Lesson Plan Overview

Course Asylum Officer Training

Lesson *Suspension of Deportation and Special Rule Cancellation of Removal under NACARA*

Field Performance Objective Given the field situation in which the asylum officer has jurisdiction over a request for suspension of deportation or special rule cancellation of removal under provisions of the Nicaraguan Adjustment and Central American Relief Act (NACARA), the asylum officer will be able to apply appropriate law to determine whether an applicant is eligible for suspension of deportation or special rule cancellation of removal.

After the lesson, the asylum officer will be able to:

Interim (Training) Performance Objectives

1. Explain the origins of NACARA.
2. Identify the statutory elements required to establish eligibility to apply for suspension of deportation or special rule cancellation of removal under NACARA.
3. Identify when the Asylum Division has jurisdiction to grant requests for suspension of deportation or special rule cancellation of removal under NACARA.
4. Identify the eligibility criteria for qualified relatives of NACARA-eligible "sponsors".
5. Identify the distinctions between suspension of deportation and special rule cancellation of removal.
6. Identify the statutory criteria for eligibility for suspension of deportation and special rule cancellation of removal.
7. Identify the appropriate factors to consider in evaluating whether an applicant has established continuous physical presence.
8. Identify the appropriate factors to consider in evaluating whether an applicant has established good moral character.
9. Identify the appropriate factors to consider in evaluating whether an applicant has established extreme hardship.
10. Identify circumstances under which an applicant is entitled

to a presumption of extreme hardship and circumstances in which the presumption may be overcome.

11. Identify bars to an asylum officer grant of suspension of deportation or special rule cancellation of removal.

12. Identify the type of evidence that may aid in establishing the statutory requirements of continuous physical presence, good moral character, and extreme hardship.

13. Identify the burden of proof required to establish eligibility for suspension of deportation or special rule cancellation of removal.

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Presentation **References**

I. INTRODUCTION

At the conclusion of this section, the asylum officer will understand the history of NACARA.

A. Relief from Deportation Prior to IIRIRA

Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), individuals in deportation proceedings could apply for suspension of deportation under section 244(a) of the Immigration and Nationality Act (INA).

Under section 244(a) of the INA, the Attorney General could exercise discretion to grant suspension of deportation to an individual who established seven years continuous physical presence in the United States, good moral character during that period, and that deportation would result in extreme hardship to the individual or to his or her spouse, parent, or child who was a US citizen or lawful permanent resident. By regulation, this authority was delegated to the Executive Office for Immigration Review (EOIR). — Pre-IIRIRA INA section 244(a)(1)

Under some circumstances (for example, when the individual was convicted of a certain crime), an individual was required to meet a higher standard and show, among other things, 10 years continuous physical presence and that deportation would result in "exceptional and extremely unusual hardship." — Pre-IIRIRA INA section 244(a)(2)

When an individual is granted suspension of deportation, his or her status is adjusted to that of lawful permanent resident. — Pre-IIRIRA INA section 244(a)

B. Changes Resulting from IIRIRA

In passing IIRIRA, Congress consolidated deportation proceedings and exclusion proceedings into removal proceedings. In addition, IIRIRA dramatically restricted the availability of suspension of deportation, now called cancellation of removal, in the following ways:

1. Lengthened the time required for continuous physical presence in the US — INA section 240A(b)(1)(A)

An individual must show continuous physical presence in the United Stated for 10 years to be eligible for cancellation of removal.

2. Heightened the hardship standard — INA section 240A(b)(1)(D)

To establish eligibility for cancellation of removal, the individual must now show that removal would result in "exceptional and extremely unusual hardship" to the alien's spouse, parent, or child, who is a US citizen or alien lawfully admitted for permanent residence. Unlike suspension of deportation, hardship to the applicant may no longer be considered.

3. Established an annual numerical cap — INA section 240A(e)

The number of individuals who can be granted suspension of deportation or cancellation of removal is now limited to 4,000 per year.

4. Established the "stop-time" rule — INA section 240A(d)(1)

Before IIRIRA, the period of continuous physical presence was calculated from the date of entry into the US to the date of application for suspension of deportation. The date of application was the date of decision. An individual could continue to accrue time toward the 7-year requirement after charging documents were served, an appearance was made in Immigration Court, and while the case was on appeal. To reduce the incentive for prolonging cases in order to reach the minimum 7 years, Congress created the "stop-time" rule providing that the period of physical presence necessary for purposes of cancellation of removal must have accrued before initiation of removal proceedings. Once proceedings are initiated, the time accrued toward physical presence "stops" as a matter of law.

NOTE: The new provision also stops time from accruing when the individual commits offenses that render him or her inadmissible or removable under certain provisions of the INA.

In *Matter of N-J-B-*, the BIA held that the stop-time rule applies retroactively to individuals placed in deportation proceedings prior to the effective date of IIRIRA (April 1, 1997), as well as to individuals

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

placed in removal proceedings after that effective date.

C. Enactment of the Nicaraguan Adjustment and Central American Relief Act (NACARA)

1. Effects of *N-J-B* and IIRIRA

On July 10, 1997, Attorney General Janet Reno announced that the Administration would act to mitigate the effects of IIRIRA and the BIA decision *Matter of N-J-B* on Central Americans and others with long-standing ties to the US.

2. Proposed legislation

The Administration submitted to Congress the "Immigration Reform Transition Act," which, among other provisions, would have allowed eligible class members covered by the settlement agreement reached in *American Baptist Churches v. Thornburgh,* 760 F. Supp. 796 (N.D. Cal. 1991) (*ABC*), to apply for relief from removal under the pre-IIRIRA suspension of deportation standards. It also clarified that the "stop-time" rule applied only to applicants placed in proceedings on or after April 1, 1997, and exempted certain classes of individuals from the cap on the number of grants of suspension of deportation or cancellation of removal allowed each year.

3. Enacted legislation

During the course of the legislative process, Congress significantly altered the bill, which was passed as the Nicaraguan Adjustment and Central American Relief Act (NACARA). In particular, Section 202 allowed certain Cubans and Nicaraguans to apply for adjustment of status based primarily on date of entry and physical presence requirements. In contrast, Section 203 permitted certain Guatemalans and Salvadorans to apply for suspension of

On November 19, 1997, President Clinton signed NACARA, stating that he was pleased with the legislation, but had concerns about several aspects of the legislation. In

deportation or cancellation of removal, which, if granted, would result in adjustment of status, but required higher eligibility criteria (such as extreme hardship and good moral character). NACARA 203 also included relief for certain nationals of the former Soviet bloc countries, exempted NACARA beneficiaries from the "stop-time" rule, and made clear that the "stop-time" rule applied retroactively to everyone else, including those placed in deportation proceedings prior to April 1, 1997.

President Clinton signed the legislation on November 19, 1997. For persons seeking suspension of deportation or special rule cancellation of removal in deportation or removal proceedings, section 203 of NACARA was effective immediately.

particular, he stated that he was "troubled by the fact that [NACARA] treats similarly situated people differently." Statement by President Clinton, November 14, 1997, released by White House Press Office. The president also urged the Attorney General to implement NACARA with an eye toward the ameliorative nature of the legislation.

D. Overview of NACARA

NACARA provides various forms of immigration benefits and relief from deportation to certain Nicaraguans, Cubans, Salvadorans, Guatemalans, and nationals of former Soviet bloc countries.

Nicaraguan Adjustment and Central American Relief Act, enacted as title 2 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (as amended by Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139, 111 Stat. 2644 (1997))

1. Section 202

   Section 202 of NACARA directs the Attorney General to adjust to the status of lawful permanent resident qualified Nicaraguans and Cubans who have been physically present in the US since December 1, 1995, and their qualified dependents. The interim regulation implementing section 202 of NACARA became effective June 22, 1998.
   Section 202 remains under the jurisdiction of the District Office. The applicant files form I-485 that is to be adjudicated by the District Office or the Immigration Court. The Asylum Office was not given jurisdiction over these applications.

2. Section 203

   IIRIRA section 309(f), as added by NACARA section 203(b)

   a. Eligibility

      Section 203 applies to certain Guatemalans, Salvadorans and nationals of former Soviet bloc countries who entered the US by certain dates and applied for asylum or registered for

benefits under the *ABC* Settlement Agreement, and to their qualified family members.

For those already in proceedings before April 1, 1997, Section 203 permitted consideration of suspension of deportation under standards in effect prior to IIRIRA.

b. Created "special rule" cancellation of removal

Section 203 of NACARA allows eligible individuals to apply for special rule cancellation of removal under standards very similar to those that existed for suspension of deportation before IIRIRA was enacted.

c. Exempts beneficiaries from stop-time rule

Section 203 NACARA exempts all beneficiaries (both those beneficiaries in deportation proceedings prior to April 1, 1997, who apply for suspension of deportation and those who apply for special rule cancellation of removal) from the stop-time rule. Thus, NACARA section 203 beneficiaries are able to count all of their time in the US since their continuous physical presence began, regardless of when charging documents were issued.

Sections 309(c)(5)(C)(i) (for suspension of deportation applications) and 309(f)(1) (for special rule cancellation of removal applications) of IIRIRA, as amended by NACARA section 203. NACARA codified *N-J-B-*, clarifying that for persons not eligible for relief under section 203 NACARA, the stop-time rule applies regardless of the date the person was placed in proceedings.

3. Section 204

Section 204 exempts NACARA beneficiaries from the annual limit now placed on the number of suspension of deportation and cancellation of removal requests that may be granted.

Amended INA section 240A(e)(3)(A)

E. Attorney General's Decision to Accord Jurisdiction to Asylum Officers

At the time of enactment of NACARA only EOIR had authority to grant suspension of deportation or cancellation

Pre-NACARA 8 C.F.R. 240.11(a), 240.20, and

of removal. 240.56

1. The interim rule implements the Attorney General's decision to give authority to asylum officers to adjudicate suspension of deportation or special rule cancellation of removal in certain circumstances. The limits of this authority are detailed in section III, Jurisdiction, below. 8 C.F.R. 240.62 (published in the Federal Register on May 21, 1999, at 64 FR 27856)

2. The decision to give asylum officers authority to grant relief under section 203 of NACARA in certain cases is based on the efficient management of resources. At the time NACARA was enacted, most NACARA section 203 beneficiaries had asylum applications pending with the Asylum Program, including most of the approximately 240,000 registered *ABC* class members. Allowing these individuals and their qualified family members to apply for relief under section 203 while their asylum applications are pending with the USCIS Asylum Division has provided an efficient method for resolving most of the claims at an earlier stage in the administrative process.

F. Expansion of Categories of Individuals Eligible to Apply for Relief Under Section 203 of NACARA

Section 1504 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) (Pub. L. 106–386, 114 Stat. 1522) amended INA section 240(b)(2) to expand the categories of individuals eligible to apply for relief under section 203 of NACARA. This includes individuals who have been battered or subjected to extreme cruelty by a spouse or parent who is or was a US citizen, lawful permanent resident, or NACARA beneficiary. In order to qualify under this provision, an alien must be inadmissible or deportable, must be continuously physically present in the United States for at least three years, must have been a person of good moral character during the three-year period, and the removal of the alien must result in extreme hardship to the alien, the alien's child, or the alien's parent.

NOTE: **Only EOIR has the authority to adjudicate applications for NACARA relief pursuant to the VTVPA.**

II. ELIGIBILITY TO APPLY FOR BENEFITS UNDER SECTION 203 OF NACARA

First, an applicant must establish eligibility to apply for relief under NACARA. Then, the applicant must establish that he or she meets the specific criteria required for suspension of deportation or special rule cancellation of removal.

At the conclusion of this section, the asylum officer will be able to identify the statutory elements required to establish eligibility to apply for suspension of deportation or special rule cancellation of removal under NACARA.

NOTE: Not every individual who is eligible to apply for NACARA suspension of deportation or special rule cancellation of removal may apply with USCIS. See section III below on jurisdiction.

There are five eligibility categories.

A. Registered *ABC* Class Members

The first group of individuals eligible to apply for NACARA relief is comprised of class members of the *ABC* Settlement Agreement who timely registered for *ABC* benefits and have a pending asylum application. If the asylum application has been denied, it is not "pending." The file must contain proof that the denial or referral was personally served on the alien or mailed to the last known address.

8 C.F.R. 240.61(a)(1)

8 C.F.R. 240.60

There are two categories of registered *ABC* class members who are eligible to apply:

The group of registered *ABC* class members corresponds to block "a)" on page one of the I-881 application for NACARA relief

1. A Guatemalan who:
   - a. first entered the United States on or before October 1, 1990; and
   - b. registered for *ABC* benefits on or before December 31, 1991, or filed an I-589 during the period on or after December 19, 1990 and on or before December 31, 1991; and
   - c. has not been convicted of an aggravated felony; and
   - d. has not been apprehended at time of entry after December 19, 1990.

See section X.A.2 of the *ABC*-NACARA Procedures Manual on evidence necessary to determine registration *Chaly-Garca v. U.S.*, 508 F.3d 1201 (9th Cir. 2007)

2. A Salvadoran who:

a. first entered the United States on or before September 19, 1990; and

b. registered for *ABC* benefits on or before October 31, 1991 (either by direct registration or by applying for Temporary Protected Status (TPS) or by filing an I-589 on or after December 19, 1990 and on or before October 31, 1991); If the EAD reflects a code of A(11), A(12), or C(19) before April 30, 1996 means there is a presumption that the person timely filed for TPS on or before October 31, 1991; and

INA §303 (1990) TPS designation shall take effect on the date of the enactment of this section and shall remain in effect until the end of the 18-month period beginning January 1, 1991

c. has not been convicted of an aggravated felony; and

Chaly-Garca v. U.S., 508 F.3d 1201 (9th Cir. 2007)

d. has not been apprehended at time of entry after December 19, 1990.

NOTE: Under the *ABC* Settlement Agreement, asylum officers are to determine whether an *ABC* class member has been apprehended at time of entry. If a class member is apprehended after an entry has been effected, the apprehension does not render the class member ineligible to apply for relief under NACARA.

The determination of whether an entry has been effected involves consideration of three factors: (1) whether the class member has crossed into the territorial limits of the US; (2) whether the class member has been inspected or admitted by an immigration officer, or has actually and intentionally evaded inspection at the nearest inspection point; and (3) whether the class member crossed into the territorial limits of the US free from official restraint, including free from surveillance.

One of the factors to determine if the person was apprehended at entry before April 1, 1997 is whether or not the person was placed in exclusion proceedings. If apprehended after April 1, 1997, check to see if the person was placed in removal proceedings or charged with an inadmissibility ground including expedited removal.

Dixon, David M., Deputy General Counsel, INS Office of General Counsel, *The ABC Settlement Agreement term: "apprehended at time of entry,"* Memorandum to Office of Field Operations, Office of International Affairs, Office of Programs, Regional Offices, District Offices, Border Patrol (Washington, DC 22 July 1999), 4p.

See section XXXI of the *ABC*-NACARA Procedures Manual for further guidance.

B. Guatemalans and Salvadorans Who Filed for Asylum on or Before April 1, 1990

This group includes Guatemalan and Salvadoran nationals who filed an application for asylum, either directly with the INS or with the Immigration Court, on or before April 1, 1990, and who have not been convicted of an aggravated felony.

8 C.F.R. 240.61(a)(2)

This group corresponds to block "b)" on page one of the I-881.

See 8 CFR 240.62(b). Since applications for suspension of deportation do not get a de novo interview, the Asylum office only has jurisdiction over individuals that fall into Category B (filed an Asylum application on or before April 1, 1990) if they are applying for special rule cancellation. If the applicant is solely eligible for NACARA based on the "on or before April 1, 1990" asylum application and they are applying for suspension of deportation, the jurisdiction remains with the court. The asylum office only obtains jurisdiction over an applicant for suspension of deportation if they are also a registered *ABC* class member and therefore fall under Category A as well.

C. Nationals of Former Soviet Bloc Countries

An individual from a former Soviet bloc country who has not been convicted of an aggravated felony is eligible to apply for benefits under NACARA if each of the following criteria are met:

8 C.F.R. 240.61(a)(3)

This group corresponds to block "c)" on page one of the I-881.

1. Entered the United States on or before December 31, 1990;

2. Filed an application for asylum on or before December 31, 1991; and

3. At the time of filing 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.

D. Qualified Family Members

Certain family members of individuals described in Categories A, B or C above are also eligible to apply for benefits under section 203 of NACARA. The required family relationship must exist at the time that the parent or spouse described in categories A, B, or C above is granted suspension of deportation or special rule cancellation of removal, but the statute does not require that the relationship still be in existence at the time that the qualified family member is considered for relief.

This group corresponds to block "d)" on page one of the I-881.

Qualified family members are those that have not been convicted of an aggravated felony and fit into one of the following categories at the time the parent or spouse is approved:

NOTE: Although the parent or spouse must have been granted the benefit, USCIS will accept the qualified family member's applications prior to the grant, but will not adjudicate the application until a decision is made on the parent or spouse's application.

1. Spouse; — 8 C.F.R. 240.61(a)(4)

2. Children (unmarried under 21 years of age, as defined at section 101(b)(1) of the INA); and — 8 C.F.R. 240.61(a)(4)

3. Unmarried sons or daughters (21 years of age or older). — 8 C.F.R. 240.61(a)(5)

   NOTE: If the unmarried son or daughter is 21 years of age or older **at the time the parent is granted the benefit,** the son or daughter must have entered the US on or before October 1, 1990. Also, the son or daughter must be **unmarried** at the time of their own application is adjudicated to qualify under this category

When determining whether an applicant qualifies as a spouse of an individual described in categories A, B, or C above, an officer must look to the laws of the jurisdiction in which the couple claims to have married. The term "married" includes the common law marriage of a couple residing in a jurisdiction that recognizes common law marriage, be it a state in the US or a foreign country.

See Martin, David A., General Counsel, INS Office of General Counsel, *Common law marriage and conditional permanent residence—Texas Declaration and*

Registration of Informal Marriage, Legal Opinion 95-8 (Washington, DC 26 August 1995).
Roddy, Nadine E., *Interstate Recognition of Common Law Marriages*, 9 Divorce Litigation 193-200 (October 1997).

Currently, there are 10 US states that recognize common law marriage. Some states also recognize the common law marriage of a couple who resided in a common law marriage state at the time of the "marriage." To establish a common law marriage, jurisdictions recognizing such relationships generally require a showing that the couple 1) had the capacity to enter into a marriage, 2) had an agreement to be married, 3) cohabited, and 4) held themselves out to the community as husband and wife.

Currently, only **9 states** (Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Oklahoma, and Texas) and the District of Columbia recognize common-law marriages contracted within their borders. In addition, five *states* have "grandfathered" common law marriage (Georgia, Idaho, Ohio, Oklahoma and Pennsylvania) allowing those established before a certain date to be recognized. Utah recognizes common law marriages only if they have been validated by a court or administrative order.

The term "unmarried" includes individuals who have been married but are divorced or widowed. For example, an applicant who has been married but is divorced or widowed at the time that his or her parent is granted relief under section 203 of NACARA may be eligible to apply for relief as a child, if still under 21 at the time the sponsoring parent

INA section 101(a)(39)

or spouse is granted relief, or an unmarried son or daughter if over 21.

Qualified Family Members(QFM) do not need to have a form I-589 pending to be eligible to apply for NACARA. Additionally, apprehension at entry is not a bar for a QFM because it is only a bar for an ABC registered class member. Since QFM's are not necessarily ABC registered class members, the apprehension bar does not apply. If a QFM is an ABC registered class member but also eligible as a QFM, the apprehension at entry would not necessarily bar them. They would adjust as a Category D on the application.

E. Victims of Domestic Violence

NOTE: **Only EOIR has authority to adjudicate requests for relief pursuant to the VTVPA.**

Pursuant to the Victims of Trafficking and Violence Protection Act (VTVPA), certain aliens who have been battered or subjected to extreme cruelty by a spouse or parent who is or was a US citizen, lawful permanent resident, or NACARA beneficiary may apply for NACARA relief.

F. Special Eligibility Preconditions for Applicants with Deportation, Removal, or Voluntary Departure Orders

IIRIRA section 309(g), as added by NACARA section 203(c)

1. Final Orders of Deportation or Removal:

   An individual who

   - is otherwise eligible to apply for NACARA because he or she is described in categories A, B, C, or D above, and
   - who has an outstanding final order of deportation or removal

   must first file and be granted a motion to reopen before he or she may apply for benefits under section 203 of NACARA.
   This requirement applies to class members eligible for *ABC* benefits that have final orders of deportation but are awaiting their *de novo* asylum interviews by the Asylum Division pursuant to the *ABC* Settlement Agreement. If a registered *ABC* class member in these circumstances did not file a motion to reopen,

8 C.F.R. 3.43 (published in the Federal Register on June 11, 1998, at 63 FR 31890; with later amendments published on March 22, 1999, at 64 FR 13663). Although applicants

	or it was filed but not approved by EOIR, the class member is ineligible to apply for NACARA with either USCIS or EOIR.	subject to a final order were required to have filed a motion to reopen by September 11, 1998, there may still be some circumstances in which an INS or Department of Homeland Security (DHS) attorney agreed to join in a motion to reopen after the regulatory deadline.
2.	Execution of a Final Order: A final order is no longer outstanding if it has been executed as a result of an individual's subsequent deportation/departure from the US.	INA 101(g)
3.	Salvadorans with TPS: A Salvadoran with Temporary Protected Status who 1) was subject to an outstanding final order of deportation and 2) left and returned to the US pursuant to a grant of advance parole did not execute the final order of deportation by this advance parole departure. Unless the final order was executed by some other departure from the US, such an individual would still be subject to an outstanding final order and must file and be granted a motion to reopen before he or she may apply for benefits under section 203 of NACARA. **Please note, this only applies to Salvadorans with TPS under the previous designation, which ran from 1/1/91 to 6/30/92.**	Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733, Title III, section 304(c) (amendment to Immigration Act of 1990 covering authorized travel abroad by beneficiaries of TPS and family unity).
4.	Voluntary Departure: If an applicant was given Voluntary Departure and did not leave the United States during the required period of time, in most cases the order will have been converted to a final order of deportation or removal. If the applicant has not since left the US, he or she would continue to be subject to the final order.	

If, however, an *ABC* class member was given Voluntary Departure, and the Voluntary Departure period extended beyond the date the *ABC* Settlement Agreement was signed (December 14, 1990), the Voluntary Departure period was in effect tolled by the Settlement Agreement. In the case of an *ABC* class member who was granted Voluntary Departure, and the Voluntary Departure period coincided with the Settlement Agreement, the applicant is eligible to apply for NACARA 203 relief, and the USCIS Asylum Division has jurisdiction over the case. If the Voluntary Departure period does not include the December 14, 1990, Settlement date and the Applicant has not otherwise left, the Applicant will continue to be under an unexecuted final order.

If an applicant was given Voluntary Departure and left the US during the requisite period of time, the applicant would have executed the Voluntary Departure order.

See section III of this lesson for a discussion of jurisdiction over NACARA applications.

5. Reinstatement of a Prior Order

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 will generally be subject to reinstatement of the prior order. 8 C.F.R. 241.8. However, under the Amendments to the Legal Immigration Family Equity Act of 2000 (LIFE), an applicant who is otherwise eligible for relief under NACARA 203 is not barred from seeking such relief because the applicant is subject to reinstatement of a prior order of deportation or removal pursuant to INA section 241(a)(5). Because of this special exception, if an applicant appears to be subject to reinstatement, the asylum officer may grant NACARA relief as long as the applicant otherwise qualifies for relief.

Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Pub.L. 106-554 (December 21, 2000); Pearson, Michael A. *Implementation of Amendment to Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries*, Memorandum (February 23, 2001)

Review Questions

1. Identify the categories of individuals who may apply under NACARA.

2. If an individual who was granted suspension of deportation under NACARA later gets married, can his wife apply for benefits under NACARA?

3. Does a Guatemalan or Salvadoran have to be a class member to apply for benefits under NACARA?

4. If an applicant is 20 years old when her mother is granted special rule cancellation of removal but waits until she is 22 years old to submit her own application for NACARA benefits, does she have to enter the US by a certain date to be eligible to apply?

5. What must an applicant who has an outstanding final order of deportation do in order to be eligible to apply for relief under section 203 of NACARA?

6. What effect did the *ABC* Settlement Agreement have on applicants who were given Voluntary Departure before, but who were obligated to leave the US after, December 14, 1990?

Practical Exercises:

1. A person born January 1978 enters the United States in June 1991. He applies for NACARA 203 relief in March 2001. His mother was granted special rule cancellation of removal pursuant to NACARA 203 in February 1998. Is this person eligible to apply for NACARA 203 relief?

2. A 26-year–old, unmarried woman applied for NACARA 203 relief in December 1999. Her father also applies for NACARA 203 relief in December 1999. Is the woman eligible to apply for NACARA 203 relief? What are the determining factors?

III. JURISDICTION

At the conclusion of this section, the asylum officer will be able to identify the circumstances under which the asylum office has jurisdiction to interview applicants requesting suspension of deportation or special rule cancellation of removal under NACARA.

A. USCIS Asylum Division

Except when EOIR has exclusive jurisdiction (as explained in subsection B below), the USCIS Asylum Division has

jurisdiction to grant, dismiss, or refer to the Immigration Court applications for suspension of deportation or special rule cancellation of removal for the following NACARA applicants.

NOTE: Asylum officers do not have authority to deny relief under NACARA. Only an immigration judge can deny a NACARA application.

1. Asylum applicants eligible for a *de novo* asylum adjudication under the terms of the *ABC* Settlement Agreement.

   a. A Guatemalan who meets *each* of the following criteria: — 8 C.F.R. 240.61(a)(1); 240.62(a)(2)

      i. first entered the United States on or before October 1, 1990; and

      ii. registered for *ABC* benefits on or before December 31, 1991 by either filing an ABC registration form or by filing an I-589 during the period beginning on or after December 19, 1990 and ending on or before October 31, 1991; and — *Chaly-Garca v. United States*, 508 F.3d 1201 (9th Cir. 2007)

      iii. applied for asylum on or before January 3, 1995, and that application is still pending adjudication by USCIS; and — 8 C.F.R. 240.60 defines "application pending adjudication by the Service" (now USCIS)

      iv. has not been apprehended at time of entry after December 19, 1990. — See section XXXI of the *ABC*-NACARA Procedures Manual and section II of this lesson for a more thorough discussion of the *ABC* Settlement Agreement term, "apprehended at time of entry."

   b. A Salvadoran who meets each of the following criteria: — 8 C.F.R. 240.61(a)(1); 240.62(a)(1)

      i. first entered the United States on or

		before September 19, 1990; and	
	ii.	registered for *ABC* benefits on or before October 31, 1991 (either directly or by applying for TPS or by filing an I-589 on or after December 19, 1990 and on or before October 31, 1991); and	*Chaly-Garca v. United States*, 508 F.3d 1201 (9th Cir. 2007)
	iii.	applied for asylum on or before January 31, 1996 (administrative grace period extended acceptance date to February 16, 1996), and that application is still pending adjudication by USCIS; and	Or, the applicant may have applied within 90 days of receiving Notice 5. See section XXXIII of the *ABC*-NACARA Procedures Manual. 8 C.F.R. 240.60 defines "application pending adjudication by the Service" (now USCIS)
	iv.	has not been apprehended at time of entry after December 19, 1990.	See section XXXI of the *ABC*-NACARA Procedures Manual or section II of this lesson for a more thorough discussion of the *ABC* Settlement Agreement term, "apprehended at time of entry."
2.	A Guatemalan or Salvadoran national who filed an application for asylum on or before April 1, 1990, and that application is still pending with USCIS		8 C.F.R. 240.61(a)(2); 240.62(a)(3) 8 C.F.R. 240.60 defines "application pending adjudication by the Service" (now USCIS). See 8 CFR 240.62(b). If the case was administratively closed by IJ AND if filed before 4/1/90 then must have registered for ABC, or jurisdiction remains

with IJ.

3. A former Soviet *Bloc* national who is eligible to apply under NACARA and whose asylum application is still pending with USCIS — 8 C.F.R. 240.61(a)(3); 240.62(a)(3) 8 C.F.R. 240.60 defines "application pending adjudication by the Service" (now USCIS)

4. A spouse, child, unmarried son, or unmarried daughter eligible to apply under NACARA and whose spouse or parent either has — 8 C.F.R. 240.61(a)(4) or (5); 240.62(a)(4)

   a. a NACARA application pending with the Asylum Program, or

   b. been granted suspension of deportation or special rule cancellation of removal by the Asylum Program.

   NOTE: ***If NACARA relief was granted by EOIR, USCIS does not have jurisdiction over the qualified family member's application***

B. EOIR

1. General rule — 8 C.F.R. 240.62(b)

   Except as explained below, EOIR has exclusive jurisdiction over applications for suspension of deportation or special rule cancellation of removal under NACARA once the applicant has been placed in deportation or removal proceedings; that is, once the applicant has been served with charging documents and the charging documents have been filed with EOIR.

2. Exceptions

   a. A Registered *ABC* class member whose proceedings were administratively closed or continued by EOIR and who has not yet had a *de novo* asylum adjudication by an asylum officer — 8 C.F.R. 240.62(b)(1)

      NOTE: For Principal Applicants, this includes cases that were closed specifically because of the *ABC* Settlement Agreement, as well as cases that were closed for other

reasons.

b.	A Registered *ABC* class member who has not yet had a *de novo* asylum adjudication by an asylum officer and who is subject to a final order of deportation or removal **AND** i. has been granted a motion to reopen previous proceedings as required under 8 C.F.R. 3.43, **AND** ii. whose reopened case has been administratively closed by the immigration judge to allow the class member to seek suspension of deportation or special rule cancellation of removal before the Asylum Program	8 C.F.R. 240.62(b)(1) 8 C.F.R. 3.43 (published in the Federal Register on June 11, 1998, at 63 FR 31890; with later amendments published on March 22, 1999, at 64 FR 13663)
c.	A NACARA beneficiary who is eligible to apply for NACARA benefits based on a parent or spouse's eligibility and whose case has been administratively closed because the parent or spouse's application is pending with the Asylum Division. If a Dependent's case is closed for any reason other than to pursue ABC or NACARA, the Immigration Court retains jurisdiction. The administrative closure must be specifically for the dependent to pursue ABC or NACARA relief.	8 C.F.R. 240.62(b)(2)

Review Questions

1. What is the main difference between those eligible to apply for NACARA relief before USCIS and those eligible to apply for NACARA relief with EOIR?

2. Identify the exceptions to EOIR's exclusive jurisdiction for individuals already in proceedings.

Practical Exercises

1. A registered *ABC* class member has a final order of deportation

against him. The applicant has not yet had a *de novo* asylum hearing on his *ABC* asylum claim. Does USCIS have jurisdiction over an application for suspension of deportation or special rule cancellation of removal by this applicant? What do you need to know to make this determination?

2. An individual is married and her husband is eligible to apply for NACARA relief. She is eligible to apply for NACARA because of her relationship to her husband. She is currently in removal proceedings. Can she apply for NACARA relief with USCIS? What do you need to know to make this determination?

IV. QUALIFIED FAMILY MEMBERS

At the conclusion of this section, the asylum officer will be able to identify eligibility based on parent-child or spousal relationships (qualified family members of NACARA-eligible "sponsors").

A. Derivative Status

In contrast to asylum law, there is no derivative status under NACARA. In other words, there is no "Follow to Join" component in NACARA. Each individual must submit a separate application and independently establish eligibility for suspension of deportation or special rule cancellation of removal.

B. Eligibility of Qualified Family Members to Apply with USCIS

As noted in section II. D. above, certain individuals are only eligible to apply for relief under NACARA if their spouse or parent ("sponsor") has been granted suspension of deportation or cancellation of removal. However, for administrative efficiency and to promote family unity, USCIS will accept applications from those individuals before their spouse or parent is granted relief under NACARA if there is evidence that the sponsor's NACARA application is pending with USCIS. The application will not be accepted if the sponsor's application has been referred to the Immigration Court or has been dismissed.

NOTE: Applications for NACARA relief are filed at the Vermont or California Service Center, depending on the applicant's state of residence. An asylum office cannot accept applications because a fee must accompany the application, and there is no method to receipt-in the fees at the asylum office.

The asylum officer cannot adjudicate the qualified family member's application until after the sponsor's application has been adjudicated.

8 C.F.R. 240.62(a)(4)

C. Qualified Family Members in Proceedings

An individual who has been placed in proceedings and whose sponsor has a NACARA application pending with USCIS may ask EOIR to administratively close the proceeding so that the individual may also file a NACARA application with USCIS. In 1998 and 1999, INS and EOIR issued guidance to immigration judges and government trial attorneys regarding individuals in proceedings who appear eligible to apply for relief under NACARA based on a relationship to a parent or spouse who is eligible to apply for relief with the Asylum Program. To promote family unity and administrative efficiency the following procedures were put in place.

1. A qualified spouse, child, unmarried son or daughter was permitted to request a continuance of his or her case until September 1, 1999, if the individual provided reasonable evidence of the relationship to the NACARA-eligible sponsor.

2. If the individual later provides evidence that his or her sponsor has applied for NACARA suspension of deportation or special rule cancellation of removal with USCIS and the sponsor appears to be eligible for NACARA benefits, EOIR may administratively close the case so that the individual may also submit his or her NACARA application to USCIS.

3. Since September 1,1999, requests by individuals for continuances or administrative closures have been handled on a case-by-case basis.

NOTE: While USCIS may take jurisdiction over the qualified family member's NACARA application once EOIR proceedings have been administratively closed, USCIS would not have jurisdiction over any asylum application of the qualified family member, either as a principal asylum applicant or as a dependent. In order for USCIS to take jurisdiction over the asylum applicant, the Immigration Court must terminate proceedings. It is not sufficient if the IJ only administratively closes the proceedings.

Virtue, Paul W, INS Office of General Counsel. *Section 203 NACARA Dependents scheduled for April Master Calendars,* Memorandum to Regional Counsel, District Counsel Management Team (Washington, DC: 16 April 1999), 1 p; Virtue, Paul W, INS Office of General Counsel. *Spouses, children, and unmarried sons and daughters of persons eligible for suspension of deportation or cancellation of removal under Section 203 of NACARA,* Memorandum to Regional Counsel, District Counsel Management Team (Washington, DC: 28 May 1998), 6 p.; Creppy, Michael J., Office of the Chief Immigration Judge, *Continuances for Spouses, Children, and Unmarried Sons and Daughters of Aliens who Are Eligible for Suspension of Deportation or Cancellation of Removal Under NACARA,* Memorandum to Immigration Judges, Court Administrators and Judicial Law Clerks (Falls Church, VA 13 May 1998), 2 p.

Review Questions

1. Is there derivative status for dependents (spouses or children) applying for NACARA? Explain your answer.

2. Can an applicant whose eligibility to apply for NACARA depends on the eligibility of his or her parent or spouse submit an application to USCIS for relief under NACARA before the sponsor has been granted relief?

V. STATUTORY ELIGIBILITY FOR SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL

At the conclusion of this section, the asylum officer will be able to identify the basic eligibility criteria for a USCIS grant of suspension of deportation or special rule cancellation of removal and understand the distinction between suspension of deportation and special rule cancellation of removal.

NOTE: When adjudicating a request for suspension of deportation or special rule cancellation of removal under NACARA 203, an asylum officer must consider whether the applicant is subject to any threshold ineligibility grounds (see section X below for a description of statutory bars to NACARA relief), before addressing the eligibility criteria described in this section. Where a bar applies, it is not necessary to consider whether the applicant meets the basic eligibility criteria or merits a favorable exercise of discretion. The step-by-step process used in adjudicating an application for relief under section 203 of NACARA can best be understood by referring to the adjudication worksheets found at Appendices AM and AN of the *ABC*-NACARA Procedures Manual.

A. Statutory Criteria for a Grant of Suspension of Deportation or Special Rule Cancellation of Removal by USCIS

To be eligible for suspension of deportation under NACARA, the applicant must be deportable under certain provisions of the INA as it existed prior to IIRIRA. To be eligible for special rule cancellation of removal under NACARA, the applicant must be inadmissible or deportable under certain provisions of the INA. Additionally, individuals who are inadmissible or deportable under certain grounds of the INA, as discussed in section X of this lesson, are not eligible for a USCIS grant of relief.

Pre-IIRIRA INA section 244(a)(1); IIRIRA section 309(f)(1), as added by NACARA section 203(b); 8 C.F.R. 240.70(b),(c), and (d)

An applicant who is in exclusion proceedings is not eligible for relief under NACARA. This includes individuals whose

Simeonov v. Ashcroft, 371 F.3d 532 (9th Cir.

exclusion proceedings have been administratively closed under the *ABC* Settlement Agreement.

All applicants must also meet the following three criteria and merit a favorable exercise of discretion:

2004); *Fieran v. INS*, 268 F.3d 340, 345 (6th Cir. 2001); *Sherifi v. INS*, 260 F.3d 737, 741-42 (7th Cir. 2001)

1. Continuous physical presence in the United States for 7 years prior to the date of decision on their application for suspension of deportation or special rule cancellation of removal;

2. Good moral character during that time; and

3. Extreme hardship to the applicant or to the applicant's spouse, parent, or child who is a US citizen or lawful permanent resident, should the applicant be removed from the United States.

B. Distinction between Suspension of Deportation and Special Rule Cancellation of Removal

Each form of relief results in adjustment of status to lawful permanent resident. Eligibility criteria for each form of relief is distinct:

1. Applicants who may be eligible to apply for suspension of deportation

   Applicants placed in deportation proceedings prior to April 1, 1997, may apply for suspension of deportation

   .

   This group includes:

   a. Registered *ABC* class members whose cases were administratively closed or continued by EOIR to have a *de novo* asylum interview

      NOTE: Any Salvadoran class member who meets the following four criteria was to be admitted back into the US in the same status as that which he or she possessed prior to departure:

      Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. No. 102-232, 105 Stat. 1733, Title III, section 304(c) (amendment to Immigration Act of

      - Was in deportation proceedings that were administratively closed or continued by EOIR,

- Registered for *ABC* by filing for TPS and the TPS application was approved,
- Departed the US under a grant of advance parole during the period that the individual was in valid TPS status (TPS for Salvadorans ran from 1/1/91 to 6/30/92), and
- Returned to the US within the authorized advance parole period

1990 covering authorized travel abroad by beneficiaries of TPS and family unity)

Such an individual would return to being the subject of administratively closed or continued deportation proceedings. The NACARA application filed by such an individual would be a request for suspension of deportation.

For all other individuals with NACARA applications pending before USCIS who left the US while in deportation proceedings, including administratively closed or continued proceedings, proceedings will be considered terminated as of the date of the applicant's departure from the United States. This is the case, regardless of whether or not the applicant's departure and return were pursuant to a grant of advance parole. The NACARA application is therefore an application for special rule cancellation of removal.

b. Registered *ABC* class members who had outstanding final orders of deportation issued by the IJ or BIA and who have timely filed a motion to reopen, which has been granted

c. Qualified spouses, children, unmarried sons or unmarried daughters in deportation proceedings

2. Applicants who may be eligible to apply for special rule cancellation of removal

This group includes applicants who were or will be placed in proceedings on or after April 1, 1997, and applicants never placed in proceedings but eligible to

apply for NACARA 203 relief affirmatively with USCIS. **It also includes applicants who left the US and returned while in deportation proceedings, and as a result, those proceedings were terminated. It also includes applicants who executed a final order by departing the United States. This is important to note when the applicant is applying solely under category B, an alien who filed for asylum on or before April 1, 1990. In general, if the Immigration Court has administratively closed the case for a Category B, USCIS will not have jurisdiction. See 8 CFR §240.62(b). The alien will have to successfully move to recalendar the Immigration Court proceedings, and proceed in court. However, if the Immigration Court has administratively closed the case for a category B, and after such closure, the alien has left the United States, the case reverts to special rule cancellation of removal and barring other jurisdictional issues, USCIS may have jurisdiction over the case.**

NOTE: There are minor distinctions, particularly with regard to requirements for continuous physical presence and threshold ineligibility grounds, between the adjudication of a request for suspension of deportation and the adjudication of a request for special rule cancellation of removal. The differences will be noted throughout the lesson, where applicable.

C. Distinction Between Deportation, Exclusion and Removal Proceedings

Prior to IIRIRA, the determination to place an individual into deportation proceedings or exclusion proceedings was based on whether or not an individual had made an entry into the US. An individual illegally in the US was subject to deportation and an individual who had not yet made an entry into the US was subject to exclusion.

A person in exclusion proceedings cannot apply for suspension of deportation or special rule cancellation of removal because they have never effected an entry and therefore are unable to accrue the necessary physical presence.

Please refer to the Supplementary Information portion of the interim regulation governing section 203

After IIRIRA, deportation proceedings and exclusion proceedings were consolidated into removal proceedings. A person could be charged with either an inadmissibility ground or a deportability ground in removal proceedings, depending on whether he or she had been admitted into the US. A person in removal proceedings can apply for cancellation of removal, regardless of whether he or she is charged with being inadmissible or deportable.

of NACARA for a more detailed discussion of the exclusion issue. 64 FR 27856, 27859-60 (May 21, 1999) (section titled "Eligibility to Apply for NACARA in Exclusion Proceedings"); *see also Simeonov v. Ashcroft*, 371 F.3d 532 (9th Cir. 2004); *Fieran v. INS*, 268 F.3d 340, 345 (6th Cir. 2001); *Sherifi v. INS*, 260 F.3d 737, 741-42 (7th Cir. 2001).

Review Questions

1. What are the basic eligibility criteria for a grant of suspension of deportation or special rule cancellation or removal?

2. What factor determines whether an applicant applies for suspension of deportation or special rule cancellation of removal?

3. Can a person who is in exclusion proceedings apply for suspension of deportation or special rule cancellation of removal?

VI. CONTINUOUS PHYSICAL PRESENCE

At the conclusion of this section, the asylum officer will be able to identify appropriate factors to consider in evaluating whether an applicant has established continuous physical presence.

A. Requisite Number of Years

The applicant must have been continuously physically present in the United States for the 7 years immediately prior to the date the decision is made on the NACARA application.

NOTE: Though the statutory provisions covering applications for suspension of deportation and special rule

By definition, United States includes the continental US, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands. INA 101(a)(38)

cancellation of removal specifically state that the 7-year period is counted back from the "date of such application," the courts have counted back 7 years from the date they are reviewing and deciding the case. This is consistent with the statutory language because an application is considered to be a continuing application until the date that it is finally considered. (Compare to the asylum one-year filing rule, which is measured from the date that the "application has been filed.")

Matter of Castro, 19 I & N Dec. 692 (BIA 1988); *see also Vargas-Gonzalez v. INS*, 647 F.2d 457 (5th Cir. 1981); *Cipriano v. INS*, 24 F.3d 763 (5th Cir. 1994)

10 years physical presence:
If the applicant is deportable or inadmissible under certain grounds, he or she must establish 10 years continuous physical presence. For applicants applying for suspension of deportation, this includes individuals found deportable under section 241(a)(2), (3), or (4) of the INA as it existed prior to IIRIRA. For applicants applying for special rule cancellation of removal, this includes individuals found inadmissible or deportable under section 212(a)(2) or 237(a)(2)(other than 237(a)(2)(A)(iii)), or 237(a)(3) of the INA**. These individuals must be referred to the Immigration Court for consideration under the higher standard. USCIS does not have the jurisdiction to adjudicate these applications.** Please refer to the NACARA act §203(b)(f)(1) which excludes INA §240A(b)(1) [higher standard] from AG jurisdiction

See Matter of Alarcon, 20 I & N Dec. 557 (BIA 1992) (an application for admission and adjustment of status is a continuing application, subject to any change in the law that is enacted after the date that the application is filed, but prior to the date of decision)

An applicant who is deportable or inadmissible under these more serious grounds will be referred to Immigration Court for adjudication of the NACARA application.

B. Absences From the United States

1. General Rule

If the applicant is applying for suspension of deportation, the applicant must establish that any absence from the US during the seven years prior to the date of decision on the application was brief, casual, and innocent, and did not meaningfully interrupt the applicant's period of continuous physical presence in the US.

Pre-IIRIRA INA section 244(b)(2); 8 C.F.R. 240.64(b)

Absences that reveal a lack of commitment to living in the US break the period of continuous physical presence.

Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995)

2. "Brief"

   a. The interim rule provides that any absence from the US for 90 days or less or absences in the aggregate of 180 days or less are considered brief.

   8 C.F.R. 240.64(b)(1) and (2)

   b. For **suspension of deportation**, there is no statutory or regulatory definition of what is considered brief. Therefore absences in excess of 90 days or absences that in the aggregate exceed 180 days will be considered on a case-by-case basis in conjunction with applicable case law to determine if the absence should be considered brief.

   8 C.F.R. 240.64(b)(1)

   c. When calculating continuous physical presence in evaluating eligibility for **special rule cancellation of removal**, any absence from the US for a period in excess of 90 days or absences that in the aggregate exceed 180 days are considered a break in the applicant's continuous physical presence.

   IIRIRA section 309(f)(2), as added by NACARA section 203(b) (referring to INA section 240A(d)(2) for treatment of certain breaks in presence); 8 C.F.R. 240.64(b)(2)

5. "Casual and innocent and does not meaningfully interrupt continuous physical presence"

   8 C.F.R. 240.64(b)(1) and (2)

   Even if an absence or absences are considered "brief," the asylum officer still needs to evaluate whether the absence is casual and innocent and did not meaningfully interrupt the period of continuous physical presence.

   Examples of departures that are not casual or innocent and that meaningfully interrupt continuous physical presence include the following:

   a. Departures that are regular and frequent

   Castrejon-Garcia v. INS, 60 F.3d 1359 (9th Cir. 1995)

b. Departures during which the applicant formed the intent to commit a crime in the foreign country, or part of the scheme was formed there.	8 C.F.R. 240.64(b)(3) The crime can be a crime under domestic or foreign law.
c. Removal from the US pursuant to a final order or voluntary departure under threat of deportation within last 7 years. This includes voluntary departure ordered by the court.	8 C.F.R. 240.64(b)(3) *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, (9th Cir. 2003)(voluntary departure represents an agreement between individual and government that he will leave the country; to treat it as a brief or casual departure is inconsistent with intent of statute)
d. Departures to serve a foreign government	*Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995)
Examples of departures that have been found to be casual, innocent and did not meaningfully interrupt continuous physical presence include the following:	
a. Departure that occurred when the individual's train crossed into Canada while traveling between two points in the US	*Di Pasquale v. Karnuth*, 158 F 2d 878 (2d Cir. 1947)
b. Departure that occurred when individual was taken from his torpedoed ship to Cuba to recuperate from injuries	*Delgadillo v. Carmichael*, 332 U.S. 388, 68 S.Ct. 10, (1947)
c. Departure to Mexico for a couple of hours for a pleasure trip	*Rosenberg v. Fleuti*, 374 U.S. 449, (1963)

C. Alien Who Has Served in the US Armed Forces

Pre-IIRIRA INA section 244(b)(2) (suspension of deportation); INA section 240A(d)(3) (cancellation of removal)

The requirements of continuous physical presence in the US shall not apply to an alien who:

1. Has served for a minimum period of 24 months in an active duty status in the Armed Forces of the US and, if separated from such service, was separated under

honorable conditions, and

2. At the time of the alien's enlistment or induction, was in the US

D. Advance Parole

Leaving the US and returning pursuant to a grant of advance parole does not, in and of itself, meaningfully interrupt continuous physical presence. However, the absence of an individual from the US under a grant of advance parole must still fall within the requirements described in section A and B above.

Remember: Prior to the consolidation of deportation and exclusion proceedings into one removal process under IIRIRA, persons paroled into the US were generally subject to grounds of excludability once parole status was terminated. An individual whose parole status was terminated prior to IIRIRA's effective date (April 1, 1997) may have been placed into exclusion proceedings. As noted in section V.C above, individuals in exclusion proceedings are not eligible to apply for suspension of deportation or special rule cancellation of removal.

E. Departures After Filing NACARA Application

An applicant's departure from the United States after filing a NACARA application does not constitute an abandonment of the application. When an applicant appears for interview, he or she should be asked if there were any departures from the United States since the NACARA application was submitted, and any absences should be analyzed to determine if there was a break in continuous physical presence. The application should be dismissed or referred for failure to appear if the applicant fails to attend an interview because he or she is outside the United States at the time and does not provide a reasonable explanation for the failure to appear.

F. Failure to Establish Continuous Physical Presence

If an applicant is unable to establish continuous physical presence, he or she is ineligible for a grant of NACARA 203 relief by USCIS. It is not necessary to consider whether the applicant meets the other basic eligibility criteria (good moral character and extreme hardship), or merits a favorable

Please refer to the adjudication worksheets found at Appendices AM and AN of the *ABC*-NACARA Procedures Manual for a more

exercise of discretion.

complete understanding of the step-by-step process of NACARA adjudication.

Review Questions

1. How many years must an applicant be physically present in the United States to establish eligibility for NACARA 203 relief?

2. What factors should be considered when determining whether an applicant for suspension of deportation has established continuous physical presence?

3. What factors should be considered when determining whether an applicant for special rule cancellation has established continuous physical presence?

4. What is the difference in evaluating continuous physical presence for suspension of deportation and for special rule cancellation of removal?

Practical Exercise

Make your decision on the following scenarios under both suspension of deportation and special rule cancellation of removal.

1. Does an individual who departs the US to serve 60 days in the Salvadoran Armed Forces during the seven-year period preceding adjudication of the NACARA application break continuous physical presence in the US? This person has not left the US before.

2. Does an individual who departs the US 25 times for 3 days at a time during the seven-year period preceding adjudication of the NACARA application for the purpose of running a business in Guatemala break continuous physical presence in the US? The individual has not left the US other than those times.

3. Same facts as 2, but the individual left on one other occasion (during the 7-year period) for 90 days

4. Same facts as 2, but the purpose of leaving was to try to sell an inherited business

5. Same facts as 2, but instead of departing 25 times for 3 days at a time, the individual departed 3 times, once for 90 days, once for

30 days, and once for 59 days, and the individual sold the business a few months ago

CRIMINAL AND MANDATORY BARS TO NACARA

First an applicant must established they are within USCIS jurisdiction and have established the requisite physical presence. Then they have the burden of showing they are not barred by either criminal or mandatory bar issues. This must be determined before there is any analysis of good moral character or extreme hardship to the applicant.

VII. CRIMINAL CONVICTION ANALYSIS

Once an applicant for NACARA has demonstrated they are within the jurisdiction of USCIS and have the requisite physical presence, they must demonstrate they are not barred by any criminal convictions or other mandatory bars to NACARA. If an applicant has a history of criminal arrests or convictions, the steps below should be used to analyze whether any resulting convictions bar the applicant from relief through NACARA.

A. Establish if a Conviction Exists

In order to be barred from NACARA relief on criminal grounds, the applicant has to have a conviction for immigration purposes under the definitions found in the INA and case law. For immigration purposes, a conviction occurs whenever a formal judgment of guilt of the alien is entered by a court or, in certain circumstances, if adjudication of guilt has been withheld. *See* INA §101(a)(48). It is important to note, that a conviction for immigration purposes may exist in situations where there is probation before judgment or deferred judgment when a case is held for a period of time while the person completes classes, community service, good behavior, have to pay court costs, etc. The rap sheet or other conviction documents may show the charge or case as dismissed but if the dismissal occurs a year or more after the charge, a certified disposition should be obtained to see if the dismissal occurred after the applicant complied with court orders, such that a conviction for immigration purposes may still exist.

INA §101(a)(48), INA §212(a)(2), *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008)

B. Do Aggravated Felony Analysis

INA §101(a)(43)

Once it has been established that the applicant has a conviction for immigration purposes, the first step of analysis should determine if the conviction meets the

definition of an aggravated felony found in INA §101(a)(43). If the conviction is an aggravated felony, the applicant is ineligible to apply for NACARA. It is important to note that it does not matter when the conviction occurred in order to apply this standard or whether the application is for suspension of deportation or special rule cancellation of removal.

C. Determine if Conviction Constitutes a Ground of Threshold Ineligibility

If the conviction is not an aggravated felony, the next step of the analysis requires the officer to determine if the conviction falls within the threshold ineligibility grounds listed below in Section VIII. It is important to distinguish between deportable and inadmissible and between suspension of deportation and special rule cancellation of removal. Such distinctions determine which section of law applies to the application. Convictions are treated differently depending on which form of relief is being sought and whether the person is inadmissible or deportable. It is important to read the distinctions in Section VIII carefully as some of the ineligibility grounds have varying starting dates for the application of the ground of ineligibility.

D. Use the Correct pre or post-IIRIRA Analysis

Criminal issues for suspension of deportation applications are analyzed under pre-IIRIRA INA §241. Special rule cancellation of removal issues are analyzed under INA §212 if the applicant is inadmissible, or INA §237 if the applicant is deportable.

VIII. THRESHOLD INELIGIBILITY GROUNDS

Please refer to the adjudication worksheets found at found at Appendices AM and AN of the *ABC*-NACARA Procedures Manual for a more complete understanding of the step-by-step process of NACARA adjudication.

If an applicant is subject to a threshold ineligibility ground (statutory bar) to a grant of NACARA relief, he or she must be referred on that basis. **The adjudicating officer need not consider whether the applicant meets the basic eligibility criteria (continuous physical presence, good moral character, extreme hardship, discretion) outlined in sections IX through XI of this lesson**. If an applicant is ineligible due to criminal grounds and is not eligible for any exceptions, the person is subject to the higher standard of 10 years physical presence after the commission or conviction of a crime and must demonstrate exceptional and extremely unusual hardship to a qualified family member. Only the IJ has jurisdiction to adjudicate this relief. Please see NACARA §203(b)(f)(1).

A. Statutory Bars to Both Suspension of Deportation and Special Rule Cancellation of Removal

1. Individuals in Exclusion Proceedings

   An applicant in exclusion proceedings may not apply for relief under section 203 of NACARA.

Simeonov v. Ashcroft, 371 F3d 532 (9th Cir. 2004); *Fieran v. INS*, 268 F.3d 340, 345 (6th Cir. 2001); *Sherifi v. INS*, 260 F.3d 737, 741-42 (7th Cir. 2001).

2. Conviction of an Aggravated Felony

   The aggravated felony bar applies to an applicant who is convicted of an aggravated felony at any time after entry, or an applicant who is deportable for having been convicted of an aggravated felony at any time after admission. An individual who has been convicted of an aggravated felony is ineligible to apply for relief under section 203 of NACARA. "Aggravated felony" is defined in INA section 101(a)(43).

   An aggravated felony conviction as a ground for removability is found at INA §237(a)(2)(A)(iii). If a person is applying for special rule cancellation of removal and is deportable, then INA §237 would apply and bar the applicant from relief under NACARA. If a person is applying for special rule cancellation of removal and is inadmissible then INA

Pre-IIRIRA INA §241(a)(2)(A)(iii); Current INA §237(a)(2)(A)(iii), INA §101(a)(43)

§212 would apply, as well as INA §101(f) which states a person convicted of an aggravated felony **at any time**, is precluded from establishing good moral character. Generally it is unnecessary to analyze an aggravated felony under INA §101(f) since it is a statutory and threshold bar.

A full and unconditional pardon of the conviction by the President of the US or the governor of a state takes the applicant out of this category.

Pre-IIRIRA INA §241(a)(2)(A)(iv); Current INA §237(a)(2)(A)(v)

A more complete discussion of what constitutes an aggravated felony is contained in the Asylum Officer Training Lesson Plan, *Mandatory Bars to Asylum and Withholding*.

a. DUI Offenses

Nguyen v. Ashcroft, 366 F.3d 386 (5th Cir. 2004)

DUI convictions are generally not considered aggravated felonies. INA section 101(a)(43)(F) defines an aggravated felony as a "crime of violence (as defined in section 16 of Title 18 [USC], but not including a purely political offense) for which the term of imprisonment [is] at least one year."

Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004)

In 2004, the U.S. Supreme Court held that "[t]he ordinary meaning of the term ["crime of violence"] suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

Leocal v. Ashcroft, 543 U.S. 1, 11 (2004)

NOTE: The Supreme Court also indicated that "[t]his case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force. . . qualifies as a crime of violence." Therefore, depending on the relevant statute, a DUI offense may still constitute a crime of violence, and hence an aggravated felony, if it involves the *reckless* use of force or *mens rea* (criminal intent). *Id*. at 13.

Prior to the Supreme Court's ruling, some circuit case law provided that a DUI offense may constitute an aggravated felony. Subsequent to *Leocal*, the Ninth Circuit held that a conviction of the offense of gross vehicular manslaughter while intoxicated involved only gross negligence, and therefore could not be found to be a

		"crime of violence." *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005)
3.	Crewmembers An individual who entered the US as a crewman subsequent to June 30, 1964 is ineligible for suspension of deportation or special rule cancellation of removal.	Pre-IIRIRA INA section 244(f)(1); Current INA section 240A(c)(1)
4.	Exchange Visitors An individual admitted as or who acquired the status of a nonimmigrant exchange alien, as defined in INA section 101(a)(15)(J), to receive graduate medical education or training is barred from suspension of deportation or special rule cancellation of removal, regardless of whether the individual is subject to or has fulfilled the two-year foreign residency requirement. All other nonimmigrant exchange aliens, as defined in INA section 101(a)(15)(J), are barred from suspension of deportation or special rule cancellation of removal only if they are subject to a two-year foreign residency requirement and they have not yet fulfilled the requirement or received a waiver.	Pre-IIRIRA INA section 244(f)(2) & (3); Current INA section 240A(c)(2) & (3)
	NOTE: To determine whether the applicant is subject to the two-year foreign residency requirement, the officer should refer to the Exchange-Visitor Skills List, available on the website of the Office of International Information Programs of the Department of State. The list enumerates fields of specialized knowledge or skills and countries that clearly require the services of persons engaged in those fields. **Example**: A national of El Salvador who was admitted as a J-1 Exchange Visitor to study computer science would be subject to the two-year foreign residency requirement. The individual's field of study and country of origin both appear on the Exchange-Visitor Skills List.	Available at: http://exchanges.state.gov/jexchanges/docs/skills_list.pdf

5. Failure to Register and Falsification of Documents

a. An applicant who has failed to register and notify the Attorney General or Secretary of Homeland Security of changes of address as required under section 265 of the INA, unless the failure was reasonably excused or was not willful.

Pre-IIRIRA INA section 241(a)(3)(A); Current INA section 237(a)(3)(A)

NOTE: In order to be barred from a grant of special rule cancellation of removal under this provision, the applicant must be deportable.

i. Willful is defined as an act done "with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law."

Black's Law Dictionary; *see also*, *Matter of B-*, 5 I & N 692 (BIA 1954)

An individual who has no knowledge of the requirement to notify INS or USCIS of a change in address cannot then be said to have willfully disobeyed the law.

ii. The purpose of registering and notifying the Attorney General or Secretary of Homeland Security of a change of address is to enable DHS to locate the applicant, if necessary. If the applicant has made himself or herself available for the interview, the intent to evade the purpose of the registration statute is absent.

b. An applicant who has been convicted under the Alien Registration Act of 1940 (8 USC 451), or violations of, attempt to violate, or conspiracy to violate the Foreign Agents Registration Act of 1938 (22 USC 611) or US Code provisions relating to fraud and misuse of visas, permits or other entry documents

Pre-IIRIRA INA section 241(a)(3)(B); Current INA section 237(a)(3)(B)

NOTE: In order to be barred from a grant of

special rule cancellation of removal under this provision, the applicant must be deportable.

The Alien Registration Act requires aliens seeking entry into the US to be registered and fingerprinted before a visa can be issued. The Foreign Agents Registration Act requires agents of foreign governments or political parties to register.

c. An applicant who is the subject of a final order for document fraud under INA §274C

Pre-IIRIRA INA section 241(a)(3)(C) Current INA section 237(a)(3)(C)

NOTE: In order to be barred from a grant of special rule cancellation of removal under this provision, the applicant must be deportable.

6. Firearms Offenses – Suspension of Deportation and Special Rule Cancellation / Deportable

Pre-IIRIRA INA section 241(a)(2)(C); Current INA section 237(a)(2)(C)

An applicant who at any time after entry is, or who is **deportable** at any time after admission for having been, convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying any weapon, part, or accessory which is a firearm or destructive device (as defined in 18 USC section 921(a)) in violation of any law. The state statute must mirror 18 USC §922. The state statute must include wording to show the applicant was an **illegal alien or alien** convicted of

Matter of Barrett, 20 I&N Dec. 171 (BIA 1990)

purchasing, selling, offering for sale, exchanging, using, owing, possession or carrying any weapon, part, or accessory which is a firearm or destructive device.
NOTE: Because this ground is not found in INA §212(a)(2), it does not apply to Special Rule Cancellation / Inadmissible.

7. Controlled Substance Offenses

See Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). Within the 9th Circuit, a person sentenced under the Federal First Offender Act (FFOA) or a state statute that mirrors the FFOA, may not have a conviction for immigration purposes, as to that conviction. It requires a case by case analysis.

a. Suspension of Deportation

i. An applicant who at any time after entry has been convicted of a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the US, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Pre-IIRAIRA INA §241(a)(2)(B)(i)

ii. An applicant who is, or at any time after entry has been, a drug abuser or addict.

Pre-IIRIRA INA §241(a)(2)(B)(ii)

b. Special Rule Cancellation of Removal

i. Inadmissible:

a. An individual who is inadmissible because he or she was convicted of a violation, or a conspiracy or an attempt

INA section 212(a)(2)(A)(i)(II)

to violate, any law or regulation of a State, the US, or a foreign country relating to a controlled substance.

b. An applicant who is <u>inadmissible</u> because an asylum officer knows or has reason to believe the applicant is or has been an illicit trafficker in any controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in illicit trafficking in any controlled substance. — INA section 212(a)(2)(C)

ii Deportable:

a. An applicant who is <u>deportable</u> for having been convicted at any time after admission of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the US, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of 30 grams or less of marijuana — INA section 237(a)(2)(B)(i)

b. An applicant who is <u>deportable</u> because he or she is, or at any time after admission has been, a drug abuser or addict — INA section 237(a)(2)(B)(ii)

8. Crimes Involving Moral Turpitude

a. Suspension of Deportation

i. An applicant who is <u>deportable</u> because he or she is convicted of a crime involving moral turpitude within 5 years after date of entry, and the sentence that **may be imposed** for this criminal conviction is one year or longer — Pre-IIRIRA INA §241(a)(2)(A)(i)

A full and unconditional pardon of the conviction by the President of the US or the governor of any state takes the applicant out of this category.

	ii.	An applicant who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct, regardless of confinement or if the convictions were in a single trial	Pre-IIRIRA INA §241(a)(2)(A)(iv)
		A full and unconditional pardon of the conviction by the President of the US or the governor of a state takes the applicant out of this category.	Pre-IIRIRA INA section 241(a)(2)(A)(ii)
b.	Special Rule Cancellation of Removal		Pre-IIRIRA INA section 241(a)(2)(A)(iv)
	1. Deportable:		
	i.	An applicant who is <u>deportable</u> because he or she is convicted of a crime involving moral turpitude within 5 years after date of entry, and the sentence that **may be imposed** for this criminal conviction is one year or longer	INA section 237(a)(2)(A)(i)
		A full and unconditional pardon of the conviction by the President of the US or the governor of any state takes the applicant out of this category.	INA section 237(a)(2)(A)(v)
	ii.	An applicant who is <u>deportable</u> for having been convicted of two or more crimes involving moral turpitude at any time after admission, not arising out of a single scheme of misconduct, regardless of confinement or if the convictions were in a single trial	INA section 237(a)(2)(A)(ii)
		A full and unconditional pardon of the conviction by the President of the US or the governor of any state takes the applicant out of this category.	INA section 237(a)(2)(A)(v)
	2. Inadmissible:		INA section

212(a)(2)(A)

iii. An applicant who is <u>inadmissible</u> because he or she was convicted of, or admits committing acts which constitute the essential elements of a crime involving moral turpitude (other that a purely political offense), or an attempt or conspiracy to commit such crime — INA 212(a)(2)(A)(i)(I)

Exception: The applicant is not barred from relief under NACARA based on commission of a crime involving moral turpitude in the following circumstances: — INA section

<u>Exception for certain crimes committed while under 18</u>

- Only one crime of moral turpitude was committed; and
- the applicant was under 18 years old when the crime was committed; and
- the crime was committed and the applicant released from any resulting confinement to a prison or correctional institution more than 5 years before the date of decision on the application.
- In the case of an alien who at the time the crime was committed is 15, 16 or 17 years of age, and; the offense is a felony involving violence; and the alien is tried and convicted as an adult, the juvenile exception will not apply.

18 USC §5032
HQ should be consulted on any case with this criminal issue.

OR

<u>Mild penalty exception</u>

- only one crime of moral turpitude was committed; and
- the maximum possible penalty for the crime did not exceed imprisonment for 1 year; and
- the applicant was not sentenced to a term of imprisonment in excess of 6 months, regardless of the time actually served. A suspended sentence counts as a sentence; probation does not.

INA §212(a)(2)(A)(ii)(II)

The criminal act cannot be construed to be a purely political offense if the common law or criminal character of the act outweighs the political nature of the crime.

An admission by an applicant of committing a crime involving moral turpitude cannot lead to a finding of a lack of good moral character, unless the applicant admits every element of the crime, as outlined by the relevant statute. Because such documented admissions will likely be infrequent, HQASM should be consulted in any case involving such an admission.

2. Analysis for crime involving moral turpitude (CIMT)
The analysis of a CIMT is not confined to the last 7 years. The conviction must first be analyzed under the threshold bars. If it is found to be a threshold bar, no further analysis is necessary. If it is determined the conviction is not a threshold bar and occurred within the last 7 years, the conviction goes to the good moral character and discretionary analysis.

a. All CIMT's should be analyzed using the three part categorical/modified categorical analysis.

Matter of Cristoval Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008).

- Categorical analysis

Look first to the statute of conviction rather than to the specific facts of the alien's crime.

The finding in this case is a departure from previous practice. In general,

Does the statute, on its face, realistically include conduct that does not involve moral turpitude? Where the categorical inquiry does not establish that an alien's crime necessarily involved moral turpitude, there must be further inquiry into the particular facts of the offense. Is there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude? If there is a realistic probability that the statute could reach conduct that does not involve moral turpitude, use the modified categorical step below.

- Modified categorical

The adjudicator should examine the record of conviction such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea or plea transcript for evidence the crime involved moral turpitude.

If it is still unclear, the officer may consider evidence, to the extent it is necessary and appropriate beyond the formal record of conviction.

The additional information is to be used to determine if the facts of an individual case are such that the conviction is for a CIMT. It is NOT an occasion to re-litigate the underlying facts or determinations made earlier by the previous trier of fact. The additional evidence may include other documents not listed above and statements made by the alien or any witnesses.

the officer was told not to look behind the record of conviction, but it may now be necessary in the sole context of determining whether a crime constitutes a CIMT. It is important to note that this investigation does not allow the officer to re-litigate or second guess the finding of the previous State or Federal trier of fact. It does allow the officer to review any additional evidence reasonably necessary to accurately resolve the moral turpitude question.

3. Definitions of moral turpitude

a. To qualify as a crime involving moral turpitude for purposes of the INA, a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness or recklessness.

Matter of Cristoval Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008)

	b.	It is proper to treat convictions obtained under statutes that limit convictions to defendents who knew, or reasonably should have known, that their intentional sexual acts were directed at children categorically should be treated as convictions for crimes involving moral turpitude.	*Matter of Cristoval Silva-Trevino,* 24 I&N Dec. 687 (A.G. 2008)
	c.	A crime of moral turpitude is a nebulous concept that refers to conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general.	*Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994); *Matter of Tran,* 21 I&N Dec. 291 (BIA 1996); *Matter of Danesh,* 19 I & N Dec. 669 (BIA 1988); *Matter of Flores,* 17 I & N Dec. 225 (BIA 1980)
	d.	Moral turpitude has also been defined as an act that is *per se* morally reprehensible and intrinsically wrong.	*Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994)
	e.	The essence of moral turpitude is an evil or malicious intent. But such a specific intent is not a prerequisite to a finding that a crime involves moral turpitude.	*Matter of Tran,* 21 I&N Dec. 291(BIA 1996) *Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994); *Matter of Lopez-Meza,* 22 I&N Dec. 1188 (BIA 1999)
	f.	The test to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.	*Maghsoudi v. INS*, 181 F.3d 8 (9th Cir. 1999); *Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994)
	e.	It is the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude.	*Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993)
3.	General considerations		*Maghsoudi v. INS*, 181 F.3d 8 (9th Cir. 1999); *Matter of Franklin,* 20 I & N Dec. 867 (BIA 1994)

a. Violations of statutes that merely license or regulate and impose criminal liability without regard to evil intent do not generally involve moral turpitude. In some jurisdictions, driving under the influence or while intoxicated is an example of a violation of a statute that licenses or regulates and imposes criminal liability without regard to intent.

Matter of Torres-Varella, 23 I &N Dec. 78 (BIA 2001) (Arizona statute of aggravated DUI with two or more convictions was not a CIMT because the individual acts were not CIMTs); *see also Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993)

4. Examples

a. Crimes found to involve moral turpitude

- Spousal abuse

  Spousal abuse is a crime involving moral turpitude. This principal extends to the abuse of a cohabitant.

  Grageda v. INS, 12 F.3d 919 (9th Cir. 1993); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996)

- Statutory rape

  Castle v. INS, 541 F.2d 1064 (4th Cir. 1976); *see Matter of Imber*, 16 I & N Dec. 256 (BIA 1977)

- Incest

  Gonzalez-Alvarado v. INS, 39 F.3d 245 (9th Cir. 1994)

- Crimes involving fraud are almost always crimes involving moral turpitude because such crimes usually require an intent to deceive.

  Jordan v. DeGeorge, 341 US 223, (1951)

- Conviction(s) for passing bad checks

  For the crime to constitute a crime involving moral turpitude, an intent to defraud when passing the bad check

  Matter of Balao, 20 I & N Dec. 440 (BIA 1992)

must be an element of the crime. The element of fraudulent intent must be required by statute or case law.	
A conviction for passing bad checks where intent to defraud is not a necessary element of the crime does not involve moral turpitude.	*Matter of Zangwill*, 18 I & N Dec. 22 (BIA 1981)

b. Crimes found not to involve moral turpitude

• Malicious mischief ordinarily does not rise to the level of depravity or fraud that could qualify the crime as one involving moral turpitude.	*Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 1995)
• Assault under certain circumstances where the crime does not have an element of intent	*Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996)
• Passing a check with insufficient funds (where intent to defraud is not an element of the crime)	*Matter of Balao*, 20 I & N Dec. 440 (BIA 1992)
• Indecent exposure **NOTE**: the felony offense of indecency with a child by exposure under Texas law, which requires the perpetrator have knowledge of the presence of a child, has been held to be an aggravated felony because it falls within the definition of sexual abuse of a minor under INA Sec. 101(a)(43)(A). See subsection J pertaining to aggravated felony convictions, which, like CIMT convictions, may preclude an applicant from establishing good moral character.	*Matter of H*, 7 I&N Dec. 301 (BIA 1956)

9. Persecution of Others

a. Suspension of Deportation

An individual who participated in Nazi persecution or in genocide is barred from a grant of suspension of deportation.	Pre-IIRIRA INA §241(a)(4)(D)

Although an applicant for suspension of deportation who participated in persecution unrelated to Nazi persecution or genocide would not be barred from a grant of NACARA relief, the applicant still may be ineligible for relief on other grounds. If the persecution occurred during the 7-year requisite good moral character period, the applicant may be unable to establish good moral character, provided the applicant's conduct in its entirety would suffice to establish good moral character.

Pre-IIRIRA INA section 244(a)

In most cases, the persecution will have taken place long before the 7-year good moral character period. In these cases the persecution is considered, along with any other negative factors and all positive factors in the case, in determining whether to exercise discretion in the applicant's favor.

HQASM will review all cases in which there is evidence the applicant assisted or participated in the persecution of others, but the officer has recommended granting NACARA relief. In addition, any referral in which the officer determines that the applicant has assisted or participated in persecution, and the case may by publicized nationally or the person may pose a threat to others must be referred to HQASM for quality assurance review.

b. Special Rule Cancellation of Removal

For those seeking special rule cancellation of removal, the bar to eligibility based on persecution of others has been broadened to include not only participants in Nazi persecution and genocide, but all persecutors.

An applicant is ineligible for special rule cancellation, if he or she is inadmissible or deportable because he or she at any time participated in Nazi persecution or genocide, committed any act of torture or extrajudicial killing, or, while serving as a foreign government official, was responsible for or directly carried out particularly severe

violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402).

Additionally, an applicant may be ineligible for special rule cancellation of removal because he or she is described in INA section 241(b)(3)(B)(i), as an individual who ordered, incited, assisted, or otherwise participated in the persecution of others on account of a protected characteristic.

INA section 212(a)(3)(E); 212(a)(2)(G)

INA section 237(a)(4)(D); 237(a)(4)(E)

Evidence the applicant participated in persecutory acts may include information from country conditions reports or the El Rescate or Guatemalan Military Database, indicating the applicant served with a "bad unit," at a "bad time," and in a "bad place." In other words, there is evidence the applicant's military, guerrilla, or security force unit committed serious abuses at a time when and location where the applicant served.

If there is evidence the applicant participated in the persecution of others on account of a protected characteristic, the applicant bears the burden of clearly establishing otherwise.

The applicant may meet this burden by providing detailed, credible testimony, explaining how he or she was able to avoid assisting in the persecution of others, given the circumstances.

In determining whether the applicant has met his or her burden of clearly establishing that he or she did not participate in the persecution of others, the asylum officer has the affirmative duty to elicit all relevant testimony from the applicant, including testimony concerning the applicant's duties and responsibilities, the location(s) where the applicant served, whether the applicant commanded others, etc. The officer should make sure to ask sufficient follow-up questions and give the applicant an opportunity to provide detailed information.

See Kiyaga v. Ashcroft, 77 Fed.Appx. 16 C.A.1,2003. Oct. 8, 2003, citing *Fedorenko v. United States*, 449 U.S. 490, 494, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981) (Asylum case in which the First Circuit upheld an IJ determination that the

It is improper for an asylum officer to determine that an applicant failed to provide detailed testimony, if the officer did not ask the applicant sufficient questions about his or her service with a military, guerrilla, or security force.	applicant participated in persecution of civilians on account of political opinion, based on evidence the applicant's unit in the Ugandan military committed atrocities at the time and location the applicant served.) Please note, this is an unpublished case and is therefore presented here as a teaching tool.

10. Security and Related Grounds

a. Suspension of Deportation

i. An applicant who is convicted of an offense (and the conviction is final), or convicted of a conspiracy or attempt to violate specified espionage, treason, or sabotage laws of the United States for which a term of imprisonment of five years or more may be imposed; sections 871 (threats against the President and his or her successors) or 960 (military expeditions against friendly nations) of title 18 of the United States Code; the Military Selective Service Act or Trading With the Enemy Act; or sections 215 (travel documentation of aliens and citizens) or 278 (importation of alien for immoral purposes) of the INA	Pre-IIRIRA INA §241(a)(2)(D)
ii. An applicant who has engaged, is engaged, or at any time after entry has engaged in: - any activity to violate any law of the US relating to espionage or sabotage, or to violate or evade any law	Pre-IIRIRA INA section 241(a)(2)(D)

		prohibiting the export from the US of goods, technology, or sensitive information; - any other criminal activity which endangers the public safety or national security; **or** - any activity the purpose of which is to overthrow the US government by force, violence, or other unlawful means	
	iii.	An applicant who has engaged, is engaged, or at any time after entry has engaged in terrorist activity	Pre-IIRIRA INA §241(a)(4)(A)
	iv.	An applicant whose presence or activities in the US would have potentially adverse foreign policy consequences for the United States (the determination is made by the Secretary of State)	Pre-IIRIRA INA §241(a)(4)(B)
		A letter from the Secretary of State is sufficient proof to establish the alien is deportable under 241(a)(4)(C).	Pre-IIRIRA INA §241(a)(4)(C)
b.	Special Rule Cancellation of Removal		*Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999)
	i.	An applicant who is <u>deportable</u> for having been convicted of an offense (and the conviction is final), or convicted of a conspiracy or attempt to violate specified espionage, treason, or sabotage laws of the United States for which a term of imprisonment of five years or more may be imposed; sections 871 (threats against the President and his or her successors) or 960 (military expeditions against friendly nations) of title 18 of the United States Code; the Military Selective Service Act or Trading With the Enemy Act; or sections 215 (travel	INA §237(a)(2)(D)

	documentation of aliens and citizens) or 278 (importation of alien for immoral purposes) of the INA	
ii.	Any applicant who is <u>inadmissible</u> for seeking to enter the US to engage in any activity in violation of the espionage or sabotage laws or to violate any law prohibiting the export of goods, technology, or sensitive information or to otherwise engage in activity to oppose, control or overthrow the US government by force, violence, or other unlawful means	INA §212(a)(3)(A)
iii.	Any applicant who is <u>inadmissible or deportable</u> because: • the applicant has engaged in terrorist activity • a consular officer or the Attorney General knows, or has reasonable grounds to believe, the applicant is engaged in or is likely to engage after entry in any terrorist activity • the applicant has incited terrorist activity under circumstances indicating an intention to cause death or serious bodily harm • the applicant is a representative of a terrorist organization, as defined in INA section 212(a)(3)(B)(vi) • the applicant is a representative of a political, social, or other similar group that endorses or espouses terrorist activity • the applicant is a member of a terrorist organization, as that term is defined in INA section 212(a)(3)(B)(vi)(I) or (II) • the applicant is a member of a terrorist organization, as that term is defined in INA section 212(a)(3)(B)(vi)(III), unless the applicant can demonstrate by clear and convincing evidence that the applicant did not know, and should not reasonably have known,	INA §212(a)(3)(B) and §237(a)(4)(B), as amended by §103 and §105(a) of the REAL ID Act (May 11, 2005)

	that the organization was a terrorist organization • the applicant endorses or espouses terrorist activity, or persuades others to endorse or espouse terrorist activity or support a terrorist organization • the applicant has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in INA section 212(a)(3)(B)(vi)), or • the applicant is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years	
	The INA defines "terrorist activity," "engaging in terrorist activity," "representative," and "terrorist organization."	INA sections 212(a)(3)(B)(iii), (iv), (v), and (vi)
iv.	Any applicant who is <u>inadmissible or deportable</u> because his or her presence or activities in the US would have potentially adverse foreign policy consequences for the United States (the determination is made by the Secretary of State)	INA §212(a)(3)(C) and 237(a)(4)(C)
v.	Any applicant who is <u>inadmissible</u> due to membership or affiliation with the Communist or any other totalitarian party	INA §212(a)(3)(D)(ii) & (iii)

B. Additional Bars to Special Rule Cancellation of Removal

1. High Speed Flight

An applicant who is <u>deportable</u> because he or she has been convicted of a violation of §758 of title 18, United States Code (relating to high speed flight from an immigration checkpoint), is ineligible.	INA section 237(a)(2)(A)(iv) **NOTE**: This section is not retroactive; it applies only to

convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.

2. Crimes Related to Domestic Violence — INA section 237(a)(2)(E)(i)

An applicant who is deportable because he or she was convicted on or after September 30, 1996 of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.
For all other applicants, generally a conviction of this type is a CIMT and should be analyzed as such.

NOTE: This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996

A crime of domestic violence includes any crime of violence committed against a person

- by a current or former spouse of the person
- by an individual with whom the person shares a child in common
- by an individual who is cohabiting with or has cohabited with the person as a spouse
- by any individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs
- by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the US, or any State, Indian tribal government, or unit of local government

This provision applies to special rule cancellation of removal cases where the applicant has been admitted to the United States and thus subject to grounds of deportation. When an applicant is an applicant for admission and thus subject to grounds of inadmissibility rather than deportation and has been convicted of a domestic crime of violence, the conviction should be analyzed as a CIMT under INA §212(a)(2).

3.	Violation of Protection Orders	INA section 237(a)(2)(E)(ii)
	An applicant who is <u>deportable</u> because, on or after September 30, 1996 • the applicant was enjoined under a protection order issued by a court, and • the court determines that the applicant has engaged in conduct that violates the portion of the protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued Under this provision, "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as an order entered during the pendency of another proceeding.	This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.
4.	False Representation of US Citizenship An applicant who is <u>deportable</u> for falsely representing that he or she is a US citizen for any purpose or benefit under the INA, or any federal or state law.	INA §237(a)(3)(D) **NOTE:** This section is not retroactive; it applies only to convictions, or violations of court orders, occurring after the date of the enactment of IIRIRA – September 30, 1996.
6.	Criminals Who Have Asserted Immunity Certain aliens who are <u>inadmissible</u> due to commission of serious criminal offenses in the US and for whom immunity from criminal jurisdiction was exercised	INA section 212(a)(2)(E)
7.	Conviction of Two or More Offenses Any alien who is <u>inadmissible</u> because he or she has	INA section 212(a)(2)(B)

been convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more

C. Bars to Discretionary Relief

The information regarding failure to appear or to depart under a final order of deportation is provided so that the asylum officer has a complete picture of all of the bars to NACARA relief. Any individual who would be subject to one of these bars is either subject to 1) an outstanding final order of deportation or removal and would have to be granted a NACARA motion to reopen by EOIR in order to seek NACARA relief, or 2) executed the final order by departing the US, thus breaking continuous physical presence.

For anyone in the first category, the immigration judge adjudicating the NACARA motion to reopen would have determined the applicability of the bar when deciding whether to approve the motion. If the motion to reopen was granted, then it is reasonable to assume that the immigration judge determined that the bar was not applicable to the case. The Asylum Division will accept such cases for NACARA adjudication only after the motion to reopen has been granted and the case has been administratively closed so that the applicant can seek NACARA relief in front of an asylum officer.

Though such instances should be rare, if the asylum officer believes such a bar applies, he or she should discuss the case with a supervisor and HQASM should be contacted. A significant issue will be whether the warning notices were provided at the time of the hearing or departure order.

1. Suspension of Deportation (5 year bar)

b.	<u>Failure to depart pursuant to order of voluntary departure</u> – An applicant granted voluntary departure shall not be eligible for suspension of deportation for a period of 5 years after the scheduled date of departure (or the date of unlawful reentry) if the applicant:	Pre-IIRAIRA INA section 242B(e)(1)

i. remained in the United States after the date of the scheduled departure and

ii. received written notice in English and Spanish and oral notice in a language that the applicant understood of the consequences of the failure to depart

Exception: This does not apply if exceptional circumstances existed for the failure to depart. This would include the *ABC* Settlement, which permitted registered class members to remain in the US pending a *de novo* adjudication of their asylum claims, even if the class member had already been granted voluntary departure.

c. Failure to appear under deportation order – An applicant shall not be eligible for suspension of deportation for a period of 5 years after the date he or she was required to appear for deportation, if the applicant failed to appear for deportation at the time and place ordered and the applicant:

Pre-IIRAIRA INA section 242B(e)(2)

i. was given oral notice in the applicant's native language or a language the applicant understood and in the final order of deportation and

ii. the notice explained the consequences of the failure to appear for deportation at the time and place ordered

Exception: This does not apply if exceptional circumstances prevented the appearance.

d. Failure to appear for asylum hearing – An applicant whose period of authorized presence in the US has expired and who has filed an asylum application is not eligible for suspension of deportation for a period of 5 years after the date of a scheduled asylum hearing, if the applicant:

Pre-IIRIRA INA section 242B(e)(3)

i. fails to appear for the asylum hearing

ii. has received written notice in English and Spanish of the hearing date, and

iii. has received oral notice in a language the applicant understands of the hearing date

Exception: This does not apply if exceptional circumstances prevented the appearance.

2. Special Rule Cancellation of Removal (10 year bar) — INA section 240(b)(7)

a. Final order of removal – An applicant is ineligible for cancellation of removal for 10 years after the date of the entry of the final order of removal if:

i. the final order of removal was issued in absentia

ii. the applicant was previously provided oral notice in his or her native language or a language he or she understands and

iii. the notice explained the time and place of the proceedings, and

iv. the notice explained the consequences for failure to appear

b. Failure to Depart - An applicant is ineligible for 10 years for the relief of cancellation of removal if:

Even after 10 years, jurisdiction for NACARA lies with Immigration Court for an unexecuted order unless applicant is an ABC registered class member

i. the applicant was given a final order allowing him or her to depart voluntarily, and

ii. the applicant failed to depart within the time specified

Exception: This does not apply if the order permitting the applicant to depart voluntarily did not inform the applicant of these

penalties.

IX. GOOD MORAL CHARACTER

At the conclusion of this section, the asylum officer will be able to identify the appropriate factors to consider in evaluating whether an applicant has established good moral character.

A. General Considerations

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1. The applicant must establish he or she has been and still is a person of good moral character during the entire required 7-year period of physical presence in the United States.

2. A child who is less than 14 years of age is presumed to be a person of good moral character and is not required to submit documentation establishing good moral character. *Matter of Sanchez-Linn*, 20 I & N Dec. 362 (BIA 1991)

3. Good moral character does not demand moral excellence

B. Statutory Definition of Lack of Good Moral Character

See. 8 C.F.R. 204.2(e)(2)(v)

It is important to note that any criminal or good moral issue should first be analyzed under INA §212, §237 or Pre-IIRIRA §241 as applicable. If the alien is still eligible after such an analysis, the statutory grounds stated at INA §101(f) should apply.

An applicant cannot establish good moral character if he or she falls into one of the categories listed in INA section 101(f) during the 7-year period for which good moral character is required to be established. The categories listed in INA section 101(f) are as follows (and are described in greater detail in subsections C through J below):

1. A habitual drunkard;
2. [Stricken by Sec. 2(C)(1) of Pub. L. 97-116];
3. An individual who has been convicted or admits the commission of an offense that would make him or her a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D) *Prostitution and Commercialized Vice*, (6)(E) *Smugglers*, and (9)(A) *Certain Aliens previously removed*, of section 212(a) of the INA; or subparagraphs (A) *Convictions of certain crimes* and (B) *Multiple criminal convictions* of section

212(a)(2) of the INA and subparagraph (C) *Controlled Substance traffickers* thereof (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marijuana); **and** the offense described therein was committed during the required period of good moral character;

4. One whose income is derived principally from illegal gambling activities;
5. One who has been convicted of two or more gambling offenses committed during the good moral character period;
6. One who has given false testimony for the purpose of obtaining any benefits under the INA;
7. One who during the good moral character period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense(s) were committed within or without the good moral character period;
8. One who at any time has been convicted of an aggravated felony defined in section 101(a)(43) of the INA; or

9. One who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

NOTE: The definition of an individual lacking good moral character in section 101(f), prior to IIRIRA, differs very slightly from the present definition in the INA, in reference to certain excludability grounds that were amended by IIRIRA. However, the differences are not relevant for purposes of asylum officer identification of applicants who are clearly eligible for relief under section 203 of NACARA.

Note: The Asylum Officer does not apply the 30 gram exception

to Special Rule Cancellation applicant who is inadmissible. Those aliens are barred under threshold ineligibility grounds found in INA §212(a)(2)(A)(II) which does not allow any exception.

Term of imprisonment or sentence: Whenever a provision requires a particular term of imprisonment or sentence in order to be applicable, the period of confinement or incarceration ordered by the court is applicable, regardless of any suspension in imposition or execution of imprisonment or sentence. However, where the statutory requirement is actual confinement, such as in paragraph 7 above, the asylum officer considers only the time actually served. Acts of juvenile delinquency: When determining whether INA section 101(f) precludes an applicant from establishing good moral character, acts of juvenile delinquency are not to be considered crimes, nor are adjudications of juvenile delinquency to be considered convictions.

Matter of Ramirez-Rivero, 18 I & N Dec. 135 (BIA 1981); *Matter of De La Nues*, 18 I & N Dec. 140 (BIA 1981)

C. Characteristics Identified Solely in INA §101(f)

1. An applicant who is a habitual drunkard — INA §101(f)(1)

   a. There must be evidence demonstrating an individual is a "habitual drunkard" before he or she is precluded from establishing good moral character.

   b. For example, a doctor's testimony or information indicating that an individual had been committed to an institution for a course of treatment for chronic alcoholism could be evidence that might preclude a finding of good moral character.

   c. There have been few precedent decisions applying this provision. It would be reasonable to consider an alien's good faith efforts at sobriety in determining whether the alien is a habitual drunkard.

2.	Deriving income principally from illegal gambling activities	*Matter of H,* 6 I & N Dec. 614 (BIA 1955)
	If an applicant has a financial interest in an illegal gambling establishment, engages in illegal gambling activities him- or herself, or is employed in an illegal gambling establishment, he or she is generally considered to fall into this category.	INA section 101(f)(4)
3.	Conviction of two or more gambling offenses An applicant who has been convicted of two or more gambling offenses committed during the 7-year period required to establish good moral character cannot establish good moral character.	*Matter of S-K-C,* 8 I & N Dec. 185 (BIA 1958)
4.	Providing false testimony for the purpose of obtaining any benefit under the INA	INA section 101(f)(5)
	a. False oral statements made under oath to an asylum officer can constitute false testimony.	INA section101(f)(6)
	b. Testimony is limited to oral testimony under oath. Falsified documents and statements not made under oath do not constitute false testimony.	*Matter of R-S-J,* 22 I&N Dec. 863 (BIA 1999)
	c. The dishonesty must carry with it an intent to obtain immigration benefits. False testimony made for other reasons, such as embarrassment, fear, or a desire for privacy, is not enough to demonstrate that the applicant is a person lacking in good moral character.	*Kungys v. United States,* 485 US 759, (1988)
	d. False testimony does not include concealments.	*Id.*
	e. False testimony need not be material if the testimony was given in an attempt to gain immigration benefits. For example, false testimony by the applicant about his or her date of birth may not necessarily be material in a suspension or cancellation claim. But if the falsity provided was or is with the intent to obtain	*Id.*

	immigration benefits and not out of fear, lack of knowledge, or a desire for privacy, this may contribute to a finding that the applicant is precluded from establishing good moral character.	
f.	If the false testimony is withdrawn voluntarily and without delay and without exposure, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Without delay is generally interpreted within the same incident, interview or line of testimony. Exposure is generally in the form of documentary evidence to the contrary of the false statement.	*Id.*
g.	A finding that testimony lacked credibility does not alone justify the conclusion that false testimony has been given. False testimony means knowingly giving false information with the intent to deceive. A finding of lack of credibility does not necessarily stem from a conclusion that the speaker intends to deceive.	*Llanos-Senarillos v. US,* 177 F.2d 164 (9th Cir. 1949); *Matter of Namio,* 14 I & N Dec. 412 (BIA 1973) In *Llanos,* the court stated that "[i]f the witness withdraws the false testimony of his own volition and without delay and without exposure, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Another relevant case, *Matter of M*—cites to *Matter of R—R*--, 3823 B.I.A., Dec. 13, 1949, which states in pertinent part, "[when] an alien in an immigration proceeding testifies falsely under oath as to a material fact but voluntarily and without prior exposure of his false testimony comes forward and corrects his testimony, perjury has not been committed and the charge based thereon is not sustained."

	h.	It is legally invalid to assume that a witness whose testimony is not accepted by the trier of fact is not a person of good moral character. The trier of fact may have considered the testimony unreliable because of the witness's poor memory, lack of personal knowledge, or other reasons that do not necessarily involve a holding that the witness deliberately gave false testimony.	*Rodriguez-Gutierrez v. INS*, 59 F.3d 504 (5th Cir. 1995)
	i.	An asylum officer must give the applicant an opportunity to explain any inconsistent statements or discrepancies. Errors in testimony may result from translation error, misunderstanding of questions, or other miscommunications.	*Id.* (quoting *Acosta v. Landon*, 125 F. Supp. 434 (S.D. Ca. 1954))
5.	Conviction resulting in incarceration for 180 days or more		When a court "suspends' the imposition of a sentence, the sentence was not actually imposed. *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Castro*, 19 I & N Dec. 692 (BIA 1988) INA section 101(f)(7)
	An applicant who has been confined to a penal institution, as a result of a conviction, for an aggregate period of 180 days or more within the required period of good moral character, regardless whether the offenses were committed within the requisite 7-year good moral character period, cannot be found to have good moral character.		
	Confinement that was served prior to the actual conviction, for which the individual was given credit in determining the date of release, counts towards the 180-day limit. Also, confinement that results from a violation of probation rather than from the original sentence to incarceration also may be counted towards the 180-day limit.		*Fonseca-Leite v. INS*, 961 F.2d 60 (5th Cir. 1992)
	The confinement must be within the 7-year period necessary to establish good moral character, though the crime could have been committed before the 7-year good moral character period.		

A penal institution is a generic term to describe places of confinement for those convicted of crimes, such as jails, prisons, workhouses, houses of correction, and other correctional institutions.

Matter of Valdovinos, 18 I & N Dec. 343 (BIA 1982)

Matter of Piroglu, 17 I & N Dec. 578 (BIA 1980)

When determining whether the applicant's 180 day incarceration falls within the 7-year time period, the asylum officer must look at the 7-years immediately preceding the date of decision rather than the 7-years immediately preceding the date of application.

Black's Law Dictionary

The applicant must have actually served the confinement of 180 days or more to be precluded from establishing good moral character on this basis. If an applicant is sentenced to but serves less than 180 days, he or she is not precluded from establishing good moral character under INA section 101(f).

Cipriano v. INS, 24 F.3d 763 (5th Cir. 1994)

a. Engaging in prostitution

To find that an applicant has "engaged in" prostitution, there must be a "continuity and regularity, indicating a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value as distinguished from the commission of casual or isolated **acts**." (emphasis added) Therefore, a single act of prostitution within the last 7 years generally would not, in itself, preclude a finding of good moral character. However, the applicant may be found to have been convicted of a crime involving moral turpitude. In such cases, the asylum officer must take into account the mild-penalty exception in determining whether the applicant is precluded from establishing good moral character as a result of conviction of a crime involving moral turpitude.

Pichardo v. INS, 216 F.3d 1198 (9th Cir. 2000)

b. Procuring a prostitute

Matter of Gonzalez-

Zoquiapan, 24 I&N Dec. 549 (BIA 2008). Arrests for solicitation on one's own behalf may not render the applicant inadmissible under INA §212(a)(2)(D)(ii)

It is necessary to distinguish between procuring and solicitation.

A conviction for solicitation of a prostitute on one's own behalf is distinguished from procurement and is not a threshold bar under INA §212(a)(2)(D). If the applicant has one or more convictions for solicitation on one's own behalf and the conviction is within the 7 years immediately preceding the interview, the Asylum Officer should review these convictions to determine if the person has shown good moral character.

IMPORTANT: If the applicant is convicted under INA section 212(a)(2)(D) rendering the person inadmissible and the person is seeking special rule cancellation, he or she is barred for a 10 year period immediately preceding the date of interview. If the conviction occurred outside of the 10 year period, the person is not barred nor are they precluded from establishing good moral character. For special rule cancellation (inadmissible) - The Asylum Officer does not analyze a conviction described in §212(a)(2)(D) under 101(f) because a conviction under §212(a)(2)(D) is a threshold bar to eligibility if the conviction occurred within the 10 years immediately preceding the interview.

G. Polygamy / Aliens Previously Removed

INA §101(f)(3) referencing §212(a)(2)(D)(iii)

Prior to IIRIRA, INA section 101(f) specifically referenced the inadmissibility ground regarding polygamy (212(a)(9)(A)) as a ground for finding lack of good moral character. While Congress renumbered the ground for inadmissibility based on polygamy to 212(a)(10)(A), it did not make the corresponding change to section 101(f). Although this has been interpreted as a technical error by many, the Ninth Circuit has declined to treat it as one, finding instead that the plain meaning of the law now defines an individual who attempts to enter the U.S. within 5 years of being previously removed through expedited removal or removal proceedings initiated upon the individual's arrival into the U.S. as without good moral character. Thus far, no other circuit has ruled on this question of statutory

interpretation.

H. Alien Smuggling

INA 101(f)(3) referencing 212(a)(6)(E)

An applicant who knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of the law during the applicable period is required to show good moral character

To find that an applicant is precluded from establishing good moral character under this provision, there must be sufficient evidence the applicant "knowingly" assisted another individual in illegally entering the United States. Evidence that an applicant simply sent money to his or her family abroad, and one or more family members later entered the US illegally, in itself, is insufficient to satisfy this requirement. To determine whether an applicant knowingly assisted another to enter the US illegally, the asylum officer should ask several follow-up questions during the interview, if there are grounds to suspect the applicant of having engaged in smuggling. For example, the officer should ask whether the applicant regularly sent money to his or her relatives abroad, whether the applicant always sent the same amount to his or her relatives, for what purpose the money was intended, whether the applicant's relatives used the money the applicant sent to enter the US illegally, and whether the applicant knew his or her money was being used to help another individual enter the US illegally.

The AO should record his or her questions and the applicant's responses in Q&A format.

NOTE: The statutory exception and waiver categories related to this inadmissibility ground do not apply to NACARA applicants because they are limited to LPRs and applicants seeking admission as immediate relatives.

I. Persecution of Others (Nazi Persecution, Genocide, Torture, Extrajudicial Killing, Severe Violations of Religious Freedom)

INA §212(a)(3)(E)

Any applicant, who, *at any time*, has committed, ordered, incited, assisted or otherwise participated in Nazi persecution, genocide, torture, or extrajudicial killing, is precluded from establishing good moral character pursuant to INA section 101(f)(9), as amended by Title E of the National Intelligence Reform Act of 2004.

INA section 212(a)(3)(E)

In addition, any applicant, who, while serving as a foreign government official, *at any time* was responsible for or directly carried out severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is precluded from establishing good moral character.

INA §212(a)(2)(G)

NOTE: Asylum Officers generally consider only the seven-year period preceding the decision on the NACARA 203 application when determining whether an applicant has established good moral character. However, if the applicant has committed any of the aforementioned acts of persecution, at any time (i.e., within or outside of the seven-year good moral character period) he or she is precluded from establishing good moral character under INA section 101(f)(9).

J. Other Factors to Consider – Good Moral Character Balancing Test

The fact that an applicant is not within any of the above categories does not compel a finding that the applicant is a person of good moral character. INA section 101(f) permits USCIS to consider every aspect of the individual's life in determining whether the person is a person of good moral character.

1. If the applicant does not fall in one of the specifically enumerated categories in INA section 101(f), the asylum officer must consider any relevant negative factors outside of the statutory definition along with **all** positive factors relating to good moral character. The asylum officer must weigh all counterbalancing positive factors against any potentially negative factors.

   Examples of possible positive factors that should be considered are:

a. school record
b. family background
c. employment history
d. financial status
e. lack of criminal record
f. volunteer work
g. involvement in religious activities
h. rehabilitation or other self-improvement actions, such as successfully completing court-ordered counseling sessions

2. Examples of negative factors that have been considered in evaluating good moral character include the following:

a. Failure to file income taxes

The fact that an applicant does not file income taxes may be a negative factor, but it is not, in itself, determinative of a person's moral character. An individual may have legitimate reasons for not filing income taxes, and the failure to file may be remedied.	*Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986)

b. Falsifying tax returns

An applicant who files an income tax return but knowingly provides <u>fraudulent</u> information on the tax return may fall into one of the statutory categories of a person lacking good moral character; that is, an individual who commits a crime involving moral turpitude.	*See Gambino v. Pomeroy*, 562 F.Supp. 974 (NJ 1983) (good moral character in application for naturalization)

c. Participation in illegal activities such as illegally selling liquor in a restaurant even though the law is not enforced, or knowingly

	consorting with and aiding criminals	
d.	Neglect of family responsibilities such as willful failure to comply with a court decree requiring child support	*Matter of Locicero,* 11 I & N Dec. 805 (BIA 1966)
e.	Several convictions for driving under the influence or while intoxicated if within the period of time needed to establish good moral character If there is a significant period of time with no repeat behavior, it would be reasonable to consider an alien's good faith efforts at sobriety in determining whether the alien has been rehabilitated.	*Matter of L,* 8 I & N Dec. 389 (BIA 1959); *see also Petition of Orphanidis,* 178 F. Supp. 872 (N.D. W. Va. 1959)
f.	**Probation** - There is no bar to establishing good moral character based solely on the fact that an applicant is on probation. If an applicant is on probation at the time of the NACARA interview, the interviewing officer should consider the underlying crime that led to the probation, the likelihood the applicant will successfully complete probation (taking into account prior arrests, any previous violations of probation, any successful completion of rehab-type programs, etc.), and the potential consequences of violating probation. If the applicant is likely to violate his or her probation, and violation of probation could lead to a term of imprisonment that would preclude the applicant from establishing good moral character (confinement of 180 days or more), the officer should refer the case as not clearly eligible. Otherwise, the asylum officer examines the totality of the conduct (including the underlying violation and the fact that the applicant has not yet successfully completed probation) to determine whether the applicant has established good moral character.	*See Petition of Dobric,* 189 F. Supp. 638 (D. Minn 1960); see also *Petition of Huymaier,* 345 F.Supp 339 (E.D. Penn. 1972) (Failure to make all required child support payments does not in and of itself show absence of good moral character on petition for naturalization; must look at circumstances behind the failure)

An asylum officer should not grant the case of an applicant who is on probation for conviction of a CIMT, if there is a likelihood the applicant will violate probation, and violation of probation would result in confinement to a penal institution of 180 days or more (hence the applicant would no longer qualify for the mild-penalty exception).

K. Failure to Establish Good Moral Character

All cases in which the asylum officer finds a lack of good moral character during the requisite time period must be referred to the Immigration Court.

If an applicant is unable to establish good moral character, he or she is ineligible for a grant of NACARA relief by USCIS. It is not necessary to consider whether the applicant meets the remaining basic eligibility criterion of extreme hardship or merits a favorable exercise of discretion.

Review Questions

1. How long must the applicant have been a person of good moral character?

2. Identify 5 of the factors that by statute define a person as lacking good moral character.

3. Can factors other than those listed in INA section 101(f) be considered when determining good moral character? If so, under what conditions?

4. Does a person who fails to file income taxes lack good moral character? What should be considered?

5. Does a person convicted of driving under the influence of alcohol lack good moral character? What should be considered?

6. Does a person convicted of passing bad checks lack good moral character? What should be considered?

7. Should an asylum officer refer the case of an applicant who is on probation at the time of the NACARA interview? What factors should the officer consider?

8. What is required for a finding that an applicant engaged in or procured prostitution?

X. EXTREME HARDSHIP

At the conclusion of this section, the asylum officer will be able to identify appropriate factors to consider in evaluating whether the applicant has established extreme hardship for purposes of establishing eligibility for suspension of deportation or special rule cancellation of removal.

A. General Principles

1. The removal of the applicant must result in extreme hardship to:

   - the applicant himself or herself, or
   - to his or her spouse, parent, or child who is a US citizen or lawful permanent resident

2. Factors relevant to the evaluation of hardship identified in case law have been codified in regulation; however,

   - there is no requirement that an applicant establish that each of the identified factors apply
   - the list of factors codified in regulation and cited in case law is not exclusive
   - factors must be considered in the aggregate

     Example: An applicant may experience hardship as a result of one factor that, alone, is not considered extreme. However, when added to the hardship the applicant will experience as a result of another factor(s), the cumulative effect may be extreme hardship.

   - an adjudicator is not required to articulate an independent analysis of each hardship factor listed in the regulation when rendering a decision. 8 C.F.R. 240.58

3. Decisions are made on a case-by-case basis, taking into account the applicant's particular circumstances.

4. *ABC* class members who registered for *ABC* or applied for asylum on or before April 1, 1990 are entitled to an evidentiary presumption of extreme hardship. (This is discussed in section VIII.C below.) — *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994)

5. In general, the Principal applicant has a presumption of extreme hardship that is difficult to overcome. Individuals from the Former Soviet Bloc and qualified family members do not have the same presumption of hardship. They must be able to articulate the hardship they would suffer if they were returned to their home country.

B. Relevant Factors to Consider

8 C.F.R. 240.58(a)

The BIA has held that the factors listed below are relevant in evaluating extreme hardship. These factors have also been codified in the regulation implementing section 203 of NACARA.

8 C.F.R. 240.64(d)

Adjudicators should weigh all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision.

1. Age – both at the time of entry and at the time of application for relief

   For example, a person who came to the US when he or she was 13, as opposed to an individual who came to the US when he or she was 25, may experience greater hardship if returned to his or her country, depending on the specific facts of the case.

   An applicant who has been in the US since he or she was a child may be more integrated socially, culturally, and economically into a community in the US.

   Matter of Anderson, 16 I & N Dec. 596 (BIA 1978); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994); *Matter of Pilch*, Int. Dec. 3298 (BIA 1996); 8 C.F.R. 240.58

2. Applicant's children – the age, number, and immigration status of the applicant's children and their ability to speak the native language and adjust to life in another country

   This provision reflects the factors relied upon to establish the presumption of extreme hardship for

	ABC class members. Its inclusion in the regulation recognizes that this grouping of factors may create the probability of extreme hardship in a given case.
USC/LPR children – In evaluating whether the applicant's removal would cause extreme hardship, it is important to note that, although an applicant cannot gain a favored status by the birth of a citizen child, the hardship to a USC/LPR child may be sufficient to warrant a finding that the applicant has established the basic eligibility criterion of extreme hardship. The asylum officer must consider the hardship the applicant's removal would cause to the applicant's USC/LPR child. Mere inconvenience to a citizen child is insufficient to constitute extreme hardship.	*Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996), and *Matter of Pilch*, 21 I. & N. Dec. 627 (BIA 1996)
If the child is to accompany the applicant to the country of removal, the normal problems associated with relocation, such as differences in educational opportunities and standards of living, or the difficulty in leaving friends behind, generally do not rise to the level of extreme hardship.	*Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998); *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996)
However, a totality of factors may constitute extreme hardship. Factors that should be considered include the age of the child, whether the child will be separated from other close relatives, language ability, psychological trauma, or serious illness.	*Villena v. INS*, 622 F. 2d 1352 (9th Cir. 1980)
If the USC/LPR child will stay in the United States, the potential separation of the family and the hardship to both the child and the parent applicant resulting from the separation may be taken into consideration when such evidence is presented.	*Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986); *Ramirez-Gonzalez v. INS*, 695 F.2d 1208 (9th Cir. 1983); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994)
Non citizen/LPR children – Hardship to the applicant's noncitizen or non-LPR children should not be considered in most cases.	*Ravancho v. INS*, 658 F.2d 169 (3d Cir. 1980); *Biggs v. INS*, 55 F.3d 1398 (9th Cir.

		1995)
	However, the asylum officer may consider the hardship the parent may experience because his or her noncitizen/non-LPR children are harmed by the parent's removal from the US.	*Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998); P*erez v. INS*, 96 F.3d 390 (9th Cir. 1996); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994)
3.	Health conditions – health conditions of the applicant, the applicant's child, spouse, or parent The health of the applicant or the applicant's child, spouse, or parent, particularly when tied to the unavailability of suitable medical care in the country to which the applicant would be returned, is a relevant factor in evaluating hardship. Likewise the health of the applicant's USC/LPR parent, child, or spouse is relevant to an evaluation of hardship, if the applicant is the person responsible for the family member's well being and support. The asylum officer should elicit information regarding the applicant's or his or her family member's medical condition. If it appears that the applicant or family member has a significant medical condition, the applicant should provide documentation regarding the condition (e.g., hospital or doctor's records). The asylum officer should take into account the kind of medical facilities the applicant or the applicant's qualified relative would have access to, if any, in the country to which the applicant would be returned. This information may be obtained from the applicant and through country condition research.	*Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir 1985); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980)
4.	Employment – the applicant's ability or inability to obtain employment in the country to which he or she would be returned	*Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995)
	Economic detriment alone does not constitute extreme hardship. However, the economic conditions of the country to which the applicant would be returned and the financial impact of deportation are relevant to the extreme hardship analysis and should be considered in conjunction with other hardship factors. Further, total inability	*Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995); *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985)

to find work can result in more than mere economic injury.

5. Length of presence – the length of the applicant's presence in the US over the minimum required time of 7 years

The longer an applicant has remained in the US, the stronger his or her ties to the US may become, and the weaker his or her ties to the home country may become.

Urban v. INS, 123 F.3d 644 (7th Cir. 1997)

As with any factor, this factor must be considered in light of all the circumstances of the case. The fact that an applicant has been in the US for just over 7 years does not mean that he or she has failed to form significant ties to the US.

Id.; Santana Figueroa v. INS, 644 F. 2d 1354 (9th Cir. 1981)

For example, a ten-year old who has been in the United States for only 7 years would have spent his or her formative years in the United States and would likely experience extreme hardship upon removal from the United States.

6. Family members legally residing in the US – An applicant's ties to family members living in the US, or lack of any such ties, must be considered in evaluating hardship.

Matter of O-J-O, 21 I&N Dec. 381 (BIA 1996)

The separation of the applicant from his or her family living in the US may be the most important single hardship factor when evaluating whether removal would result in extreme hardship to the applicant. Included in the evaluation of hardship to the applicant is the suffering an applicant may experience at seeing his or her child, spouse, or parent suffer as a result of the separation.

The removal of an applicant who has a USC/LPR parent, spouse, or child might also result in hardship to the USC/LPR parent, spouse, or child.

For example, the BIA has found that the deportation of an applicant who contributed to the support and care of a disabled USC father would cause extreme hardship to that father and thus the applicant satisfied the extreme hardship criteria. The asylum officer

should ask the applicant about other means of support, such as other relatives who might provide support for the USC/LPR family member.

While the lack of an applicant's ties to family members residing in the US is relevant, it is not, in itself, determinative. There may be other factors that, when considered together, establish that the applicant would experience extreme hardship if returned, even though he or she has no or few family ties in the US.

Gutierrez-Centeno v. INS, 99 F.3d 1529 (9th Cir. 1996); *Mejia-Carrillo v. INS*, 656 F.2d 520 (9th Cir. 1981); *Salcido-Salcido v. INS*, 138 F. 3d 1292 (9th Cir. 1998); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994)

For example, it has been held that an applicant who had no significant family ties in the US but supported her parents and siblings in Thailand established that she would experience extreme hardship if she returned to Thailand, because she would no longer be able to support her family. In this particular case, the applicant's inability to support her family in her home country constituted extreme hardship to her.

Matter of Louie, 10 I & N Dec. 223 (BIA 1963); In this case the applicant also established extreme hardship to himself.

7. <u>Financial impact of departure from the US</u>

Matter of O-J-O, 21 I&N Dec. 381 (BIA 1996)

Adverse financial impact generally is not, in and of itself, sufficient to establish extreme hardship. The asylum officer should consider the degree of any adverse financial impact.

However, an individual who would become destitute and unable to survive if returned to his or her country may be found to face extreme hardship should he or she be removed from the US.

In addition, while economic detriment, such as the loss of a job, may not be enough alone to constitute extreme hardship, it is still a factor to consider in evaluating extreme hardship.

Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995)

8. <u>Irreparable harm as a result of disruption of educational opportunities</u>

Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); *Matter of Ige*, 20 I & N Dec. 880 (BIA 1994); *Matter of Sipus*, 14 I & N Dec.

The lack of educational opportunities for the applicant's USC/LPR children is an important factor to consider when evaluating the hardship to the child,

though the fact that educational opportunities are better in the US than in the applicant's homeland does not alone establish extreme hardship.

229 (BIA 1972)

Example: The Ninth Circuit found an applicant's USC child would suffer extreme hardship if the applicant were returned because the child had a medical disability that would prohibit or greatly delay learning the applicant's native language, and thus would result in a loss of education.

Matter of O-J-O, 21 I&N Dec. 381 (BIA 1996), quoting *Mejia-Carrillo v. INS*, 656 F.2d 520 (9th Cir. 1981)

However, the emotional and psychological impact of readjustment should be considered when assessing hardship. An individual deprived of his or her livelihood and uprooted from a community to which he or she has belonged and contributed may experience extreme hardship.

Watkins v. INS, 63 F. 3d 844 (9th Cir.1995)

The psychological harm an applicant may experience upon return to a country he or she left amidst the turmoil of civil war or persecution must also be considered. For instance, individuals who have lost relatives because of civil war may experience psychological trauma upon return.

Matter of Ige, 20 I & N Dec. 880 (BIA 1994)

10. <u>Political and economic conditions in the country of return</u>

Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981)

Political unrest in the country of origin should be considered in assessing hardship.

Violence and threats that fail to establish the political, religious, or ethnic motivation necessary to establish eligibility for asylum may nonetheless be important factors to consider in evaluating whether the applicant would experience extreme hardship.

A case in which a claim of persecution is raised must be examined from the perspective of extreme hardship rather than on the basis of the criteria used to identify a refugee under asylum law.

Matter of O-J-O, 21 I&N Dec. 381 (BIA 1996); *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th Cir. 1996)

	Depressed economic conditions and volatile political situations are additional factors to consider in evaluating extreme hardship.	*Blanco v. INS*, 68 F.3d 642 (2d Cir. 1995)
11.	Ties to the country to which the applicant would be returned An applicant's lack of strong family ties in the country to which he or she would be returned is an indication that the applicant might find it more difficult to re-integrate in the country of origin. Conversely, an applicant who has strong family ties in the country to which he or she would be returned may find his or her re-integration into the country's culture eased.	*Ordonez v. INS*, 137 F.3d 1120 (9th Cir 1998)
12.	Ties to the US Contributions and ties to a community in the US, including integration into the society and culture of the US, are factors that should be considered in assessing extreme hardship.	*Matter of L-O-G*, 21 I&N Dec. 413 (BIA 1996)
	Extensive community and charitable activities in which an applicant is engaged in his or her community provide evidence of a high degree of integration into the community and support a finding of extreme hardship.	*Matter of Anderson*, 16 I & N Dec. 596 (BIA 1978)
13.	Immigration history An applicant who has been authorized to reside in the US without fear of deportation may have relied on the authorization to reside in the US and, as a result, put down ties to the community. An applicant who has obtained work authorization and remained in the US under the color of law is more likely to have assimilated into US society.	*Matter of O-J-O*, 21 I&N Dec. 381 (BIA 1996)
	In evaluating extreme hardship, the asylum officer may consider DHS's actions with respect to enforcing a final order of deportation, including decisions to defer or stay a removal order or policy	*Salmeda v. INS*, 70 F. 3d 447 (7th Cir. 1995); *Gutierrez-Centeno v. INS*, 99 F.3d 1529 (9th

decisions to limit enforcement of an order. Cases in which DHS affirmatively permitted the applicant to remain in the US weigh more heavily in favor of an extreme hardship determination than those cases in which DHS declined to enforce the order. On the other hand, immigration history that suggests the applicant delayed return to his or her country to deliberately avoid or frustrate lawful orders can serve as a negative factor when evaluating extreme hardship.

Cir. 1996)

Matter of Pena-Diaz, 20 I & N Dec. 841 (BIA 1994)

14. Absence of other means to adjust status

Because suspension of deportation and cancellation of removal are considered extraordinary forms of relief, immediate or short-term availability of adjustment of status (for instance through a USC spouse) has been considered relevant to the degree of long-term hardship an applicant may face. An asylum officer should not base a determination on speculative relief that may be available in the future, nor should this factor be determinative. The fact that an applicant has an asylum application pending should not be considered a negative factor in evaluating hardship.

Matter of M-, 4 I & N Dec. 707 (BIA 1952); *Matter of T-F-*, 4 I & N Dec. 711 (BIA 1952); *see also Gutierrez-Centeno v. INS*, 99 F.3d 1529, fn. 6 (9th Cir. 1996)

C. Rebuttable Presumption of Extreme Hardship

8 C.F.R. § 1240.64(d)

The Department of Justice concluded that sufficient evidence exists to support an evidentiary rebuttable presumption of extreme hardship for *ABC* class members who are eligible to apply for relief under NACARA. This conclusion is based on a determination that the *ABC* class shares certain characteristics that give rise to a strong likelihood that an *ABC* class member or qualified relative would suffer extreme hardship if deported or removed.

The regulations designate two categories of NACARA applicants who are eligible for the presumption of extreme hardship – 1) Salvadorans and Guatemalans who applied for asylum by 4/1/90, and 2) *ABC* class members who registered for *ABC* benefits and have not been apprehended at time of entry after 12/19/90. The presumption means that an asylum officer must find that an *ABC* class member who 1) is eligible to apply for NACARA benefits under either of these two categories and 2) completes the NACARA application

has established extreme hardship, unless a preponderance of the evidence establishes that neither the applicant nor a qualified family member would suffer extreme hardship if the class member is removed.

1. Shared characteristics of the *ABC* class

   a. Significant ties to the US

   A prolonged stay in the US without fear of deportation and with benefit of work authorization is a strong predictor of extreme hardship.

An *ABC* class member is a Guatemalan national who entered the United States on or before 10/1/90 or a Salvadoran who entered the United States on or before 9/19/90.
8 C.F.R. 240.60

   i. As noted above, the longer an individual has lived in the United States beyond the requisite 7 years, the more likely it is that he or she will have developed significant ties to the US.

8 C.F.R. 240.64(d)(1)
Please refer to the Supplementary Information portion of the interim regulation governing section 203 of NACARA for a more detailed discussion of the decision to establish a rebuttable presumption of extreme hardship.
64 FR 27856, 27864-67 (May 21, 1999) (section titled "Rebuttable Presumption of Extreme Hardship for Certain NACARA Beneficiaries")

   ii. Similarly, the longer an applicant has lived in the United States under protection from deportation, the more likely it is that he or she will develop long-term ties to the US.

   iii. Because *ABC* class members have had work authorization, for the most part, they were more likely to have access

to steady employment, career opportunities, and reasonable wages and could openly contribute to the economy and form ties to the US.

b. The unique immigration history and circumstances of the *ABC* class has given rise to other predictors that are unique to the class. *Matter of O-J-O,* 21 I&N Dec. 381 (BIA 1996)

i. Financial impact of departure/employment

For those class members who have had steady employment, the possibility of extreme hardship if removed from the United States is compounded by the significant underemployment in Guatemala and El Salvador.

ii. Psychological impact of return *Matter of L-O-G,* 21 I&N Dec. 413 (BIA 1996)

Many of these individuals fled circumstances of civil war and political violence in their homelands during the 1980s.

iii. Another shared characteristic is the difficulty many of the NACARA-eligible Salvadorans and Guatemalans might have faced if they had returned home permanently during the early 1990s. The US government recognized this by giving Salvadorans TPS and DED even after the Peace Accords were signed. Guatemalan peace accords were not signed until 1996.

2. The presumption of extreme hardship is rebuttable.

a. Because of the shared characteristics leading to the creation of the presumption, Guatemalan and Salvadoran *ABC* class members who 1) filed for asylum by 4/1/90 or 2) registered for *ABC* benefits and have not been apprehended at entry after 12/19/90,

generally will be considered to have established extreme hardship upon submission of a completed application.

b. The presumption of extreme hardship is not a blanket finding that all *ABC* class members will experience extreme hardship if returned. Instead, it is an evidentiary tool designed to address the significant likelihood that individual *ABC* class members will experience extreme hardship if returned to their native countries.

c. The asylum officer must still review the applicant's responses to questions regarding extreme hardship and evaluate the applicant's particular circumstances to determine whether a preponderance of the evidence establishes that neither the applicant nor the applicant's qualified relatives, if any, would suffer extreme hardship if the applicant is returned. — 8 C.F.R. 240.64(d)(2)

3. Operation of the presumption — 8 C.F.R. 240.64(d)(1)

a. The creation of the presumption shifts the focus of inquiry such that an adjudicator will evaluate whether there is sufficient evidence in the record to disprove extreme hardship. However, the creation of the presumption does not eliminate the necessity of examining the evidence of extreme hardship in each case. The adjudicator may ask additional questions or request additional documentation at the interview or hearing, if necessary. — 8 C.F.R. 240.64(d)(2) and (3)

b. An applicant is required to submit a completed application that includes answers to questions relating to extreme hardship and to answer questions regarding hardship at the interview or hearing.

4. Overcoming the presumption — The presumption shifts the burden of proof with respect to the hardship element.

8 C.F.R. 240.64(d)(2)

a. When the evidence in the record shows no factors associated with extreme hardship (no family in the United States, no work history, no ties to the community, no serious medical condition or any other hardship factors) the presumption may be overcome. 8 C.F.R. 240.64(d)(1)

b. When the evidence in the record significantly undermines the basic assumptions on which the presumption is based, the presumption may be overcome.

Example: An individual who has amassed great wealth and invested it in his home country may be able to return to his country without experiencing extreme hardship. However, the asylum officer must still consider whether there are any other hardship factors present in the case (such as a serious medical condition for which there is no treatment in the home country) such that return would result in extreme hardship.

Non-Presumption Cases

1. Applicants eligible to apply under section 203 of NACARA only as nationals of the former Soviet Bloc or as NACARA qualified family members are not eligible for an evidentiary presumption of extreme hardship.

2. The Department of Justice concluded that the immigration history of these groups was too disparate to predict the likelihood of extreme hardship for these individuals.

3. However, the regulations specifically recognize that those characteristics which led to the creation of the presumption may be present and should be given appropriate weight in individual cases.

4. Evidence of an extended stay in the US without fear of deportation and with the benefit of work authorization, when present in a particular case, shall be considered relevant to the determination of whether deportation will result in extreme hardship.

5. For a NACARA qualified family member who has a sponsor who has been granted suspension of deportation or special rule cancellation of removal, an important factor in determining extreme hardship is the new status of the sponsor. The applicant would now have a lawful permanent resident parent or spouse. As noted earlier, a very important factor when evaluating whether removal would result in extreme hardship is the separation of the applicant from his or her family in the US.

   In addition, the adjudicator now also has to evaluate whether the applicant's removal would result in hardship to the new LPR spouse or parent.

D. Failure to Establish Extreme Hardship

If an applicant is unable to establish extreme hardship, or, in the case of an *ABC* class member, the presumption of extreme hardship has been overcome, the applicant is ineligible for a grant of NACARA 203 relief by USCIS. It is not necessary to consider whether the applicant merits a favorable exercise of discretion.

Review Questions

INA section 240.58(a); This includes a FSB national with an asylum application pending in USCIS backlog.

1. Briefly state 3 general principles that apply in making a determination of extreme hardship.

2. Identify the relevant factors that must be considered when making a determination of extreme hardship. Offer a brief explanation of each factor.

3. What type of evidence would overcome the presumption that an *ABC* class member or his or her qualified relative would suffer extreme hardship if the applicant were removed?

XI. DISCRETION

Once an applicant has been found to meet the basic eligibility criteria for suspension of deportation or special rule cancellation of removal, the asylum officer should consider all of the circumstances of the case to decide if the statutorily eligible applicant merits a favorable exercise of discretion.

Please refer to the adjudication worksheets found at found at Appendices AM and AN of the *ABC*-NACARA Procedures Manual for a more complete understanding of the step-by-step process of

NACARA adjudication.

The decision whether to exercise discretion to grant suspension of deportation or special rule cancellation of removal may not be arbitrary, irrational, or contrary to law. As in an asylum adjudication, once the applicant has been found eligible for relief, discretion should be exercised in favor of the applicant unless there are clearly defined reasons that support a referral.

In determining whether to exercise discretion in the applicant's favor, the officer must weigh all positive factors against any negative factors. The factors to be considered are often similar to those used when determining good moral character but sometimes may be different. For example, the fact that an applicant has a serious medical condition or has lived in the United States for a very long time and is integrated into the community are factors that weigh in favor of exercising discretion to grant but may say little about the applicant's character. In addition, the factors considered in determining discretion do not need to be within the 7-year good moral character period.

Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983); *Vaughn v. INS*, 643 F.2d 35 (1st Cir. 1981)

The adjudicator may also consider that Congress chose to create a statutory persecutor bar when it reformulated suspension of deportation as cancellation of removal. Therefore, in suspension of deportation cases, evidence that the applicant participated in the persecution of others is treated as a negative factor in evaluating discretion. See section X.A.9 below.

Example: In a suspension of deportation case, the evidence indicates that the applicant assisted in the persecution of civilians on account of imputed political opinion when he was a soldier in El Salvador in 1985, and the applicant failed to clearly establish otherwise. The applicant is not barred from being granted suspension of deportation, and the action occurred long before the good moral character period. However, the officer should consider the persecution a significant negative factor, to be weighed against any positive factors in the case, in determining whether the applicant warrants a favorable exercise of discretion.

XII. SUMMARY OF CLAIMS THE ASYLUM OFFICER MUST REFER TO THE IMMIGRATION COURT

INA section 240B(d)

The asylum officer shall refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court for adjudication in deportation or removal proceedings, and will provide the applicant with

written notice of the statutory or regulatory basis for the referral, if:

1.	The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA	
2.	The applicant does not appear to merit relief as a matter of discretion	8 C.F.R. 240.70(d)(1)
3.	The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal but does not admit deportability or inadmissibility	8 C.F.R. 240.70(d)(2)
4.	The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure was not excused by the USCIS, unless the application is dismissed, or	8 C.F.R. 240.70(d)(3) See *ABC*-NACARA Procedures Manual for discussion of this requirement.
5.	The applicant is requesting suspension of deportation or special rule cancellation of removal under the Victims of Trafficking and Violence Protection Act (VTVPA). This act allows spouses and children who have been battered and abused by a spouse or parent who is or was USC, LPR, or NACARA beneficiary to qualify for suspension of deportation or special rule cancellation of removal without maintaining continuous physical presence for 7 years.	8 C.F.R. 240.70(d)(4)

XIII. EVIDENCE

Please refer to sections I.F and II.E above.

At the conclusion of this section, the asylum officer will be able to identify the types of evidence an applicant should present to establish continuous physical presence, good moral character, and extreme hardship.

A. Burden of Proof

The burden of proof to establish eligibility for suspension of deportation or special rule cancellation of removal is on the applicant.

Reminder: The extreme hardship element is considered established in presumption cases as soon as the applicant submits a completed application and testifies regarding his or her written responses at the time of interview. The AO must then evaluate whether the preponderance of the evidence overcomes the presumption.

B. Types of Evidence

The asylum officer should elicit testimony regarding physical presence, good moral character, and extreme hardship. The applicant may also present witnesses to substantiate his or her testimony. In addition, the applicant may offer documentary evidence.

8 C.F.R. 240.64(a)

a. Necessity of documentation – continuous physical presence

The asylum officer should review the applicant's A-file(s) and relevant DHS databases to collect information from INS or DHS records on the applicant's continuous physical presence.

i. Issuance of an EAD on a yearly basis may establish physical presence for each year.

If there is evidence that the applicant applied for and received an EAD each year for the 7 years prior to the date of the application, and the applicant provides credible testimony that he or she did not depart the United States during that time, or any departures did not break continuous physical presence, the applicant may be found to have established continuous physical presence.

ii. Documentation required

If INS or DHS records do not establish that the applicant has been continuously physically present in the US, the applicant

should provide documentation demonstrating he or she was in the US each year of claimed physical presence.

If the applicant departed the US and the asylum officer has questions about the applicant's testimony regarding the duration of the time the applicant spent outside the US, the asylum officer may require the applicant to provide documentation confirming presence in the US after the date of departure.

b. Necessity of documentation – good moral character

Absence of arrest or conviction records based on the background security checks is strong evidence the applicant has good moral character.

Testimony and affidavits from employers or US citizens corroborates the good moral character.

In the event FBI fingerprint checks cannot be completed because of inability to obtain good fingerprints, the applicant should submit police clearances for each jurisdiction lived in during the required 7 years of continuous physical presence.

c. Necessity of documentation – extreme hardship

See ABC-NACARA Procedures Manual

i. Salvadorans and Guatemalan *ABC* class members who either 1) filed for asylum by 4/1/90 or 2) registered for *ABC* and have not been apprehended at entry after 12/19/90 are not initially required to present documentary evidence demonstrating that removal would result in extreme hardship. The asylum officer may ask for evidence on the issue of extreme hardship at the interview. If there is evidence in the record that would allow

USCIS to overcome the presumption of extreme hardship, the applicant must be allowed to present evidence that would demonstrate extreme hardship.

In some cases, particularly where credibility is an issue, it may be reasonable to require documentation, such as relevant medical records, or a reasonable explanation as to why important documentation is unavailable.

ii. Individuals who have not been accorded a presumption should submit documentation demonstrating that removal would result in extreme hardship.

2. Types of documentary evidence 8 C.F.R. 250.67(b)(6)

The following is a list of documents that may be helpful in establishing the statutory criteria. This list is not exclusive. Nor is the applicant required to submit any particular documents, as the applicant may be able to substantiate his or her claim with testimony, either testimony of the applicant or of the applicant's witnesses. Nonetheless, it is generally reasonable to expect an applicant to corroborate a claim with supporting documents. Other documents not listed here may also be submitted by the applicant and may be relevant.

a. Physical Presence

- Bankbooks
- Leases, Deeds
- Licenses
- Receipts
- Letters
- Birth, church or school records
- Employment records
- Medical records

- Evidence of tax payments
- INS or DHS records
- Photographs with electronic date

b. Good Moral Character

- Affidavits from witnesses, preferably US citizens or lawful permanent residents
- Affidavits from the applicant's employer
- Police records from the jurisdictions in which the applicant has lived, only if fingerprint results are inconclusive

c. Extreme Hardship

- School records of applicant and/or applicant's children
- Medical records, if relevant
- Records of participation in community organizations, for example, churches, PTA, social or other clubs
- Records of volunteer work
- Documents showing the number of people the applicant employs, if self-employed
- Contributions made by applicant to his or her family, either in the US or in his or her native country
- Country condition information showing high crime rate, political and economic instability of the country to which the applicant would be returned
- Evidence of difficulties of similarly situated returnees

- Affidavits of individuals who have first-hand knowledge of applicant's circumstances

- Affidavits regarding intent to leave USC child in the US

3. Witnesses

The applicant is entitled to call witnesses to appear on his or her behalf. However, applicants may be encouraged to submit affidavits of witnesses, rather than bringing witnesses to the interview. The following is not an exhaustive list.

a. To establish physical presence:

- The applicant's past and present employers

- The applicant's family members

- School or church officials/leaders

- Neighbors

- Relatives lawfully residing in the US

b. To establish good moral character:

- The applicant's past and present employers

- The applicant's family members

- School or church officials/leaders

- Neighbors

- Relatives lawfully residing in the US

- Other credible third party witnesses

c. To establish extreme hardship:

- The applicant's family

- Relatives of the applicant who are lawfully residing in the US
- The applicant's employer, if the employment is deemed extremely necessary
- Psychiatrists who will testify to the psychological problems the applicant or his or her US or lawful permanent resident parent, spouse or child will suffer if the applicant is returned
- Medical doctors who will testify as to any special medical conditions
- Neighbors and friends of the applicant and his or her family
- Church or school officials/leaders.

C. Weight of Evidence

The asylum officer must give substantial weight to the applicant's testimony. Credible testimony alone may, in some instances, be sufficient to establish continuous physical presence, good moral character, and extreme hardship. For most cases, however, corroborating information in the form of documentation and/or witnesses will be necessary for the applicant to establish eligibility for suspension of deportation or special rule cancellation of removal. Otherwise, a reasonable explanation will need to be provided as to why certain documentary evidence cannot be produced.

Review Questions

1. Who carries the burden of proof to obtain relief under NACARA?

2. What types of evidence can the applicant present to establish eligibility?