") and Miscellaneous Amendments to Various Adjustment and Relief Acts (the "LIFE Act Amendments"), which affect individuals who may be eligible to apply for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) or the Haitian Refugee Immigration Fairness Act (HRIFA), or for suspension of deportation or special rule cancellation of removal under section 203 of NACARA ("NACARA 203 relief"). The purpose of this memorandum is to explain how the new legislation affects applicability of section 241(a)(5) of the Immigration and Nationality Act (INA) to potential beneficiaries of section 203 of NACARA and to provide guidance on implementation. The effect of this recent legislation on applicants for adjustment of status under section 202 of NACARA (certain Cubans and Nicaraguans) or HRIFA (certain Haitians) is discussed in a separate memorandum.

Section 1505(c) of the LIFE Act Amendments\(^1\) provides that an individual who is otherwise eligible for relief under section 203 of NACARA shall not be barred from applying for such relief by operation of section 241(a)(5) of the INA (reinstatement)\(^2\). This means that a

\(^{1}\) Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

\(^{2}\) Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of
NACARA 203 applicant or potential NACARA 203 applicant who was deported, excluded or removed from the United States, or who otherwise left the United States, while under a final order and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible. Consequently, in many cases involving persons covered by NACARA 203, INS officers should not reinstate the existing final order, but should instead follow the guidance set out in this memorandum. Immigration officers should become familiar with the general categories of persons affected by the reinstatement exemptions that are described in this memorandum.

Specifically, the new legislation affects certain nationals of El Salvador, Guatemala, former Soviet bloc countries, and their dependents who are eligible to apply for suspension of deportation and special rule cancellation of removal under NACARA 203. It should be noted that dependents are not required to be nationals of El Salvador, Guatemala or the former Soviet bloc to be eligible for NACARA 203 relief. The legislation also affects certain individuals (non-nationality specific) who have been battered or subject to extreme cruelty by a NACARA 203 beneficiary or by a United States Citizen (USC) or Lawful Permanent Resident (LPR).

An Immigration and Naturalization Service (INS) officer who encounters an individual who appears eligible to apply for NACARA 203 relief should not reinstate a prior order unless a final denial (no pending appeal) of NACARA 203 relief has been made, the alien has been convicted of an aggravated felony, or one of the other specific circumstances outlined in this memorandum applies. In all other cases, the officer should either take no further action or should place the alien in removal proceedings, depending upon the particular circumstances described below. The attached chart summarizes the general categories and appropriate actions discussed in this memorandum.

A. Eligibility Categories for NACARA 203

An individual may be eligible to apply for NACARA 203 relief if he or she has not at any time been convicted of an aggravated felony, as defined under section 101(a)(43) of the INA, and is described in one of the following categories:

(1) A registered class member of the settlement in American Baptist Churches vs. Thornburgh (ABC) who has not been apprehended at time of entry after December 19, 1990. This includes any

and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."
Guatemalan national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991; and any

Salvadoran national who first entered the United States on or before September 19, 1990, and registered for ABC benefits or applied for Temporary Protected Status (TPS) on or before October 31, 1991.

Because the determination of whether an ABC class member registered for benefits requires an adjudication and may, in some cases, be established by credible testimony, INS officers should consider only whether the individual is a class member (Guatemalan who first entered the U.S. on or before October 1, 1990 or Salvadoran who first entered the United States on or before September 19, 1990), not whether the individual registered, in determining whether to reinstate the prior order.

Asylum Officers are responsible for determining whether an ABC class member was apprehended at time of entry. If there is evidence that an ABC class member was apprehended at time of entry, the ABC Coordinator of the local Asylum Office should be contacted to make the determination and, where appropriate, issue a notice of ABC ineligibility to the class member. For further guidance on this issue, see memorandum from David Dixon, Deputy General Counsel, “The ABC Settlement Agreement term: apprehended at entry,” July 22, 1999 (attached).

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or Executive Office for Immigration Review (EOIR), the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990, either by filing an application with the INS or filing the application with the Immigration Court and serving a copy of that application on the INS. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an
I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(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. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

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

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the spouse or child of an individual described in paragraph (1), (2), or (3), unless the parent or spouse has received a final denial of NACARA 203 relief or the alien has been convicted of an aggravated felony. If an I-589 or I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 proceedings.

If the alien formerly was the spouse of an alien described in paragraph (1), (2) or (3) above and the spouse was granted relief under NACARA 203 before the marriage was terminated by divorce or death, the alien may still be eligible for NACARA relief and therefore the prior order should not be reinstated.

(5) An unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) above who:
Memorandum for Regional Directors, et al.
Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(3) (Reinstatement) to NACARA 203 Beneficiaries

- 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 (1), (2), or (3) above, and
- entered the United States on or before October 1, 1990.

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) unless

- the parent has received a final denial of relief under NACARA 203; or
- the unmarried son or unmarried daughter entered the United States after October 1, 1990 and either the parent's NACARA application has not been decided or was granted after the unmarried son or daughter turned 21 years of age; or
- the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(6) An alien who was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a USC or LPR, or who is the parent of a child of a USC or LPR, who has been battered or subjected to extreme cruelty by a USC or LPR).

If the individual is in proceedings before EOIR, allow the process to continue pending determination on eligibility for relief. If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.

(7) An alien who was the spouse or child of an individual described in paragraph (1), (2), or (3) and the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described in paragraph (1), (2), or (3). The spousal or parental relationship must have existed at the time the individual described in paragraph (1), (2), or (3) had a decision made on the application for suspension or cancellation, submitted the application, registered for ABC, applied for TPS, or applied for asylum.
To give effect to the new legislation, an INS officer should not reinstate the prior order of an alien who previously was the spouse or child of an individual described in paragraph (1), (2), or (3) above if it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3 unless the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

B. Determination of Appropriate Actions

As noted above, generally, a previous final order should not be reinstated unless there has been a final denial of a NACARA 203 application, the alien has been convicted of an aggravated felony, or the other limited circumstances outlined in this memorandum apply. In all other cases, the appropriate action to take depends on the current status of the alien’s NACARA or asylum applications.

If an individual described in one of the categories above has an asylum application or a NACARA 203 suspension of deportation or special rule cancellation of removal application pending with the INS or EOIR, the INS officer should not reinstate a prior order. Instead, the INS or EOIR will continue to process the pertinent application(s) and determine whether the individual is eligible for relief under NACARA 203. The Asylum Office will refer to EOIR the NACARA application of any applicant found ineligible for an INS grant of relief. (Note that the INS has authority to grant only certain NACARA applicants and some individuals not eligible for a grant of relief by the INS may still be eligible for a grant by an immigration judge).

If an individual described in one of the categories above appears subject to section 241(a)(5) and does not have an asylum application or NACARA 203 application pending with the INS or EOIR, the INS officer should place the individual in removal proceedings so that a determination can be made on NACARA 203 eligibility, except in the specific circumstances outlined in this memorandum. If the individual is a spouse, child, or unmarried son or daughter of an alien described in numbered paragraph (1), (2), or (3) of this memorandum and the alien described in paragraph (1), (2), or (3) appears inadmissible or deportable, the INS officer should issue charging documents against that spouse or parent, as well, provided that he or she does not have an asylum or NACARA 203 application pending with the INS Asylum Office.
The attached chart summarizes these actions and also describes the limited circumstances under which reinstatement may be appropriate.

C. Coordination with ABC Implementation

Because many of the potential NACARA applicants are also members of the ABC class, the General Counsel's memorandum of December 15, 1999, “ABC Settlement Implementation” has been attached for review. The December 15, 1999 memorandum outlines the provisions of the settlement agreement in American Baptist Churches vs. Thornburgh and gives instructions on verifying ABC eligibility. An updated list of ABC/NACARA coordinators is also attached to this memorandum.

If you have any questions regarding this guidance, please contact Ms. Wenona G. Paul at (202) 305-9742.

Attachments (4)
MEMORANDUM FOR: REGIONAL DIRECTORS
GENERAL COUNSEL
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES
DIRECTOR, INTERNATIONAL AFFAIRS

FROM: Michael Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

On December 21, 2000, President Clinton signed into law the Legal Immigration Family Equity Act (the "LIFE Act") and Miscellaneous Amendments to Various Adjustment and Relief Acts (the "LIFE Act Amendments"), which affect individuals who may be eligible to apply for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) or the Haitian Refugee Immigration Fairness Act (HRIFA), or for suspension of deportation or special rule cancellation of removal under section 203 of NACARA ("NACARA 203 relief"). The purpose of this memorandum is to explain how the new legislation affects applicability of section 241(a)(5) of the Immigration and Nationality Act (INA) to potential beneficiaries of section 203 of NACARA and to provide guidance on implementation. The effect of this recent legislation on applicants for adjustment of status under section 202 of NACARA (certain Cubans and Nicaraguans) or HRIFA (certain Haitians) is discussed in a separate memorandum.

Section 1505(c) of the LIFE Act Amendments1 provides that an individual who is otherwise eligible for relief under section 203 of NACARA shall not be barred from applying for such relief by operation of section 241(a)(5) of the INA (reinstatement)2. This means that a

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1 Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IRIRA. A copy of the amendment is attached to this memo.

2 Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of
Memorandum for Regional Directors, et al.

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

NACARA 203 applicant or potential NACARA 203 applicant who was deported, excluded or removed from the United States, or who otherwise left the United States, while under a final order and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible. Consequently, in many cases involving persons covered by NACARA 203, INS officers should not reinstate the existing final order, but should instead follow the guidance set out in this memorandum. Immigration officers should become familiar with the general categories of persons affected by the reinstatement exemptions that are described in this memorandum.

Specifically, the new legislation affects certain nationals of El Salvador, Guatemala, former Soviet bloc countries, and their dependents who are eligible to apply for suspension of deportation and special rule cancellation of removal under NACARA 203. It should be noted that dependents are not required to be nationals of El Salvador, Guatemala or the former Soviet bloc to be eligible for NACARA 203 relief. The legislation also affects certain individuals (non-nationality specific) who have been battered or subject to extreme cruelty by a NACARA 203 beneficiary or by a United States Citizen (USC) or Lawful Permanent Resident (LPR).

An Immigration and Naturalization Service (INS) officer who encounters an individual who appears eligible to apply for NACARA 203 relief should not reinstate a prior order unless a final denial (no pending appeal) of NACARA 203 relief has been made, the alien has been convicted of an aggravated felony, or one of the other specific circumstances outlined in this memorandum applies. In all other cases, the officer should either take no further action or should place the alien in removal proceedings, depending upon the particular circumstances described below. The attached chart summarizes the general categories and appropriate actions discussed in this memorandum.

A. Eligibility Categories for NACARA 203

An individual may be eligible to apply for NACARA 203 relief if he or she has not at any time been convicted of an aggravated felony, as defined under section 101(a)(43) of the INA, and is described in one of the following categories:

(1) A registered class member of the settlement in American Baptist Churches vs. Thornburgh (ABC) who has not been apprehended at time of entry after December 19, 1990. This includes any

and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.
Memorandum for Regional Directors, et al.  
Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

- Guatemalan national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991; and any

- Salvadoran national who first entered the United States on or before September 19, 1990, and registered for ABC benefits or applied for Temporary Protected Status (TPS) on or before October 31, 1991.

Because the determination of whether an ABC class member registered for benefits requires an adjudication and may, in some cases, be established by credible testimony, INS officers should consider only whether the individual is a class member (Guatemalan who first entered the U.S. on or before October 1, 1990 or Salvadoran who first entered the United States on or before September 19, 1990), not whether the individual registered, in determining whether to reinstate the prior order.

Asylum Officers are responsible for determining whether an ABC class member was apprehended at time of entry. If there is evidence that an ABC class member was apprehended at time of entry, the ABC Coordinator of the local Asylum Office should be contacted to make the determination and, where appropriate, issue a notice of ABC ineligibility to the class member. For further guidance on this issue, see memorandum from David Dixon, Deputy General Counsel, "The ABC Settlement Agreement term: apprehended at entry," July 22, 1999 (attached).

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or Executive Office for Immigration Review (EOIR), the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990, either by filing an application with the INS or filing the application with the Immigration Court and serving a copy of that application on the INS. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an
I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(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. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

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

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the spouse or child of an individual described in paragraph (1), (2), or (3), unless the parent or spouse has received a final denial of NACARA 203 relief or the alien has been convicted of an aggravated felony. If an I-589 or I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 proceedings.

If the alien formerly was the spouse of an alien described in paragraph (1), (2) or (3) above and the spouse was granted relief under NACARA 203 before the marriage was terminated by divorce or death, the alien may still be eligible for NACARA relief and therefore the prior order should not be reinstated.

(5) An unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) above who:
• 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 (1), (2), or (3) above, and

• entered the United States on or before October 1, 1990.

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) unless

• the parent has received a final denial of relief under NACARA 203; or

• the unmarried son or unmarried daughter entered the United States after October 1, 1990 and either the parent’s NACARA application has not been decided or was granted after the unmarried son or daughter turned 21 years of age; or

• the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(6) An alien who was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a USC or LPR, or who is the parent of a child of a USC or LPR, who has been battered or subjected to extreme cruelty by a USC or LPR).

If the individual is in proceedings before EOIR, allow the process to continue pending determination on eligibility for relief. If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.

(7) An alien who was the spouse or child of an individual described in paragraph (1), (2), or (3) and the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described in paragraph (1), (2), or (3). The spousal or parental relationship must have existed at the time the individual described in paragraph (1), (2), or (3) had a decision made on the application for suspension or cancellation, submitted the application, registered for A, B, C, applied for TPS, or applied for asylum.
To give effect to the new legislation, an INS officer should not reinstate the prior order of an alien who previously was the spouse or child of an individual described in paragraph (1), (2), or (3) above if it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3 unless the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

B. Determination of Appropriate Actions

As noted above, generally, a previous final order should not be reinstated unless there has been a final denial of a NACARA 203 application, the alien has been convicted of an aggravated felony, or the other limited circumstances outlined in this memorandum apply. In all other cases, the appropriate action to take depends on the current status of the alien’s NACARA or asylum applications.

If an individual described in one of the categories above has an asylum application or a NACARA 203 suspension of deportation or special rule cancellation of removal application pending with the INS or EOIR, the INS officer should not reinstate a prior order. Instead, the INS or EOIR will continue to process the pertinent application(s) and determine whether the individual is eligible for relief under NACARA 203. The Asylum Office will refer to EOIR the NACARA application of any applicant found ineligible for an INS grant of relief. (Note that the INS has authority to grant only certain NACARA applicants and some individuals not eligible for a grant of relief by the INS may still be eligible for a grant by an immigration judge).

If an individual described in one of the categories above appears subject to section 241(a)(5) and does not have an asylum application or NACARA 203 application pending with the INS or EOIR, the INS officer should place the individual in removal proceedings so that a determination can be made on NACARA 203 eligibility, except in the specific circumstances outlined in this memorandum. If the individual is a spouse, child, or unmarried son or daughter of an alien described in numbered paragraph (1), (2), or (3) of this memorandum and the alien described in paragraph (1), (2), or (3) appears inadmissible or deportable, the INS officer should issue charging documents against that spouse or parent, as well, provided that he or she does not have an asylum or NACARA 203 application pending with the INS Asylum Office.
Memorandum for Regional Directors, et al.

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

The attached chart summarizes these actions and also describes the limited circumstances under which reinstatement may be appropriate.

C. Coordination with ABC Implementation

Because many of the potential NACARA applicants are also members of the ABC class, the General Counsel's memorandum of December 15, 1999, "ABC Settlement Implementation" has been attached for review. The December 15, 1999 memorandum outlines the provisions of the settlement agreement in American Baptist Churches vs. Thornburgh and gives instructions on verifying ABC eligibility. An updated list of ABC/NACARA coordinators is also attached to this memorandum.

If you have any questions regarding this guidance, please contact Ms. Wenona G. Paul at (202) 305-9742.

Attachments (4)
MEMORANDUM FOR ASYLUM OFFICE DIRECTORS
DEPUTY DIRECTORS
SUPERVISORY ASYLUM OFFICERS
QUALITY ASSURANCE/TRAINING OFFICERS
ASYLUM OFFICERS

FROM: Joseph E. Langlois
Director, Asylum Division

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries.

This memorandum supersedes the memorandum dated January 16, 2001, that covers the same subject. Please remove the January 16, 2001, memorandum from your files and replace it with this one. The January 16, 2001, memorandum instructed Asylum Offices that section 241(a)(5) would preclude an applicant granted NACARA 203 relief from also being granted asylum, if otherwise eligible. This memorandum revises that guidance. It clarifies that an asylum applicant who has been granted lawful permanent resident status is not barred by section 241(a)(5) from seeking and, if eligible, receiving, a grant of asylum.

On December 21, 2000, President Clinton signed into law an amendment to the Legal Immigration Family Equity Act (the "LIFE Act")¹, which provides that an individual who is otherwise eligible for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act (INA) (reinstatement)².

The NACARA Procedures Manual currently instructs Asylum Offices to not schedule any interviews for NACARA or ABC cases in which it appears that the individual may be subject to

¹(See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). (Pages H12299-H12300.) The amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

²Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."
reinstatement, pending further guidance on the issue. (See section V.D.2.) It further instructs that, in those cases where the reinstatement issue is not apparent until the time of the interview, asylum officers should suspend the interview and take no further action at this time.

In light of the recent legislative action that specifically provides that an individual who is otherwise eligible for relief shall not be barred from applying for NACARA 203 relief by operation of section 241(a)(5) of the INA, you may now process NACARA 203 applications of individuals who reentered the United States illegally after having received final orders of removal, exclusion, or deportation. Such NACARA applications should be adjudicated without regard to section 241(a)(5). If the applicant appears eligible for relief under NACARA 203, the application should be granted. If the applicant is not found eligible for relief under NACARA, the application should be referred to the immigration judge, unless the applicant has a pending ABC asylum application (see below).

Section V.D.2 of the NACARA Procedures Manual is revised as follows:

2. Individuals who depart the U.S. while under a final order and reenter the U.S. illegally (reinstatement of prior orders)

If an individual is removed or departs from the U.S. after the issuance of a final order, the order is generally considered to have been executed and is no longer outstanding. An exception may apply if the individual received advance parole while in temporary protected status. If an individual returns to the United States illegally after having been removed from the United States, or departed voluntarily while under an order of removal, deportation or exclusion, the individual may be subject to reinstatement of the prior order. 8 CFR § 241.8. Pursuant to section 241(a)(5) of the INA, once the previous order is reinstated, the individual is not eligible to apply for relief under the INA. However, the Legal Immigration Family Equity Act of 2000 (LIFE), as amended, specifically provides that an individual who is otherwise eligible for relief under NACARA shall not be barred from applying for such relief by operation of section 241(a)(5). This means that a NACARA applicant who was deported, excluded or removed from the United States, or otherwise left the United States while under a final order, and subsequently reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible.

a. ABC asylum application pending

The INS has not yet determined whether an ABC-registered class member’s eligibility for benefits under the settlement agreement is affected by the applicability of the reinstatement provision. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has

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3 An individual with an outstanding final order who 1) is given authorization to travel abroad while in temporary protected status and 2) returns in accordance with this authorization may not have executed the final order by his or her departure from the U.S. See, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Sec. 304.
been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if NACARA relief has been granted, the asylum application of any ABC-eligible applicant who otherwise would have been subject to reinstatement may be adjudicated if the applicant wishes to proceed with the asylum application. If the applicant is not eligible for relief under NACARA, place both the NACARA application and the asylum application on hold. Further guidance on adjudicating asylum applications of ABC-eligible applicants who are not granted NACARA relief will be provided shortly.

b. Non-ABC asylum application pending

A non-ABC asylum application (for example, an application filed by an ABC class member on or before April 1, 1990, who did not register for benefits or by a Former Soviet Bloc national (FSB) applicant whose asylum application filed on or before December 31, 1991 is still pending), is affected by the reinstatement provisions. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if the applicant has been granted NACARA relief, the asylum application may be adjudicated if the applicant wishes to go forward with the application. If NACARA relief has not been granted the pending non-ABC asylum application should be administratively closed in RAPS under “C4” as being under the jurisdiction of the immigration judge. Notice should be given to the applicant with the referral letter informing him or her that the asylum application has been closed because the applicant appears to be subject to section 241(a)(5) of the INA. See Appendix BC.

If the applicant has a derivative asylum application pending and is not eligible for ABC benefits or NACARA relief, the dependent should be removed from the principal in RAPS, and the Asylum Office should give notice to both the principal asylum applicant and the dependent of the action taken. See Appendix BD. Note that, if the principal on the asylum application is granted NACARA relief and withdraws the asylum application, the dependent will no longer have a pending derivative asylum application and therefore no notice regarding possible application of section 241(a)(5) is necessary.

Please remove from the NACARA Procedures Manual APPENDIX AZ(3) - NACARA Dismissal Letter - Applicant Subject to Reinstatement, which should no longer be used.

If you have any questions regarding this guidance, please contact Wenona Paul (202-305-9742).

4 Although technically the asylum application would not be under the jurisdiction of the IJ, we do not yet have a code in RAPS to indicate that the person is precluded from seeking asylum based on section 241(a)(5) of the INA.
APPENDIX BC – Notice of Dismissal or Referral of Asylum Application Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev.2/21/01)

A Number
Date:

ADDRESS

Dear M:

This letter refers to your application for asylum, Form I-589. Our records indicate that on _____, you were [deported, excluded or removed] from the United States [or, you left the United States while under a final order of deportation, exclusion or removal]. You then reentered the United States illegally on ______.

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Individuals granted lawful permanent resident status under Section 203 of NACARA ("NACARA 203 relief") are no longer subject to reinstatement under 241(a)(5) of the INA. However, individuals who have not been granted NACARA 203 relief and who therefore are still subject to Section 241(a)(5) of the INA are not permitted to apply for asylum. Because you reentered the United States illegally after having been ordered deported, excluded or removed, and you have not been granted NACARA 203 relief, you are not permitted to apply for asylum in the United States.

The INS has determined that you are not eligible for an INS grant of relief under section 203 of NACARA (see attached letter). However, the INS is not reinstating your prior order of deportation, exclusion or removal, because you may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your NACARA application is being referred to an Immigration Judge for a determination. Your asylum application has been dismissed because you are not eligible to apply for asylum as a result of your illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, you may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

DIRECTOR NAME
Asylum Office Director

cc: Name of Representative
APPENDIX BD – LOSS OF DERIVATIVE STATUS Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev. 2/21/01)

A Number
Date:

ADDRESS

Dear [Name]

This letter refers to your inclusion of [name of dependent] as a dependent in your application for asylum, Form I-589. Our records indicate that on [date], [name of dependent] was [deported, excluded, or removed] from the United States [or, left the United States while under a final order of deportation, exclusion, or removal]. He/she then reentered the United States illegally on [date].

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Because your dependent reentered the United States illegally after having been ordered deported, excluded, or removed, he/she is not permitted to apply for asylum in the United States and therefore cannot be included in your asylum application. However, individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are still permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Although, the law permits the Immigration and Naturalization Service (INS) to consider your dependent’s application for relief under section 203 of NACARA, it prohibits the INS from including your dependent in your application for asylum.

The INS has determined that your dependent is not eligible for an INS grant of relief under section 203 of NACARA. However, the INS is not reinstating the prior order of deportation or removal against your dependent because he/she may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your dependent’s NACARA application is being referred to an Immigration Judge for a determination. In addition, your dependent has been removed from your asylum application because it appears he/she is not eligible to apply for asylum or be included in an asylum application as a result of his/her illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, your dependent may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

[DIRECTOR NAME]—
Asylum Office Director

cc: [Name of Dependent] [Name of Representative]
MEMORANDUM FOR: REGIONAL DIRECTORS
   REGIONAL COUNSEL
   DISTRICT DIRECTORS (EXCEPT FOREIGN)
   DISTRICT COUNSEL
   SECTOR COUNSEL
   OFFICERS IN CHARGE (EXCEPT FOREIGN)
   CHIEF PATROL AGENTS
   ASYLUM OFFICE DIRECTORS

FROM:        Michael Pearson
             Executive Associate Commissioner
             Office of Field Operations

SUBJECT:     Implementation of Amendment to the Legal Immigration Family Equity Act
             (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to
             NACARA 203 beneficiaries.

On December 21, 2000, President Clinton signed into law the Legal Immigration Family Equity
Act (the “LIFE Act”) and Miscellaneous Amendments to Various Adjustment and Relief Acts
(the “LIFE Act Amendments”), which affect individuals who may be eligible to apply for
adjustment of status under section 202 of the Nicaraguan Adjustment and Central American
Relief Act (NACARA) or the Haitian Refugee Immigration Fairness Act (HRIFA), or for
suspension of deportation or special rule cancellation of removal under section 203 of NACARA
(“NACARA 203 relief”). The purpose of this memorandum is to explain how the new
legislation affects applicability of section 241(a)(5) of the Immigration and Nationality Act
(INA) to potential beneficiaries of section 203 of NACARA and provides guidance on
implementation. The effect of this recent legislation on applicants for adjustment of status under
section 202 of NACARA (certain Cubans and Nicaraguans) or HRIFA (certain Haitians) is
discussed in a separate memorandum.

Section 1505(c) of the LIFE Act Amendments\(^1\) provides that an individual who is otherwise
eligible for relief under section 203 of NACARA shall not be barred from applying for such
relief by operation of section 241(a)(5) of the INA (reinstatement)\(^2\). This means that a

\(^1\) Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY
2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for
relief under NACARA 203 and who are otherwise eligible for relief “shall not be barred from applying for such
relief by operation of section 241(a)(5) of the Immigration and Nationality Act,” as in effect after the effective date
of IIRIRA. A copy of the amendment is attached to this memo.

\(^2\) Section 241(a)(5) of the INA provides: “If the Attorney General finds that an alien has reentered the United States
illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

NACARA 203 applicant or potential NACARA 203 applicant who was deported, excluded or removed from the United States, or who otherwise left the United States, while under a final order and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible. Consequently, in many cases involving persons covered by NACARA 203, INS officers should not reinstate the existing final order, but should instead follow the guidance set out in this memorandum. Immigration officers should become familiar with the general categories of persons affected by the reinstatement exemptions that are described in this memorandum.

Specifically, the new legislation affects certain nationals of El Salvador, Guatemala, former Soviet bloc countries, and their dependents who are eligible to apply for suspension of deportation and special rule cancellation of removal under NACARA 203. It should be noted that dependents are not required to be nationals of El Salvador, Guatemala or the former Soviet bloc to be eligible for NACARA 203 relief. The legislation also affects certain individuals (non-nationality specific) who have been battered or subject to extreme cruelty by a NACARA 203 beneficiary or by a United States Citizen (USC) or Lawful Permanent Resident (LPR).

An INS officer who encounters an individual who appears eligible to apply for NACARA 203 relief should not reinstate a prior order unless a final denial (no pending appeal) of NACARA 203 relief has been made, the alien has been convicted of an aggravated felony, or one of the other specific circumstances outlined in this memorandum applies. In all other cases, the officer should either take no further action or should place the alien in removal proceedings, depending upon the particular circumstances described below. The attached chart summarizes the general categories and appropriate actions discussed in this memorandum.

A. Eligibility Categories for NACARA 203

An individual may be eligible to apply for NACARA 203 relief if he or she has not at any time been convicted of an aggravated felony, as defined under section 101(a)(43) of the INA, and is described in one of the following categories.

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3 Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

4 Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

(1) A registered class member of the settlement in American Baptist Churches vs. Thornburgh (ABC) who has not been apprehended at time of entry after December 19, 1990. This includes any

- Guatemalan national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991; and any

- Salvadoran national who first entered the United States on or before September 19, 1990, and registered for ABC benefits or applied for Temporary Protected Status (TPS) on or before October 31, 1991.

Because the determination of whether an ABC class member registered for benefits requires an adjudication and may, in some cases, be established by credible testimony, INS officers should consider only whether the individual is a class member (Guatemalan who first entered the U.S. on or before October 1, 1990 or Salvadoran who first entered the US on or before September 19, 1990), not whether the individual registered, in determining whether to reinstate the prior order.

Asylum Officers are responsible for determining whether an ABC class member was apprehended at time of entry. If there is evidence that an ABC class member was apprehended at time of entry, the ABC Coordinator of the local Asylum Office should be contacted to make the determination and, where appropriate, issue a notice of ABC ineligibility to the class member. For further guidance on this issue, see memorandum from David Dixon, Deputy General Counsel, “The ABC Settlement Agreement term: apprehended at entry,” July 22, 1999 (attached).

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(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. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or
EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(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. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

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

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the spouse or child of an individual described in paragraph (1), (2), or (3), unless the parent or spouse has received a final denial of relief NACARA 203 or the alien has been convicted of an aggravated felony.

If the alien formally was the spouse of an alien described in paragraph (1), (2) or (3) above and the spouse was granted relief under NACARA 203 before the marriage was terminated by divorce or death, the alien may still be eligible for NACARA relief and therefore the prior order should not be reinstated.

(5) An unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) above who

- 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 (1), (2), or (3) above, and

- entered the United States on or before October 1, 1990.
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) unless

- the parent has received a final denial of relief under NACARA 203; or

- the unmarried son or unmarried daughter entered the United States after October 1, 1990 and either the parent’s NACARA application has not been decided or was granted after the unmarried son or daughter turned 21 years of age; or

- the alien has been convicted of an aggravated felony.

If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(6) An alien who was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a US citizen or LPR or who is the parent of a child of a US citizen or LPR who has been battered or subjected to extreme cruelty by a US citizen or LPR).

If the individual is in proceedings before EOIR, allow the process to continue pending determination on eligibility for relief. If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.

(7) An alien who was the spouse or child of an individual described in paragraph (1), (2), or (3) and the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described in paragraph (1), (2), or (3). The spousal or parental relationship must have existed at the time the individual described in paragraph (1), (2), or (3) had a decision made on the application for suspension or cancellation, submitted the application, registered for ABC, applied for TPS, or applied for asylum.

To give effect to the new legislation, an INS officer should not reinstate the prior order of an alien who previously was the spouse or child of an individual described in paragraph (1), (2), or (3) above if it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3 unless the alien has been convicted of an aggravated felony.

If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

Pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

B. Determination of Appropriate Actions

As noted above, generally, a previous final order should not be reinstated unless there has been a final denial of a NACARA 203 application, the alien has been convicted of an aggravated felony, or the other limited circumstances outlined in this memorandum apply. In all other cases, the appropriate action to take depends on the current status of the alien's NACARA or asylum applications.

If an individual described in one of the categories above has an asylum application or a NACARA 203 suspension of deportation or special rule cancellation of removal application pending with the INS or EOIR, the INS officer should not reinstate a prior order. Instead, INS or EOIR will continue to process the pertinent application(s) and determine whether the individual is eligible for relief under NACARA 203. The Asylum Office will refer to EOIR the NACARA application of any applicant found ineligible for an INS grant of relief. (Note that the INS has authority to grant only certain NACARA applicants and some individuals not eligible for a grant of relief by the INS may still be eligible for a grant by an immigration judge). If it is ultimately determined that the individual is not eligible for relief, the INS may file a motion to terminate proceedings before EOIR to reinstate the prior order.

If an individual described in one of the categories above appears subject to section 241(a)(5) and does not have an asylum application or NACARA 203 application pending with the INS or EOIR, the INS officer should place the individual in removal proceedings so that a determination can be made on NACARA 203 eligibility, except in the specific circumstances outlined in this memo. Again, if it is ultimately determined that the individual is not eligible for relief, the INS may file a motion to terminate proceedings before EOIR to reinstate the prior order. If the individual is a spouse, child, or unmarried son or daughter of an alien described in numbered paragraph (1), (2), or (3) of this memorandum and the alien described in paragraph (1), (2), or (3) appears inadmissible or deportable, the INS officer should issue charging documents against that spouse or parent, as well, provided that he or she does not have an asylum or NACARA 203 application pending with the INS Asylum Office.

The attached chart summarizes these actions and also describes the limited circumstances under which reinstatement may be appropriate.

C. Coordination with ABC Implementation

Because many of the potential NACARA applicants are also members of the ABC class, the General Counsel's memorandum of December 15, 1999, "ABC Settlement Implementation" has been attached for review. The December 15, 1999 memorandum outlines the provisions of the settlement agreement in American Baptist Churches vs. Thornburgh and gives instructions on
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

verifying ABC eligibility. An updated list of ABC/NACARA coordinators is also attached to this memorandum.

If you have any questions regarding this guidance, please contact Wenona G. Paul at (202) 305-9742 for questions regarding NACARA 203.
ACTION FOR INDIVIDUALS DESCRIBED IN NACARA 203 WHO ALSO APPEAR SUBJECT TO REINSTATEMENT

NOTE: If individual described below has been convicted of an aggravated felony or has a final denial of an application for suspension of deportation or special rule cancellation of removal under section 203 of NACARA (Form I-881) this chart does not apply and a prior order may be reinstated.

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Guatemalan either</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.</td>
</tr>
<tr>
<td></td>
<td>If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
<tr>
<td>2. Salvadoran either</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.</td>
</tr>
<tr>
<td></td>
<td>If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
<tr>
<td>3. Alien who 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 at the time of filing an asylum application and who entered the United States on or before December 31, 1990, and filed an application for asylum on or before December 31, 1991. (It does not matter whether the asylum application has been denied.)</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.</td>
</tr>
<tr>
<td></td>
<td>If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>4.</td>
<td>Child or spouse of an individual described in 1, 2, or 3 above.</td>
</tr>
<tr>
<td>5.</td>
<td>Unmarried son or daughter of an individual described in 1, 2, or 3 above.</td>
</tr>
<tr>
<td>6.</td>
<td>Alien was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a US citizen or LPR or who is the parent of a child of a US citizen or LPR who has been battered or subjected to extreme cruelty by a US citizen or LPR).</td>
</tr>
</tbody>
</table>
19. DENIAL OF DERIVATIVE ASYLUM STATUS
(rev. January 2005)

Denial of Derivative Asylum Status

This letter refers to your request for asylum in the United States (Form I-589).

Based on the results of a mandatory, confidential investigation of the identity and background of your [spouse/child, [Name], [A-number]], we have determined that s/he is ineligible to receive derivative asylum status because:

1. □ Your spouse/child is barred by statute from a grant of asylum for the following reason(s):
   □ Your spouse/child was convicted of an aggravated felony or other particularly serious crime.
   □ There are reasonable grounds for regarding your spouse/child as a danger to the security of the United States.
   □ Your spouse/child is described within section 212(a)(3)(B)(i)(I), (II) or (III) of the Act.
   □ Evidence indicates that your spouse/child ordered, incited, assisted, or otherwise participated in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion.
   □ For applications filed on or after April 1, 1997, there are serious reasons for believing that your spouse/child has committed a serious nonpolitical crime outside of the U.S. prior to his or her arrival in the U.S.

2. □ Your spouse/child is currently under the jurisdiction of the immigration court and is therefore ineligible to derive asylum status through you. Please direct any questions concerning this matter to the Immigration Court having jurisdiction in your dependent’s case. The address of the court is: Office of the Immigration Court, [insert address]

3. □ A review of the records of the Department of Homeland Security (DHS) revealed that on [date], DHS reinstated a prior order of exclusion, deportation or removal that had been issued against your spouse/child.

   Section 241(a)(5) of the Immigration and Nationality Act (INA) requires DHS to reinstate an exclusion, deportation or removal order if an individual subject to the order leaves the United States and re-enters the U.S. illegally. Once a prior order has been reinstated, the person is not eligible to apply for any relief under the INA, including asylum.

   Although your spouse/child is ineligible to apply for any relief under the INA, including asylum, he or she may be eligible to apply for withholding of removal under section 241(b)(3) of the INA and under the Convention Against Torture. If your spouse or child requests such an interview, an asylum officer will interview him or her to see if he or she has a reasonable fear of persecution or torture in his or her native country or place of last habitual residence, if stateless.

   USCIS therefore denies derivative asylum status to your [spouse/child, [Name] effective [date]. Any recommended approval previously issued to him/her is hereby canceled. There is no appeal from this decision.

Your [spouse/child] is not eligible to apply for employment authorization based on any previous recommended approval of your asylum request. Any employment authorization s/he may have
received will expire sixty (60) days from the date of this notice or on the expiration date of the Employment Authorization Document, whichever period is longer.

[Insert this paragraph only if the asylum office Director will issue an NTA to the dependent]

Your [spouse/child] will receive a Notice of Appear (Form I-862) under separate cover, which will place him/her under removal proceedings. If s/he wishes to pursue a request for asylum, s/he must file a Form I-589, Application for Asylum and for Withholding of Removal, with the Immigration Judge.
28. CANCELLATION OF RECOMMENDED APPROVAL (REINSTATEMENT OF A PRIOR ORDER)
(rev. January 2005)
[Use this letter if a recommended approval was previously issued, but a prior order of removal, deportation or exclusion has been reinstated]

Cancellation of Recommended Approval based upon
Reinstatement of a Prior Exclusion, Deportation or Removal Order

This letter refers to your request for asylum in the United States (Form I-589).

You previously received a letter from this office recommending approval of your asylum application pending the results of the mandatory, confidential investigation of your identity and background. A review of the records of the Department of Homeland Security (DHS) revealed that on [date], DHS reinstated a prior order of exclusion, deportation or removal that had been issued against you.

Section 241(a)(5) of the Immigration and Nationality Act (INA) requires DHS to reinstate an exclusion, deportation or removal order if an individual subject to the order leaves the United States and re-enters the U.S. illegally. Once a prior order has been reinstated, the person is not eligible to apply for any relief under the INA, including asylum.

Therefore, because this office does not have jurisdiction over your asylum request, your recommended approval is hereby cancelled as of [This date corresponds to the date the application is administratively closed in RAPS (CLOS screen – C4)]. [This includes the dependents included in your asylum application, who are listed above.] Any work authorization that you have received based upon the Recommended Approval letter cannot be renewed beyond its scheduled expiration date and is subject to revocation after notice by a District Director.

Although you are ineligible to apply for any relief under the INA, including asylum, you may be eligible to apply for withholding of removal under section 241(b)(3) of the INA and under the Convention Against Torture. An asylum officer will interview you to see if you have a reasonable fear of persecution or torture in your native country or place of last habitual residence, if you are stateless.

In the near future, you will receive notification of a date, time and place for your reasonable fear interview.
29. DISMISSAL OF ASYLUM APPLICATION BASED ON FAILURE TO COMPLY WITH IDENTITY AND SECURITY CHECK PROCEDURES

DISMISSAL OF ASYLUM APPLICATION BASED ON FAILURE TO COMPLY WITH IDENTITY AND SECURITY CHECK PROCEDURES

This letter refers to your request for asylum in the United States (Form I-589).

You previously received notice from U.S. Citizenship and Immigration Services (USCIS) requiring your appearance at an Application Support Center (ASC) for biometrics collection and fingerprinting. You have failed without good cause to appear for the ASC appointment(s) scheduled for you.

Failure to comply with identity and security check procedures without good cause may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. See 8 CFR 208.10.

Your asylum request is therefore dismissed as of [This date corresponds to the CLOS date in RAPS]. There is no appeal from this decision. This dismissal includes the dependents included in your asylum application who are listed on the first page of this notice.

Because you no longer have an asylum application pending with USCIS, you and any dependents included in your asylum application are not eligible to apply for or renew employment authorization based on a pending asylum application.
30. DISMISSAL OF ASYLUM APPLICATION – REINSTATEMENT OF PRIOR ORDER

DISMISSAL OF ASYLUM APPLICATION – REINSTATEMENT OF PRIOR ORDER

This letter refers to your asylum application (Form I-589), filed on [date].

Sec. 241(a)(5) of the Immigration and Nationality Act (INA) requires the Department of Homeland Security to reinstate orders of removal, deportation, or exclusion when the subject of the order leaves or is removed from the United States and re-enters illegally. After reinstatement of the prior order, the subject is no longer eligible to apply for any relief under the INA, including asylum. Records indicate that you were ordered [removed, excluded, deported] on [date] by the Executive Office for Immigration Review on [date] at [city, state]. For more information, you may contact the Public Information Line for the Executive Office for Immigration Review, at 1-800-898-7180. You re-entered the United States unlawfully on or about [date] at or near [POE]. You were reinstated as described above and under the provisions of INA § 241(a)(5) on _____.

Since it appears you are statutorily ineligible to apply for asylum, your asylum application is hereby dismissed as of [date corresponding to CLOS date]. [WHERE APPLICABLE: This dismissal of your asylum application includes the dependents included in your asylum application, who are listed above.] All processing of your asylum application is terminated. Any employment authorization you have been granted based on your pending asylum application cannot be renewed beyond its expiration date and is subject to revocation after notice.

Sincerely,

for
Director,
Asylum Office
U.S. Citizenship and Immigration Services
(b)(5)
Office of the Chief Counsel
Standard Operating Procedures
Review of Adjustment of Status Applications filed by
Applicants with a final order of removal
(b)(5)
Interim Policy on Arrest of Aliens for Immigration Violations at USCIS Field Offices

(b)(5)

August 26, 2010

Background.
Hypothetical #2

Does USCIS have jurisdiction over an I-485 filed under the following circumstances?

Subject was ordered removed and physically deported to Mongolia in 2003. The subject has since entered Alaska without inspection by an Immigration Officer.
Answer #2

YES, USCIS has jurisdiction over the I-485 because the subject departed the United States and therefore is no longer in proceedings.

Note: The subject is still inadmissible under 212(a)(9)(C)(i)(II) and could be amenable to Reinstatement of Removal after denial of the I-485. ICE/DRO should be contacted.
<table>
<thead>
<tr>
<th>GROUNDS</th>
<th>JURISDICTION / PROCESS</th>
<th>DERIVATIVES &amp; STATUS ISSUES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>TEMPORARY PROTECTED STATUS (TPS)</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Relevant Law: INA § 244(c)(3) 8 CFR § 244.14 | **Jurisdiction:**  
- CIS can commence withdrawal process below, **OR**  
- If an alien granted TPS is issued an NTA on 212/237 grounds which would have rendered the alien ineligible for TPS under 8 CFR §244.3(c) or 244.4, CIS loses jurisdiction, the NTA constitutes notice that TPS is subject to withdrawal, and a final order of removal constitutes withdrawal. Such alien has a right to a de novo determination of TPS eligibility before the IJ, and the BIA is the only admin. review.  
- If CIS issues a NOIW and the basis for withdrawal constitutes a 212/237 ground, the Notice of Withdrawal should include an NTA, transferring jurisdiction to EOIR.  
- If alien is already in (generally admin. closed) proceedings when TPS is withdrawn, ICE can move to recalendar.  
- If alien has TPS withdrawn and is subject to reinstatement or execution of a final removal order, ICE can proceed with removal.  
**CIS Process:** (Alien may be NTA’d w/o withdrawal. See above.)  
- District director issues a Notice of Intent to Withdraw, served by personal service. | **Derivatives:**  
- THERE IS NO DERIVATIVE TPS!  
- ALL ALIENS MUST QUALIFY INDEPENDENTLY FOR TPS. See 8 CFR § 244.2.  
- THIS ALSO MEANS THAT A SPOUSE MUST BE A NATIONAL OF A TPS COUNTRY AND QUALIFY FOR TPS ON HIS/HER OWN.  
Therefore, withdrawal of an alien’s TPS does not necessarily mean that the alien’s spouse and children also have TPS withdrawn.  
**Status Issues:** For purposes of adjustment of status and change of status, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant. See INA § 244(f). |
| *NOTE: TPS is different from Temporary Treatment Benefits (TTBs), given to aliens who apply for and demonstrate prima facie eligibility for TPS. TTBs include an EAD and a stay of removal until a final determination of eligibility for TPS is made. INA §244(a)(4). Withdrawal and re-registration apply only to aliens with TPS, not TTBs. If an alien with TTBs is not eligible for TPS, CIS can adjudicate and deny the Form I-821, which mirrors the withdrawal process in the 3rd column. TTBs terminate upon a final determination of the alien’s TPS eligibility. See 8 CFR §244.13(a). Always check whether an alien has TTBs or TPS, especially for aliens in larger TPS classes. | | |

**USCIS ACADEMY**  
**REVOCATION, RESCISSION, AND DENATURALIZATION**  
**July 2009**
How to Issue a Notice to Appear

OCC-013-01-NTAP

December 2013
What is the purpose of an NTA?

- If an alien is inadmissible to or deportable from the United States:
  
  A Notice to Appear (NTA) initiates the Removal Proceeding that is required to remove an alien from the United States if alternative means of removal do not apply.

- Alternative means of removal are:
  - Reinstatement of prior removal order
  - Administrative Removal
  - Expedited Removal
  - Visa Waiver Program Removal
Aliens Not Subject to Removal Proceedings (No NTA)

- Crewman
- Stowaways
- Visa Waiver entrants
- Aliens subject to alternative means of removal:
  - Expedited removal
  - Reinstatement of removal
  - Administrative removal
- Threats to national security [INA § 235(c) cases]
Aliens Not Subject to Removal Proceedings (No NTA) (cont’d)

- Aliens not subject to removal proceedings may nonetheless be eligible for a credible or reasonable fear review, and “asylum only” proceedings if a fear of persecution is found.
Alternative Methods of Removal

- Administrative Removal – INA § 238(b)
  - Non lawful permanent residents convicted of aggravated felonies

- Reinstatement of Removal – INA § 241(a)(5)
  - Original order of removal is reinstated for aliens previously removed (or deported or excluded) who re-entered illegally
We follow the same policy at San Jose CIS.

Thanks

Anita Erfan
Section Chief
San Jose CIS
(408) 283-6504
Anita.Erfan@dhs.gov

Thanks!

Angela Crider Neary
Associate Counsel
U.S. Citizenship & Immigration Services
Office of the Chief Counsel
Western Law Division
(408) 836-8564

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That policy is still in effect. I’ve been told by local ERO that reinstatements are not a priority for them. When we deny a case that is subject to reinstatement – and no relief is available to them - we send the file to ERO as a means to notify them of the case.

Richard Valeika
Section Chief
DHS / USCIS / O21 / San Francisco Field Office
☎ 415-248-8711 ✉ Richard.Valeika@dhs.gov

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Removal Proceedings

U.S. Citizenship and Immigration Services
Alternatives to Removal Proceedings

- Administrative Removal
- Expedited Removal
- Reinstatement of an Order
- Asylum only Proceedings
- Rescission Proceedings
Alternatives to Removal Proceedings

- Reinstatement of an Order
  - INA § 241(b)(5)
    - summary removal procedure for aliens who return to the US illegally after a prior order of deportation/removal
      - Evidence must support 1) a prior order, 2) a departure from the United States, and 3) an illegal reentry
      - Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006) held that INA provision for reinstatement against aliens illegally reentering applied to aliens who reentered the U.S. before IIRIRA's effective date
    - These proceedings do not take place before the IJ
    - Some exceptions – ie, HRIFA, Legalization class action members, certain NACARA applicants
    - Only
Alternatives to Removal Proceedings

- Reinstatement of an Order – cont.
  - If there is fear, withholding only proceedings under 8 CFR § 208.31. See 8 CFR § 241.8(e)
    - USCIS has exclusive jurisdiction to make reasonable fear determinations; asylum offices specifically
    - EOIR has exclusive jurisdiction to review such determinations – § 208.31(e)
  - The IJ shall consider only alien’s application for withholding of removal
    - Appeal of IJ decision lies with the BIA
Reinstatement Order example

(5) Reinstatement of removal orders against aliens illegally reentering.

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

* Check before applying to VAWA, T and U nonimmigrants
I-212 Adjudication

OCC-010-01-I212

May 2010

U.S. Citizenship and Immigration Services
Federal Circuit Split - 212(a)(9)(C)

- Issue: Whether INA 245(i) may overcome the effect of applying 212(a)(9)(C) and permit an alien to adjust to LPR status

- There was a split in the circuit courts concerning the penalty fee cases and differences in holdings between the federal courts and the BIA

- Ninth Circuit held in Gonzales v. DHS that its earlier Perez-Gonzalez decision, is no long controlling, after Torres-Garcia
  - Probably also applies to Acosta, which was based on Perez-Gonzalez

- Tenth Circuit in Herrera v. Holder indicated that its Padilla-Caldera decision is no longer controlling after Briones
Federal Circuit Split - § 212(a)(9)(C)

- Adjudicators are to follow Torres-Garcia and Briones, and not earlier circuit opinions.
  - See May 19, 2009 Aytes Memorandum entitled, Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of Gonzalez v. DHS, 508 F.3d 1227 (9th Cir. 2007).

- The USCIS position: an alien who is inadmissible under § 212(a)(9)(C) is ineligible for § 245(i) adjustment
Aytes Memorandum – May 19, 2009

- Supersedes March 31, 2006 memo entitled “Effect of Perez-Gonzalez v. Ashcroft on adjudication of Form I-212 applications filed by alien who are subject to reinstated removal orders under INA 241(a)(5)” (the “Perez-Gonzalez” [9th Circuit case] memorandum)

- Provides prospective field guidance and applies to all 245(i) adjustment applications and 212(a)(9)(C)(ii) Form I-212s currently pending or that will be filed with USCIS regardless of circuit where case arose or is adjudicated

- Current processing guidelines also applicable

- Memo does not affect previously approved I-485s and/or I-212s based on the original 2006 “Perez-Gonzalez” memo
Aytes Memo Guidance - § 212(a)(9)(C)(ii) prior to end of 10 year period

- If an alien is inadmissible under § 212(a)(9)(C)(i)(I) or (II)

- Then the alien’s I-212 application for consent to reapply cannot be approved unless
  - the alien is outside the U.S. and
  - at least 10 years have elapsed from the date of last departure

- The 10 year period commences from the alien’s date of last departure from the U.S. after becoming inadmissible under § 212(a)(9)(C)(i)
Guidance- § 212(a)(9)(C)(ii) prior to end of 10 year period (cont’d)

- If an alien is:
  - In the U.S. after subsequent reentry without admission, or
  - Abroad but has not been outside the U.S. for at least 10 years since the last departure;

- The I-212 should be denied.

- For cases involving § 212(a)(9)(C)(i)(I) of the Act cite to Matter of Briones.

- For cases involving § 212(a)(9)(C)(i)(II) of the Act cite to Matter of Torres Garcia.

- Denial language is given in the Aytes memo. (see handout)
Memo Guidance- § 212(a)(9)(C)(i) & a Prior Reinstated Removal Order

- Adjudicators should deny Form I-212's filed by aliens who are:
  - Inadmissible under either
    - § 212(a)(9)(C)(i)(II) alone or
    - §§ 212(a)(9)(C)(i)(I) and (II)
    AND
  - Subject to a reinstated removal order under § 241(a)(5) that occurred prior to the filing date of the Form I-212

- Denial language is given in the Aytes memo. (see handout)
Memo Guidance- § 212(a)(9)(C)(i) & a Current Reinstated Removal Order

- Adjudicators should deny Form I-212’s filed by aliens who are:
  - Inadmissible under either
    - § 212(a)(9)(C)(i)(II) alone or
    - §§ 212(a)(9)(C)(i)(I) and (II)
  AND

- Subject to a reinstated removal order under § 241(a)(5) at the time of adjudication of the Form I-212

- Denial language is given in the Aytes memo. (see handout)
Guidance- ICE not reinstating the removal order

- If the alien is present in the U.S. but ICE chooses not to reinstate the order of removal at the time of the adjudication of the Form I-212:

- Adjudicators should follow the guidance for cases involving § 212(a)(9)(C)(ii) prior to end of 10 year period covered in previous slides. (This guidance is also found in part B of the Aytes memo).
Guidance- Aliens Eligible to File for Consent to Reapply

- *If* the alien is inadmissible under § 212(a)(9)(C)(i) and
  - is abroad for the requisite 10 year period since last departure
  - *Then* the alien may properly apply for consent to reapply.

- Adjudicators should exercise their discretion and analyze the alien’s eligibility for relief considering both positive and negative factors.

- The alien’s inadmissibility under § 212(a)(9)(C)(i) is itself a negative factor that USCIS may properly consider in exercising its discretion.
Policy Memoranda

- Memorandum of Michael Aytes, USCIS Acting Associate Director for Operations and Dea Carpenter, Acting Chief Counsel, to the field, dated March 31, 2006 entitled Effect of Perez-Gonzalez v. Ashcroft on Adjudication of Form I-212 Applications Filed by Aliens Who Are Subject to Reinstated Removal Orders Under INA 212(a)(5) (Rescinded by May 19, 2009 Aytes Memo)
Policy Memoranda

- Memorandum of Michael Aytes, Acting Deputy Director dated May 19, 2009 entitled Adjudicating Forms I-212 For Aliens Inadmissible Under 212(a)(9)(C) Or Subject to Reinstatement Under 241(a)(5) of the Immigration and Nationality Act In Light of Gonzalez v. DHS, 508 F.3d 1227 (9th Cir. 2007) (Rescinds March 31, 2006 Aytes-Carpenter Memo)