



NEW IMMIGRATION LAW GRANTS AMNESTY TO NICARAGUANS AND CUBANS AND ALLEVIATES HARSH RULES FOR CERTAIN CENTRAL AMERICANS AND EASTERN EUROPEANS – PRESIDENT ORDERS INTERIM RELIEF FOR HAITIANS

by Francesco Isgro*

After enacting in 1996 some of the harshest legislation in recent years, Congress in the closing hours of 1997, approved a generous amnesty program for nationals of Nicaragua and Cuba. The Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, also alleviates for certain Central Americans and Eastern Europeans, some of the harsh rules enacted by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

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AMNESTY FOR NICARAGUAN AND CUBANS

NACARA permits Nicaraguan and Cuban nationals in the United States to adjust their status to lawful permanent residence. To qualify for this program, a national from these two countries will have to prove the following. First, the applicant must prove that he or she is a national of Cuba or Nicaragua. Second, the applicant must demonstrate that he or she has been physically present in the United States continuously since December 1, 1995. The "continuous physical presence" period is broken if the alien had total absences exceeding 180 days during the qualifying period. Continuous physical residence may be established by showing that the applicant filed an application with the INS - such as asylum or employment authorization - or showing the issuance of an order to show cause, or by any other evidence that the INS designates under the rules likely to be published to implement this provision. Third, an applicant must be admissible for permanent residence, but certain bars to admissibility in INA § 212(a) will not be applied.¹ For example, an applicant who could be denied admission as a public charge would be able to adjust his or her status under this program. Also eligible for adjustment are the unmarried sons or daughters of an alien granted adjustment under this program, as long as the physical presence requirement is met.

A Cuban or Nicaraguan who is eligible for adjustment under NACARA must file an application for adjustment of status before April 1, 2000.

Pending the issuance of further instructions or implementing regulations, immigration judges (IJ) have been instructed not to issue orders of deportation or removal against aliens

who appear eligible for adjustment under NACARA.

LIMITED RELIEF FOR CENTRAL AMERICANS AND EASTERN EUROPEANS

NACARA alleviates one of the harshest rules enacted by IIRIRA, which made thousands of aliens unlawfully present in the United States ineligible for suspension of deportation. Although, IIRIRA eliminated this relief and replaced it with a relief known as cancellation of removal, aliens who had been placed in proceedings prior to April 1, 1997, continue to be eligible for suspension. To be eligible for suspension, an alien must demonstrate, among other requirements, that he had been present in the U.S. unlawfully for a continuous period of seven years or more. However, a provision under IIRIRA stated that the continuous presence terminates upon the issuance of an order to show cause (OSC).² The OSC is the charging document which, prior to IIRIRA, was served upon an alien who was subject to removal or deportation.³ Thus, many Central Americans who had been served with OSCs, notably those who became members of the class in *American Baptist Churches, et al. v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991)(ABC), became ineligible for suspension of deportation because they could not meet the seven-year continuous residence requirement.

Section 203(a) of NACARA, reaffirmed the congressional intent that the continuous residence be terminated by the issuance of an OSC, regardless of when the OSC was issued. In so doing, however, Congress exempted a number of aliens from this rule, among them: Salvadorans and Guatemalans, as well as nationals of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania,

East Germany, Yugoslavia, or any state of the former Yugoslavia.⁴

More significantly, however, section 204(a) of NACARA also exempted these aliens from the 4,000 annual cap on the number of suspensions and adjustment which the Attorney General may grant. Given the possibility that up to several hundred thousands may be eligible for suspension, this change will have a more profound impact.

The Attorney General has not yet promulgated regulations to implement NACARA, thus, it is unclear whether immigration judges will adjudicate these applications. However, in a notice published in the Federal Register, EOIR has designated the period from January 16, 1998, to September 11, 1998, as the time during which motions to reopen under NACARA may be filed, 63 Fed. Reg. 3154 (Jan. 21, 1998). EOIR also announced that a motion to reopen filed under NACARA would not be subject to the normal time and number restrictions generally imposed on motions to reopen. However, only one motion can be filed under NACARA. The notice further indicates that grants of suspension and cancellation under NACARA are not subject to the 4,000 annual cap.

INTERIM RELIEF FOR HAITIANS

Invoking his "constitutional authority to conduct the foreign relations of the United States," President Clinton on December 23, 1997, ordered the Attorney General to take the necessary steps to defer for one year the enforced departure (DED) of certain Haitians who had been paroled into the United States or who had applied for asylum before December 31, 1995.

During the debates on NACARA, the Administration had been critical of

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Congress for not having provided relief to Haitians. In directing the Attorney General to grant DED, the President said that "Haitians deserve the same treatment we sought for Central American." He noted that, "[l]ike Central Americans, Haitians for many years were forced to seek the protection of the United States because of oppression, human rights abuses and civil strife at home."

Not all Haitians benefit from the grant of DED. Specifically excluded is any Haitian national: 1) who has been convicted of an aggravated felony; 2) who is found to be a persecutor of others within the meaning of 8 U.S.C. 1101(a)(42); 3) whose removal the Attorney General determines is in the interest of the United States; 4) whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States; 5) who voluntarily returned or returns to Haiti or his or her country of last habitual residence outside the United States; 6) who was deported, excluded, or removed prior to the date of this memorandum; or 7) who is subject to extradition.

The President also directed that Haitians who qualify for DED are to be granted employment authorization for one year from the date of the President's memorandum.

Notes.

¹The grounds of inadmissibility that will not apply are: INA §§ 212(a)(4) (public charge); 212(a)(5) (labor certification); 212(a)(6)(A) (present in the United States without being admitted or paroled); 212(a)(7)(A) (documentary requirements); 212(a)(9)(B) (aliens unlawfully present for more than six months or one year).

²To be more precise, § 309(c)(1) of IIRIRA, provided that the "continuous residence" rule would be applicable to "notices to appear issued before, on, or after the date of the enactment of this Act." Early on, a dispute arose as to whether a "notice to appear" also meant an "order to show cause."

³Under IIRIRA the charging document is known as a notice to appear (NTA).

⁴Section 203(b) of NACARA.