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October 13, 2010

Alejandro N. Mayorkas, Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave.
Mail stop 2000
Washington, D.C. 20529

Dear Honorable Director Mayorkas:

I am an AILA member, who has practiced exclusively in the area of immigration law for more than 30 years.

I am sending this open letter to you as Director of USCIS, U.S. Department of Homeland Security in support of and to comment on 3 provisions of the Family unity portion of the recent Memorandum sent to you relating to Administrative Alternatives to Comprehensive Immigration Reform. My comments are limited to 1) TPS, 2) Parole in place, 3) unlawful presence of those granted advanced parole.

As a preliminary statement, I wish to emphasize that the provisions I address in this letter are not only justifiable reinterpretations of past opinions but are directly supported by black letter law and clear congressional intent. In the analysis which follows, I will proceed to provide legislative history and justifications for their support.

1. Allowing TPS Applicants who Entered Without Inspection to Adjust or Change Status

Allowing TPS grantees who entered EWI to adjust status is supported by black letter law and clear Congressional intent.

INA 244(f)(4) entitled" benefits during the TPS period" states that while a person is maintaining valid TPS status they are considered as "being in and maintaining" the status of a valid nonimmigrant for purposes of 245 adjustment of status and 248 change of status.

Further, the regulations found at 8 C.F.R. 244, all USCIS public notices, and private notices sent to TPS applicants approving TPS (a)(12) status all use the exact same language.

The provisions of INA 244 in general and INA 244(f)(4) in specific do not exclude those entering without inspection from obtaining TPS. Further, INA 244(c)(2)(A)(i) and (ii) specifically states that paragraphs (5) and (7)(A) of INA 212(a) shall not apply and except for that specifically mentioned in clause (iii), the Attorney General may waive any other provision of section 212(a).

Please be advised that some of my clients granted TPS who entered EWI have previously adjusted their status; however USCIS apparently forgot what they used to do before 245(i) was enacted.

Moreover, legislative history clearly proves that when Congress designated El Salvador to be the first TPS country, they specifically addressed the fact that most Salvadorans fled their country and entered the U.S. without inspection, and they enacted provisions of INA 244(f)(4) which allow TPS grantees the ability to adjust/change status should relief become available.

Attached please find my brief to the Fifth Circuit Court of Appeals which cites to parts of the Congressional record where there was acknowledgment by Congress that most El Salvadorans entered without inspection, and discussion about whether they would permit TPS grantees to adjust status without other provisions of the law. Congress later came to a compromise position in INA 244(f)(4) when they stated that a person granted TPS during the TPS period, be considered as being in status and maintaining the status of a valid nonimmigrant for purposes of 245/248 adjustment/change of status. Also, see the title of Section INA 245 which is entitled "Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence." Consider any person who is in and maintaining valid status as a nonimmigrant and they are clearly eligible to adjust status.

Please be reminded that TPS was passed in 1990, which was 2 years before 245(i). If the only persons who could benefit were those who entered legally and were maintaining a valid nonimmigrant status, they could have adjusted under 245(a) and INA 244(f)(4) would have been superfluous.

Moreover, TPS is an ameliorative provision and must be viewed in the light most favorable to the alien. INA 244(f)(4) puts those granted TPS protection into a different status – that of a nonimmigrant maintaining status; further support of that idea is found in the fact that TPS grantees revert to their original status after the TPS period expires.

USCIS often cites the case of U.S. v Flores, 404 F.3d 320(5th Cir 2005) for the proposition that TPS/EWI's cannot adjust; however, this case is distinguishable because the respondent in Flores was an "applicant" for TPS (c)(19) but was not granted (a)(12) TPS status, and as such was not eligible for the benefits of 244(f) because he had not been granted TPS status. Please see the Fifth Circuit case of U.S. v Orellana, 405 F.3d 360, 364-65 n.21 (5th Cir 2005) which found TPS to be considered a lawful status, etc. and in dicta confirmed that Orellana who was EWI, would be eligible to adjust status.

It is inconceivable and irrational to think that despite the plain language in INA 244(f)(4); the passage of TPS specifically for persons from El Salvador many of whom have been in TPS status since the 1990's; the subsequent passage of NACARA; the fact that EWI's are not excluded from TPS; that INA 244(c)(2) specifically waive 212(a)(5) and (7)(A) inadmissibility… that Congress intended to keep these persons in limbo if they found a way to regularize their status.

Also, note that I have appealed this exact issue (the ability of a TPS grantee who entered EWI to adjust status) to the Fifth Circuit, the OIL attorney assigned to this case agrees with my position, and the Chief Counsel ICE in Harlingen is joining with me in a motion to the BIA to reopen and remand this case. I have attached to this letter a copy of my brief to the Fifth Circuit.

In light of the above, I respectfully request USCIS to produce a memo tracking the law and regulations found at INA 244(f)(4), informing the Service Offices that EWI's granted TPS are considered as being in and maintaining the status of a valid nonimmigrant for purposes of 245 adjustment of status or 248 change of status, and are eligible to adjust status in the U.S.

2. Expand the Use of Parole-in-Place

Expanding the use of parole in place was contemplated by the 1996 amendments to IIRAIRA and strong supports family unity.

Adjustment of status or parole in place for EWI's put in removal proceedings are supported by the provisions of INA 236(a)(1) which states that persons present in the United States who have not been admitted or who arrives in the U.S. (whether or not at a designated port of arrival.)..; - shall be deemed for purposes of this Act an "applicant for admission."

Since those who entered EWI who are stopped inside the U.S. and referred for removal proceedings are charged under INA 212, they should be eligible to adjust status the same as those paroled at the border for removal proceedings. Further, INA 212(d)(5)(A) permits humanitarian parole of these persons if they were at the border or airport seeking entry this provision can be similarly extended to parole persons found in the U.S. who are also deemed "applicants for admission." These same persons found in the U.S. who are placed in removal proceedings are charged with I-212 inadmissibility.

Many EWI's are married to U.S. citizens and would be eligible to adjust their status if they were admitted and inspected or "paroled." These same persons who may be beneficiaries of approved I-130 petitions are afraid to leave the U.S. lest they trigger the 212(a)(9)(B) – 10 year bar, or 212(a)(9)(C) permanent bar to reentering the U.S. Not even criminals face permanent bars to reentry.

It is incongruous for EWI's to be considered and charged in removal proceedings under INA 212 as "applicants for admission" and then deny that you have the power

under INA 212(d)(5)(A) to parole them as any other applicant for admission. It denies equal protection for someone just entering the U.S. to be eligible to adjust status when those who are here are not. If USCIS has the power to use parole in place for military families in order to strengthen family unity, then the same power exists for other persons deemed applicants for admission whose return home to their country would impose extreme hardship on qualified family members.

For all the above reasons, I respectfully request that USCIS expand the use of parole in place.

3. Amend the Unlawful Presence Policy for Adjustment Applicants

USCIS's policy of applying the 212(a)(9) bars to adjustment applicants granted advance parole should be rescinded as it is not necessarily supported by the law and regulations.

A change in policy is not only supported by the authors of the memorandum, it is dictated by fairness and the clear words of the statute coupled with the regulations. Moreover, 212(a)(9) waivers are adjudicated erratically across the country making it difficult for those otherwise eligible to adjust their status.

Under the plain words of the statute INA 212(a)(9)(B) is triggered only when a person departs and "again seeks admission", however, 8 C.F.R. 245(a)(4)(B) specifically states these persons are not applicants for admission until the AOS application is denied.

8 C.F.R. 245.2(a)(4)(B) states that:

> "*the travel outside of the United States by an applicant for adjustment who is not under exclusion, deportation, or removal proceedings shall not be deemed an abandonment of the application if she was previously granted advance parole by the Service for such absences; was inspected and paroled upon returning to the United States."*

The foregoing provision says to me that an adjustment applicant who travels on advance parole to resumes processing of the adjustment returns in the same status.

8 C.F.R. 245.2(a)(4)(B) goes on to say:

> *"If the adjustment of status application of such individual is subsequently denied, he will be treated as an applicant for admission, and subject to the provisions of section 212 and 235 of the Act."*

The above sentence says to me that only if the adjustment application is subsequently denied (for another reason) will the applicant be treated as an "applicant for admission" and subject to the provisions of 212 or 236.

Persons granted advance parole reenter in the same status as they left and USCIS should not use their departure on advance parole as the precise reason to deny their adjustment. It is true that after the AOS application is denied, persons become subject to the 212 provision; however from the words of 8 C.F.R. 245.2(a)(4), the departure alone should not trigger the denial of adjustment.

There is something unfair about USCIS granting these persons permission to travel only to say "Gotcha – you have triggered a bar and cannot adjust". USCIS often points to the words on the I-512 document to state that these persons have been fairly warned of the consequences of travel. However, USCIS forgets that these provisions are complicated for attorneys to understand not to mention unsophisticated non English speaking applicants for AOS. Many of these persons who have been granted permission to travel may be under dire circumstances traveling to visit ill or deceased relatives. Moreover, since the ability to apply for advance parole is now included in the AOS fees, many persons travel on advance parole without consulting USCIS or attorneys about its consequences.

I therefore urge you to adopt the recommendations not to apply the 212(a)(9) bars to AOS applicants who will travel or have traveled on advance parole.

Conclusion

A reinterpretation of the above provisions would not only promote family unity but would provide thousands of families in limbo or denied AOS the opportunity to regularize their status.

It would also provide a considerable financial boost to the government and to an agency which may be struggling to keep afloat due to the decrease in benefits available since 245(i) ended.

Thank you for your consideration and any thought given to my letter and the suggestions by Denise A. Vanison, Roxana Bacon, Debra A. Rogers and Donald Neufeld.

Respectfully submitted,

Barbara J. Brandes

BJB/lme
cc: Denise A. Vanison, Policy and Strategy
Roxana Bacon, Office of the Chief Counsel
Debra A. Rogers, Field Operations
Donald Neufeld, Service Center Operation
AILA (American Immigration Lawyers Association)
ILW (Immigration Lawyers on the Web)

No. 10-60293

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lilian Ramirez
Agency Nos. A29 956 731
Petitioner
v.
Eric H. Holder, Jr., U.S. Attorney General
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Lilian Ramirez, AKA Ana Lilian Franco Ramirez Lopez

Attornery of Record for Lilian Ramirez

/s Barbara J. Brandes

Barbara J. Brandes

Dated: July 8, 2010

i. Request for Oral Argument

We respectfully request that the Court schedule this case for oral argument. The resolution of the INA § 244(f)(4) issue in this case will have far reaching effects for many TPS grantees who entered the United States without inspection, including Salvadorans and recently-designated Haitians, who are eligible to adjust status under INA § 245, but who have been left in limbo due to the Department of Justice's, Department of Homeland Security's, and USCIS's failure to recognize Congressional intent in passing INA § 244(f)(4).

We believe that oral argument would be helpful in explaining the legislative history of Temporary Protected Status so that the court is fully able to understand our argument that Congress intended TPS grantees to adjust their status in the United States pursuant to INA § 244(f)(4), even if they initially entered without inspection. We further request oral argument to argue Petitioner's eligibility for NACARA relief, as such relief is likely not raised before this court frequently and oral discussion may help resolve any uncertainties. In light of the foregoing, we respectfully request the opportunity for oral argument before a panel of the Court.

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I. Jurisdiction

The Petitioner appeals from the March 19, 2010 Board of Immigration Appeals' affirmance of the Immigration Judge's denial of Petitioner's motion to reopen her May 31, 1989 deportation hearing in Harlingen, Texas, which is located
in the Fifth Circuit. On April 16, 2010, Petitioner timely filed a Petition for Review of the Board's decision dismissing Petitioner's motion to reopen to apply for adjustment of status and NACARA.

This court has jurisdiction to review the denial of a motion to reopen by the Board of Immigration Appeals under 8 U.S.C. §§ 1252(a)(1) and 1252(a)(2)(D) because they exercise discretion as delineated by a regulation of the Attorney General, which is not barred from judicial review. Zhao v. Gonzales, 404 F.3d 295, 301-02 (5th Cir. 2005); Manzano-Garcia v. Gonzales, 413 F.3d 462 (5th Cir. 2005); Kucana v. Holder, 130 S. Ct. 827 (2010).

The court has jurisdiction to review the Board and Immigration Judge's decision regarding eligibility for adjustment of status because 8 U.S.C. § 1252(a)(2)(B)(i) does not bar review of determinations of eligibility for relief, because determinations of eligibility are nondiscretionary. See Sepulveda v. Gonzales, 407 F.3d 59 (2d Cir. 2005); Singh v. Gonzales, 413 F.3d 156 (1st Cir. 2005); Pinho v. Gonzales, 432 F.3d 193 (3rd Cir. 2005).

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II. Preliminary Statement

This case is about an El Salvadoran national who has resided lawfully in the United States for nearly 20 years as a grantee of Temporary Protected Status ("TPS"), and who therefore cannot be removed from the United States. The Immigration Judge and the Board of Immigration Appeals, contrary to the law's plain language and Congressional intent, denied Petitioner the opportunity to reopen her 1989 deportation proceedings to apply for newly available relief. Petitioner seeks adjustment of status and NACARA relief, which were unavailable
at the time of the previous hearing, and for which she is prima facie eligible.

Specifically, the Board found Petitioner, who was granted TPS in 1991 and continues to maintain her TPS status, statutorily ineligible for adjustment of status for having entered the United States without inspection. Despite the plain language of the Immigration and Nationality Act ("INA"), specifically INA § 244(f)(4), which confers on TPS grantees, even those who entered without inspection, the ability to adjust or change their status should they otherwise become eligible for relief, and despite Congress's clear intent in passing the TPS legislation to benefit all Salvadorans, the Board and Immigration Judge found Petitioner statutorily ineligible for adjustment of status.

It is clear that Congress knew that almost all Salvadorans had entered the United States without inspection when it passed the TPS legislation specifically

with Salvadorans in mind. Therefore, Congress clearly intended INA § 244(f)(4), the section conferring on TPS grantees the benefit of adjusting and changing their status, to be applicable to all Salvadorans regardless of their manner of entry.

The Court's adjudication of the instant Petition for Review could impact on the eligibility for relief of many thousands of TPS grantees who entered the United
States without inspection and who continue to maintain their TPS status, as many of these individuals have become eligible to adjust or change their status in the United States, but for the Board's erroneous interpretation of the law.

III. Statement of the Case

Here, Petitioner entered the United States on March 4, 1989, and was immediately arrested and detained by the former INS. Order to Show Cause, JA 283-84. She appeared before the Immigration Judge on May 9, 2010 (Notice of Hearing, JA 276), and applied for asylum. Asylum Application, JA 279-82. On May 20, 1989, Petitioner was subsequently released to family in California, and failed to appear at a May 31, 1989 deportation proceeding. Order of Release on Recognizance, JA 274-75. The Immigration Judge deemed Petitioner's relief abandoned, and ordered her deported in her absence without conducting an in absentia hearing on the merits of her pending asylum application. Order of the Immigration Judge, JA 273.

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On February 3, 2000, Petitioner's former counsel filed a motion to reopen to apply for NACARA benefits, but the Immigration Judge denied the motion as untimely. Motion to Reopen, JA 257-272; Decision of the Immigration Judge Denying February 3, 2000 Motion, JA 248.

On January 16, 2009, Petitioner, through present counsel, filed a motion to reopen her 1989 deportation proceedings to apply for adjustment of status based on
the approved I-130 Petition of her U.S. citizen husband. Motion to Reopen, JA 160-243. The Petitioner explained her dire circumstances which led to her failure to appear at the 1989 hearing, and argued that she was statutorily eligible for adjustment of status under INA § 245(a) and NACARA, that she was not barred under Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) and Matter of Velarde-Pacheco, 23 I&N Dec. 235 (BIA 2002) from reopening to adjust status, and that there were no bars to reopening under former INA § 242(b), which was in effect at
the time of the 1989 hearing.

The Immigration Judge denied Petitioner's motion to reopen, stating that Petitioner had failed to establish reasonable cause for her failure to appear at the 1989 hearing, and stating that because she had not been admitted to the United States and was not grandfathered for INA § 245(i) purposes, Petitioner was ineligible for adjustment of status under INA § 245. Decision of Immigration Judge, JA 151-52.

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Petitioner appealed the denial to the Board of Immigration Appeals (Appeal to Board, JA 11-134), which affirmed the Immigration Judge's decision. Decision of the Board, JA 3-4. The Board stated that Petitioner "did not act with due diligence in moving to reopen proceedings," and that her grant and maintenance of
TPS status "does not obviate her illegal entry and does not constitute an inspection
and admission for section 245 purposes." Id. Finally, the Board denied reopening sua sponte, stating that "while [Petitioner's] family [ties] constitute significant equities, her disregard of her obligation to attend her 1989 hearing is a significant adverse factor." Id. The instant Petition for Review was timely filed on April 16, 2010.

IV. Statement of the Facts

Petitioner fled El Salvador more than 20 years ago when she was barely 18 years old (See Petitioner's Passport listing her date of birth as 2/6/1971, JA 213), submitted an application for asylum to the Immigration Court (Asylum Application, JA 279-82), and was treated by former INS as a juvenile. See Record of Deportable Alien, JA 219 (listing Petitioner as "CHILD" beside her occupation "student."). Petitioner was released from a juvenile detention facility in Harlingen,
Texas, on May 20, 1989, 11 days before her next scheduled master calendar hearing, into the custody of her aunt and uncle who lived more than 1,500 miles away in La Puente, California. Order of Release on Recognizance JA 274-75

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(listing the address of the relatives to whom Petitioner was released as 16216 Abbey St., La Puente, CA 91744, and stating: “Permission granted to travel to Los Angeles, CA.” Emphasis added.).

Petitioner traveled with her aunt and uncle to their home in California, an address which INS knew of; however, she was thrown out of their home within a week due to her aunt’s jealousy. See Petitioner’s Affidavit, JA 46. With less than one week until her hearing, no money, no shelter, no papers relating to her hearing,
and no ability to speak or communicate in English, Petitioner was unable to travel the more-than 1,500 miles from La Puente, California, to Harlingen, Texas, for her
May 31, 1989 hearing. Id. Further, it was virtually impossible for the Petitioner to have advised the Immigration Court of her situation or to have requested a continuance with so little time, especially without the assistance of a competent adult guardian. Please note that the Court and INS had notice of her new address and granted her permission to relocate (See Order of Release on Recognizance, JA
274-75), but failed to change venue to California.

After Petitioner failed to appear at the May 31, 1989 hearing, the Immigration Judge deemed her application for asylum abandoned, and ordered her
deported in her absence, without conducting a proper in absentia hearing in which he should have considered the merits of her pending asylum application. Decision of the Immigration Judge, JA 273.

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In 1990, upon the enactment of the law and designation of El Salvador as a TPS-eligible country, Petitioner immediately applied for TPS, which was granted in 1991. See Employment Authorization Card issued June 25, 1991, JA 259. Since 1991, when she was 20 years old, Petitioner has maintained a valid TPS status (See Receipt for Petitioner's most recent application for TPS in the record dated November 20, 2008, JA 207), has been authorized to work and live in this country, and is protected against removal, because Congress has deemed her to be worthy of the humanitarian relief of TPS. Petitioner is now 39 years old. As would anyone living here with authorization to work and to remain in this country,

Petitioner has made her life here in the United States. In 2003, she married Jose Lopez, a U.S. citizen. See Naturalization Certificate, JA 200; Marriage Certificate,

JA 61. Together, they have two U.S. citizen daughters. See Birth Certificates, JA 201-03. In 2005, Mr. Lopez filed an I-130 on Petitioner's behalf, which was approved after a Stokes interview on July 25, 2008. See I-130 Approval Notice After Stokes, JA 194.

V. Issues Presented for Review

1.

Whether the Board of Immigration Appeals erred as a matter of law in holding Petitioner legally ineligible for adjustment of status under INA § 245 due to her entry without inspection when: a) INA § 244(f)(4) specifically confers on TPS grantees a nonimmigrant status for purposes of adjustment of status under INA § 245; b) a grant of TPS waives entry without inspection and assimilates a person granted TPS status into the status of a nonimmigrant who has been inspected and admitted; c) Congress intended all aliens granted TPS status to be permitted to change or adjust their status should such relief become available;

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and d) the Board's interpretation of INA § 244(f)(4) is entitled to less deference because it has departed from past interpretation without justification?

2.
Whether the Board of Immigration Appeals erred as a matter of law in affirming the Immigration Judge's application of the "reasonable cause" standard to Petitioner when the May 31, 1989 hearing was not conducted as a proper in absentia proceeding and therefore the standard is inapplicable?
3.
Whether the Board of Immigration Appeals abused its discretion in refusing to reopen Petitioner's deportation hearing for her to apply for discretionary relief of adjustment of status and NACARA when: a) Petitioner is not barred from reopening proceedings to adjust her status under Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) and Matter of Velarde-Pacheco, 23 I&N Dec. 235 (BIA 2002), and under former INA § 242(b) there were no time or number restrictions on motions to reopen for discretionary relief; b) Petitioner had reasonable cause for her failure to attend the May 31, 1989 hearing; c) the Board failed to consider the equities of Petitioner's case; and d) the Board failed to reopen sua sponte to allow Petitioner to apply for NACARA relief for which she is prima facie eligible?

VI. Summary of Argument

The Board erred as matter of law in finding Petitioner legally ineligible for

adjustment of status when INA § 244(f)(4) specifically confers on TPS grantees a

valid nonimmigrant status for purposes of adjustment of status under INA §, and

when Congress made El Salvador the first TPS country.

The clear language of INA § 244(f)(4) does not exclude those who entered

without inspection. Further, since a grant of TPS authorizes the Attorney General

to waive any provision of INA § 212(a), specifically waives INA § 212(a)(7)(A)

and implicitly waives INA § 212(a)(6)(A); a grant of TPS assimilates TPS grantees

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into the status of a nonimmigrant who has been inspected and admitted and therefore eligible for adjustment of status under INA § 245(a).

The Board's interpretation thwarts Congressional intent, which was to allow all Salvadorans to get TPS status and adjust status under Section 245 of the Act if they became eligible for relief during the TPS period. The Board's interpretation of INA § 244(f)(4) is entitled to less deference because it has permitted TPS grantees who had entered without inspection to adjust and they have departed from
this past interpretation without justification.

With regard to the motion to reopen, the Board erred as a matter of law when it required the Petitioner to show "reasonable cause" for her failure to appear
at her 1989 hearing. Since the hearing was not conducted as a proper in absentia hearing, a showing of reasonable cause was not required to reopen the proceedings
to apply for NACARA relief or adjustment of status. Wellington v. INS, 108 F.3d

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631 (5Cir. 1997); Williams-Igwonobe v. Gonzales, 437 F.3d 453 (5Cir. 2006).

Further, the Board abused its discretion in failing to reopen Petitioner's deportation proceedings for her to apply for the discretionary relief of adjustment of status and NACARA, as Petitioner is not barred under Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) and Matter of Velarde-Pacheco, 23 I. & N. Dec. 253 (BIA 2002) from reopening proceedings to adjust her status, there were no restrictions on motions to reopen under former INA § 242(b), she is not seeking to rescind the

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proceedings but to reopen for previously unavailable relief, there is clear and convincing evidence that Petitioner's marriage is bona fide, and the I-130 petition filed on her behalf was approved after a Stokes interview and an immigrant visa is immediately available.

Assuming arguendo the Court finds that Petitioner must demonstrate reasonable cause for her failure to attend the May 31, 1989 hearing, Petitioner had reasonable cause for her failure to attend the hearing.

Further, the Board abused its discretion when it failed to consider the equities of Petitioner's case, which greatly outweigh her failure to appear at the 1989 hearing; i.e.: that she has been in valid TPS status since 1991, is married to a

U.S. citizen, has 2 U.S. citizen children, has resided continuously in the United States for over 20 years, cannot be removed because of her TPS status, is the beneficiary of an I-130 petition approved after a Stokes interview, and is eligible to
adjust status in the United States under INA § 245(a) pursuant to INA § 244(f)(4), or under the provisions of NACARA.
Finally, the Board abused its discretion and should have reopened sua sponte to allow Petitioner to apply for NACARA despite the deadline imposed by the Attorney General because she remains statutorily eligible and her former counsel failed to effectively assist her in applying timely for this relief.

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VII. Argument

1.

The Board erred as matter of law in finding Petitioner legally ineligible for adjustment of status when INA § 244(f)(4) clearly states that TPS grantees are nonimmigrants for purposes of 245 adjustment of status, Congress did not exclude persons who entered without inspection from its provisions, and the Board's interpretation thwarts Congressional intent.

Standard of Review

When the Board applies the wrong legal standard or errs as a matter of law, the court has jurisdiction to review the legal determination de novo. 8 U.S.C. § 1252(a)(2)(D); Mikhael v. INS, 115 F.3d 299 (5th Cir. 1997); Singh v. Gonzales, 436 F.3d 484 (5th Cir. 2006).

a.

The clear language of INA 244(f)(4) allows TPS grantees, including those who initially entered without inspection, to apply for adjustment of status, should such relief become available to them during the TPS benefit period. INA § 244(f), entitled "Benefits and status during the period of temporary

protected status" states at INA § 244(f)(4) that:

"during a period in which an alien is granted temporary protected status under this section… for purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant."

Those who entered without inspection are not excluded from TPS or its

benefits under INA § 244(f)(4). Further, the plain language of INA § 244(f)(4), 8

C.F.R. § 244.10(f)(2)(iv) and all USCIS notices conferring TPS status, sent to TPS grantees, even those who entered without inspection, state that the grantee is

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considered as being in, and maintaining, lawful status as a nonimmigrant for purposes of adjustment of status under section 245 of the Act and change of status under section 248 of the Act. When the language of a statute is clear on its face, there is no need to inquire into congressional intent. INS v. Phinpathya, 646 U.S. 183 (1984). INA § 244(f)(4) does not specifically exclude aliens who entered without inspection from adjusting or changing status under its provisions, and since the statute, the regulations, and USCIS notices granting TPS status all include the same verbiage, the statute is not ambiguous and its words must be given their plain meaning.

Despite the clear language of the above provisions, in its decision, the Board rejects Petitioner's eligibility for adjustment of status when it states that the fact that Petitioner is in valid TPS status:

"does not constitute an inspection and admission for section 245 purposes." JA at 3-4.

This is contrary to the holdings of the Fifth Circuit which has previously discussed the benefits of TPS status and the meaning of INA § 244(f)(4) and has held that a person granted and maintaining valid TPS status is considered to be in a lawful immigration status for various purposes including criminal laws relating to the possession of firearms by persons illegally or unlawfully present in the United States. United States v. Orellana, 405 F.3d 360, 364 (5th Cir. 2005); United States v. Flores, 404 F.3d 320 (5th Cir. 2005). In both Orellana and Flores, the court

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discussed the many benefits conferred on TPS grantees, and concluded that persons who had applied for, were granted, and were currently maintaining valid TPS status were not illegally or unlawfully present in the United States during the period of TPS. Among the benefits conferred by the INA to TPS grantees, this Court noted that while a person is in valid TPS status, they are eligible to adjust status under INA § 245. Flores at 322-323; Orellana at 366:

"Here, Orellana entered the country without inspection, making his initial presence unlawful. However, he subsequently applied for and was granted TPS. As a result, Orellana was granted protection from removal, authorized to seek employment, and given the ability to apply for adjustment of status as if he were in lawful non-immigrant status. While it is true that upon withdrawal of TPS, Orellana would "revert" to his original illegal immigration status, he was in a form of lawful status throughout the time his TPS registration was effective." (emphasis added).

It is important to note that both Petitioners in Orellana and Flores entered the United States without inspection. If the Court had believed them to be ineligible for adjustment of status on account of their entry without inspection, the Court would not have discussed in great depth the benefits available to them as TPS grantees, including their ability to apply for adjustment of status.

We note that Congress entitled INA § 244(f): “Benefits and status during period of temporary protected status.” The title of a statute or section can aid in resolving any ambiguity in its interpretation. INS v. National Ctr. For Immigrants Rights, Inc., 502 U.S. 183 (1991); Almendarez-Torres v. U.S., 118 S.Ct 1219

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(1998) (heading of section is relevant in determining its meaning). Here, the title of the Section strongly suggests that subsections 1-4 provide TPS grantees with certain status and confer certain benefits on them.

Further, INA § 245 is entitled: "Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence." Since INA § 244(f)(4) treats TPS grantees as nonimmigrants for purposes of INA § 245 adjustment, and Section 245 is entitled "Adjustment of Status of Nonnimmigrant to that of Person Admitted for Permanent Residence," it is clear that TPS grantees are eligible to adjust status under INA § 245 should relief become available to them during the TPS period, because they are considered to be nonimmigrants maintaining their status.

b.
A grant of TPS authorizes the Attorney General to waive any provision of INA § 212(a), specifically waives INA § 212(a)(7)(A) and implicitly waives INA § 212(a)(6)(A), entry without inspection, as it assimilates a person granted TPS status into the status of a nonimmigrant who has been inspected and admitted.

INA § 244(c)(1)(a)(iii) states that aliens eligible for temporary protected status must be admissible as an immigrant, except as otherwise provided under INA § 244(c)(2). INA § 244(c)(2)(i) specifically waives inadmissibility under INA §§ 212(a)(5)(A) and 212(a)(7)(A).

Under INA § 244(c)(2)(ii), "except as [otherwise provided], the Attorney General may waive any… provision of section 212(a)." TPS applicants may only be granted TPS if they are admissible to the United States. Ordinarily, a person

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who is present in the United States without having been admitted or paroled is inadmissible under INA § 212(a)(6)(A), and is therefore ineligible for TPS unless the Attorney General waives their inadmissibility.

In light of the foregoing, since any person granted TPS who entered without inspection was inadmissible under INA § 212(a)(6)(A), it is reasonable to assume that USCIS waived their inadmissibility when they grant them TPS and issue an I94
card. See United States v. Orellana, 405 F.3d 360, 363 (5th Cir. 2005):

> "Technically, Orellana was not eligible for TPS because he had entered the country without inspection and was inadmissible at the time of his application. See [INA § 244(c)(1)(A)(ii)]. However, Orellana disclosed his illegal entry on his TPS application, and this application was subsequently granted. This raises an inference that Orellana's inadmissibility was waived by the Attorney General."

The Attorney General granted Petitioner TPS status knowing she had entered the United States without inspection. Technically, since Petitioner entered the United States without inspection, she was inadmissible at the time she applied for temporary protected status, and was further ineligible for TPS but for a waiver of this ground of inadmissibility. Since Petitioner was in fact granted TPS status by the Attorney General, her entry without inspection in 1989 was implicitly waived by the Attorney General pursuant to INA § 244(c)(2)(ii).

USCIS has previously considered a grant of TPS to be an admission. See Matter of Escobar-Turcios, Case No. A24 848 532 (unpublished IJ decision Oct. 21, 1992), reported in 69 No. 42 Interpreter Releases 1400 (Nov. 2, 1992), which

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held that the requirement a person be admitted is “subsumed into the congressional
act of grace conferring upon TPS recipients a nonimmigrant status.”

In light of the above, the grant of TPS to Petitioner obviated and waived her inadmissibility on account of her entry without inspection and assimilated her into the class of a nonimmigrant who is maintaining her lawful nonimmigrant status and who is eligible to adjust her status under INA § 245(a).

c.
Even if you find that INA § 244(f)(4) is ambiguous, the Board’s interpretation of the statute is contrary to the clear intent of Congress, which was to allow Salvadorans to get TPS status and adjust status under Section 245 of the Act. Where the language of a statute is susceptible to more than one interpretation or where the legislative history in “rare and exceptional circumstances” is clearly contrary to the clear language of the statute, the congressional intent controls. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Further, all interpretations must be viewed in the light most favorable to the alien. Leocal v. Ashcroft, 543 U.S. 1 (2004); INS v. St. Cyr, 121 S.Ct. 2271 (2001); INS

v. Cardoza-Fonseca, 421 U.S. 421 (1987); INS v. Errico, 384 U.S. 214 (1966) (applying rule to provisions relating to relief).
Congressional intent was to provide TPS grantees, including those who entered without inspection, the ability to adjust or change status. The Legislative History of why Congress designated El Salvador as the first TPS country (relevant legislation and Congressional history included in Appx. C)

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proves that Congressional intent was to allow all Salvadorans, even those who entered without inspection, the ability to adjust or change their status, should they become eligible for this benefit during the TPS period of designation.

Temporary Protected Status (TPS) was created as a brand new form of relief in 1990 as part of a larger piece of immigration reform legislation, the Immigration
Act of 1990 (PL 101-649; 101 S.358.ENR). Included in this legislation was INA § 244(f)(4), the clause stating that one of the benefits of TPS was lawful non-immigrant status for purposes of INA § 245 adjustment and INA § 248 change of status.

Since the early 1980's there had been several varying attempts to create some form of statutory based protection. Congress had been specifically attempting to pass protection for the Salvadoran population, from Extended Voluntary Departure (EVD), a temporary stay of deportation, to a temporary safe haven. As the administrative precursor to TPS, EVD is a strictly discretionary, extra-statutory relief from deportation for either individuals or groups under a blanket grant from the Attorney General.

In the controversial case Hotel & Restaurant Employees Union v. Smith, 594

F. Supp. 502 at 504 (DC Cir. 1983), Salvadoran nationals in the United States sued
because of the denial of granting the EVD status for them based on the civil war that was taking place back in El Salvador. The case ultimately exposed the overall
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inadequacy of EVD as a form of relief from deportation due to the almost absolute
discretion in the hands of the Attorney General to apply it. The court stated that the Salvadoran nationals had no constitutional right to EVD, Id. at 508. In evaluating claims for EVD under humanitarian causes (such as open civil war), the
court continued that "there was nothing in the Immigration and Nationality Act that would establish such a standard," Id. at 506. This case spurred the next 8 years of reform legislation targeted specifically at granting statutorily based protection to Salvadorans in the U.S.

Simultaneously with the passage of TPS, El Salvador was the first country to be designated thereunder (101 S.358, Sections 302, 303). In prior drafts, there had been 3 other countries proposed for designation: Lebanon, Liberia and Kuwait. (Appx. C, pg. 97-109). However, El Salvador was the only country under S.358 to be granted (101 S.358.EAH; 101 S.358.ENR). (Appx. C, at 110-115).

It is clear from the hearings and floor debates leading up to the passage of

S.358 that most, if not all, of the Salvadorans who were going to qualify for relief had entered illegally (H. Debates dated Oct. 2, 1990 and Oct. 27, 1990; H. Rept. 101-955; HR Hrg. 101/17; HR Hrg. 100/33). At the very beginning, the court in Hotel & Restaurant Employees acknowledged that the Salvadoran population at issue was the illegal population, entirely because they were the ones at risk of being deported (supra at 504). Further, Congress continued to reaffirm their
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intention in targeting the legislation at illegally present Salvadorans even in extending the TPS registration period. “Many of the Salvadorans who came into this country illegally did so because they rightly feared that if they remained in their country, they would be killed… The Salvadorans who qualify for TPS should
have a full opportunity to apply for it,” (102 HR. 2332, Extension of Remarks, Hon. Nancy Pelosi, 06/25/1990) (Appx. C, pg. 117).

Prior to PL 101-649 in 1990, TPS did not exist. Aliens seeking relief from deportation had three options: asylum, withholding of removal, or EVD (as in Hotel & Restaurant Employees). It was clear that throughout the various iterations of TPS and attempts to statutorily protect the Salvadorans that the goal was to set out a clear congressional standard previously lacking. It was repeatedly stated that the legislation was drafted and designed to fill the gap between asylum (with strict statutory requirements) and EVD (applied by extra-statutory discretion) as relief from deportation. (H. Debates dated Oct. 2, 1990 and Oct. 27, 1990; H. Rept. 101955;
HR Hrg. 101/17; HR Hrg. 100/33).

When the first forms of relief were proposed in Congress, the language of INA § 244(f)(4) was not present in the legislation, (97 H.RES. 126; 97 S.RES. 336;
98 H.RES. 21; 98 S.RES. 156; 98 HR. 4447; 98 S. 2131; 99 HR. 822; 99 S. 377; 100 HR. 2922; 100 HR. 618; 101 HR.1355). During the subcommittee hearings in the House over the Temporary Safe Haven Act of 1987 (100 HR. 2922) (Appx. C

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at 72-86), the option of adding adjustment of status to the benefits of the statutory protection was discussed. In the panel discussion, the concern of allowing otherwise illegal aliens to adjust was directly debated (HR. Hrg 100/33 at 15, 123).
Specifically, Ms. Meissner (a Senior Associate with the Carnegie Endowment) argued that any statutory protection had to include the possibility to adjust by the sheer fact that some country conditions last longer than can be foreseen. “It seems to me that any law on safe haven must take into account the fact that some situations will not resolve themselves… after 10 or 15 years people who still cannot be returned in our eyes are unlikely ever to return. They should have the opportunity to adjust.” Id. (Statement included in Appx. C at 85-86).

The adjustment of status clause (INA § 244(f)(4)) as a benefit of TPS was then proposed in 1989, under the Chinese and Central American Studies and Temporary Relief Act (101 HR. 45). It was added into S.358 on Oct. 03, 1990, in the same month that Congress limited the country designation to solely that of El Salvador. (Appx. C, pg. 97-109). At this point, Congress had been taking extensive testimony and evidence on the legal ramifications of adjustment under TPS for nearly 3 years. The resulting INA 244(f)(4) appears to be a compromise in that TPS status does not itself give a person the eligibility to apply for adjustment of status directly but provides that all TPS grantees are considered to be
in and maintaining a lawful nonimmigrant status should they be otherwise before

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eligible for relief during the TPS period of designation. Without an adjustment or a change of status TPS grantees revert back to their prior status when the TPS designation is terminated. It is wholly irrational to say that Congress added the very specific benefit of adjustment of status and limited the group to receive that benefit exclusively to Salvadorans (that they had been attempting to protect for nearly a decade) (Appx. C, pg. 110-115), only to completely divest the overwhelming majority of that group of the benefit because they had entered illegally, of which Congress was well aware since at least 1983.

Since we have proven that Congress debated the adjustment of status provisions and specifically incorporated INA 244(f)(4) into the Immigration Act of
1990 with the El Salvador designation, it is clear that Congress intended to provide
TPS grantees, including those who entered without inspection, the ability to adjust or change status should they otherwise become eligible for this relief during the TPS period. In light of the foregoing, since Petitioner is in valid TPS status and is the beneficiary of an approved I-130 petition, she is eligible to adjust status under INA § 245 despite the fact that she entered without inspection.

d.
The Board's interpretation of INA § 244(f)(4) is entitled to less deference because it has departed from past interpretation without justification.
The Board's interpretation of INA § 244(f)(4) is entitled to less deference because it has departed from past interpretation and practices which allowed

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Salvadoran TPS grantees who entered without inspection to adjust status under INA § 245(a).

Even when the Board would ordinarily be given deference to its interpretation of the INA, it abuses its discretion and is entitled to less deference if it has departed from a past interpretation of the INA without justification. INS v. Cardoza-Fonseca, 480 U.S. 421 (U.S. 421) (“An agency interpretation of a relevant
provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” citing Watt v. Alaska, 451 U.S. 259 (1981)); World Color Press, Inc. v. Dole, 489 U.S. 1011, (1989) ("Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.").

The Board’s position that Petitioner’s grant of TPS status “does not obviate” her entry without inspection is contrary to the regulations found at 8 C.F.R. § 244.10(f)(2)(iv) and all notices given to TPS grantees which state that for purposes
of adjustment of status under INA 245, TPS grantees are considered as being in and maintaining a valid nonimmigrant status. EOIR has previously granted adjustment of status to TPS grantees who entered the United States without inspection. Matter of Escobar-Turcios, Case No. A24 848 532 (unpublished IJ decision Oct. 21, 1992), reported in 69 No. 42 Interpreter Releases 1400 (Nov. 2, 1992).

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Although unpublished decisions do not have precedential value, if their holding is relevant to another situation, they may be quoted for their persuasive reasoning. See Young v. New Process Steel, LP, 419 F.3d 1201, 1204 (11th Cir. 2005) (non-precedential discussion accorded only the respect it earns through its persuasive value).

In Matter of Escobar-Turcios, Case No. A24 848 532 (unpublished IJ decision Oct. 21, 1992), reported in 69 No. 42 Interpreter Releases 1400 (Nov. 2, 1992), the Immigration Judge granted adjustment of status to a TPS grantee who had entered the United States without inspection:

"The plain language of this section of the Act places an alien under TPS into a nonimmigrant status. The requirement that an alien be inspected and admitted into the United States is subsumed into the congressional act of grace conferring upon TPS recipients a nonimmigrant status. Unlike aliens who were afforded the privilege of extended voluntary departure, Congress has accorded to TPS aliens a nonimmigrant status." Id.

Since the Board has offered no justification from departing from this past policy and a plain reading of INA § 244(f)(4), 8 C.F.R. § 244.10(f)(2)(iv), and TPS
grantee notices, the Board is not entitled to deference.

2.
The Board erred in applying the reasonable cause standard to reopen these proceedings because the in absentia hearing did not follow proper procedure.
Standard of review

When the Board applies the wrong legal standard or errs as a matter of law, the court has jurisdiction to review the legal determination de novo. 8 U.S.C. §

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1252(a)(2)(D); Mikhael v. INS, 115 F.3d 299 (5th Cir. 1997); Singh v. Gonzales, 436 F.3d 484 (5th Cir. 2006).

a.
The Board erred as a matter of law when it affirmed the Immigration Judge's application of an incorrect legal standard requiring Petitioner to show "reasonable cause" for her failure to appear at her 1989 hearing, when the hearing was not conducted as a proper in absentia hearing and therefore a showing of reasonable cause was not required to reopen the proceedings.
The Immigration Judge applied the "reasonable cause" standard to Petitioner's motion to reopen. JA 158. However, because the 1989 hearing was not conducted as a proper in absentia hearing, the "reasonable cause" standard is inapplicable.

An in absentia hearing is "a hearing on the merits of the record before the administrative court." Wellington v. INS, 108 F.3d 631 (5th Cir. 1997). In a proper in absentia proceeding, the Immigration Judge must proceed "in like manner as if the alien were present." Id. When the respondent is not present and the merits of his or her case are not considered, the hearing is not a proper in absentia hearing, and the alien is not required, in moving to reopen proceedings to apply for previously unavailable relief, to establish "reasonable cause" for the failure to appear at the hearing. Id; Williams-Igwonobe v. Gonzales, 437 F.3d 453 (5th Cir. 2006).

Here, Petitioner applied for asylum before the Immigration Judge (see asylum application, JA 279-282). Petitioner failed to appear at her May 31, 1989

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hearing. On June 21, 1989, the Immigration Judge signed a form order, which lists
the Petitioner's name, alien number, and the address where she had been detained at a juvenile facility (but not the address of the family members to whom she was released from custody). JA 279. The order fails to state the relief Petitioner had requested, and even misstates Petitioner's gender, stating:

"Wherefore, upon due consideration, it is the finding of this
court that Respondent, in failing to appear at the hearing concerning
his request, has abandoned his claim for relief from deportation."

Without discussing the merits of Petitioner's asylum claim the court jumps to:
"Wherefore, the issue of deportability having been resolved, it
is hereby ordered that the respondent be deported from the United

States to El Salvador, for reasons set forth under the Order to Show
Cause." Id. (emphasis added).
As per Williams-Igwonobe v. Gonzales, 437 F.3d 453 (5th Cir. 2006) and

Wellington v. INS, 108 F.3d 631 (5th Cir. 1997), when proper in absentia hearings
were not conducted, an alien moving to reopen must show merely that she is eligible for relief which was previously unavailable, and that the equities of the case weigh in favor of granting the discretionary relief. Id.

Here, since Petitioner submitted substantial evidence that she was eligible for adjustment of status and NACARA, relief which was not available at the time of her 1989 hearing, and demonstrated that she warranted a favorable exercise of discretion, the Immigration Judge and the Board abused their discretion in

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erroneously applying the "reasonable cause" standard and in refusing to reopen proceedings. Therefore, the case should be remanded for a hearing on the merits of Petitioner's unadjudicated asylum claim and her previously unavailable claim for relief of NACARA and adjustment of status under INA § 245 pursuant to INA § 244(f)(4).

3.
The Board abused its discretion in failing to reopen Petitioner's deportation hearing for her to apply for the discretionary relief of adjustment of status and/or NACARA.
Standard of Review

This court reviews the Board's denial of a motion to reopen for abuse of discretion. Singh v. Gonzales, 436 F.3d 484, 487 (5th Cir. 2006). A decision is an abuse of discretion if it is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis… or on other considerations that Congress could not have intended to make relevant." Hang v. INS, 360 F.2d 715 (2d. Cir. 1966); Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir.1990); World Color Press, Inc. v. Dole, 489 U.S. 1011 (1989).

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a.
The Board and the Immigration Judge abused their discretion in refusing to reopen the 1989 proceedings because Petitioner is not barred from reopening proceedings to adjust her status under Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) and Matter of Velarde-Pacheco, 23 I. & N. Dec. 253 (BIA 2002) because there were no restrictions on motions to reopen under former INA § 242(b), there is clear and convincing evidence that Petitioner's marriage is bona fide, and the I-130 petition filed on her behalf was approved after a Stokes interview and an immigrant visa is immediately available.

If you find that the in absentia hearings were properly conducted, Petitioner respectfully requests you to reopen her 1989 order of deportation not to rescind the
order, but instead to apply for discretionary relief which was not available at the time of the hearing. Under Matter of M-S-, 22 I&N Dec. 349 (BIA 1998), an alien moving to reopen proceedings to apply for discretionary relief is not subject to the "reasonable cause" requirement, because the alien is not seeking to rescind the order nunc pro tunc, but merely to reopen the proceedings to pursue additional relief which was unavailable at the time. Here, since the Board Immigration Judge required the Petitioner to prove she had reasonable cause for failing to appear, which violated the holding of Matter of M-S-, the Immigration Judge and Board abused their discretion.

Further, under Matter of Velarde-Pacheco, 23 I. & N. Dec. 253 (BIA 2002), Petitioner's proceedings should have been reopened because the fact that the I-130
petition filed on her behalf was approved after a Stokes interview proves with clear
and convincing evidence that her marriage is bona fide.

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In addition, since Petitioner's deportation case is from 1989 and was subject to former INA § 242(b), which had no time and number limits on motions to reopen, and no prohibition on applying for discretionary relief for the failure to appear, Petitioner is not time or number barred from filing the instant motion to reopen, nor barred from adjustment of status for the failure to appear. Further, since neither the Immigration Judge nor the Board held that Petitioner was barred from filing the motion on account of time and number limitations, and further, since the DHS failed to raise any arguments relating to time and number limits on motions to reopen, the Government is foreclosed from now arguing that Petitioner's motion to reopen is time and number barred. See Torres de la Cruz v. Maurer, 1022 (10th Cir. 2007) (failure to raise a claim before the Board waives it before the court).

Moreover, current INA § 240(b)(5) bars, only for 10 years, a person held removable in her absence from applying for adjustment of status, voluntary departure, or cancellation of removal. Since the aforementioned relief is only available to persons in the United States, it is reasonable to assume that Congress intended that those who evade the Immigration Judge's orders, fail to leave voluntarily, etc., would only be barred for a finite (10 years) period of time.1

1See other provisions of the INA holding a person permanently barred from eligibility for relief, proving that
Congress intended only a 10-year bar to apply to the situation of a person who fails to appear: See INA §
212(a)(2)(B) (person convicted of 2 or more offenses and imprisoned for more than 5 years permanently ineligible
for relief); INA § 212(a)(2)(C) (person known to be a controlled substance trafficker permanently ineligible for

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Congress has mandated many permanent bars, but mandated only a 10-year bar when
they amended the law to provide consequences for the failure to appear at a removal
hearing. Here, since Petitioner was under former INA § 242(b) proceedings which

had no bars to discretionary relief for the failure to appear, and more than 20 years have passed since Petitioner's 1989 hearing, Petitioner should not be barred from reopening for adjustment of status.

Furthermore, since under former INA § 242(b) Petitioner's motion to reopen is not time or number barred, and she established the bona fides of her marriage, she satisfied the requirements of Matter of Velarde-Pacheco, 23 I&N Dec. 235 (BIA 2002), and therefore the Immigration Judge and Board erred and abused their
discretion in refusing to reopen proceedings.

b.
The Board unreasonably held that Petitioner, an unaccompanied minor, failed to show reasonable cause for her failure to attend the May 31, 1989 hearing, as she was barely 18 when she fled El Salvador, spoke no English, was detained in a juvenile facility, had filed an application for asylum, and was released to relatives who failed to assist her in traveling from California to Texas for her hearing and abandoned her to homelessness.

Petitioner's 1989 hearing was an in absentia hearing under former INA §

242(b) proceedings. When the basis for a motion to reopen is to rescind an in

absentia deportation hearing, the movant must establish that she had 'reasonable

relief); INA § 212(a)(3)(B) (person who engages in terrorist activity permanently ineligible for relief); INA §
212(a)(9)(C) (person who enters or attempts to enter the United States after having been unlawfully present for a
period of a year or more permanently ineligible for relief); INA § 212(a)(10)(D) (person who votes unlawfully
permanently ineligible for relief).

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cause' for her absence from the proceedings. Matter of Haim, 19 I&N Dec. 641 (1988); Matter of Ruiz, 20 I&N Dec. 91 (1989).

Petitioner had reasonable cause for failing to appear because she was barely 18 years old, spoke no English, had been treated by INS as a juvenile and detained
in a juvenile facility, was released by INS into the custody of her aunt and uncle who lived in La Puente, California only 11 days before her scheduled hearing, and who abandoned her to homelessness in California shortly thereafter. JA 46. Therefore, Petitioner could not possibly have been expected to contact the Immigration Court or travel over 1,500 miles from La Puente to Harlingen, Texas for her hearing without the assistance of a competent adult guardian.

Moreover, INS knowingly permitted Petitioner to be released to relatives that INS knew lived in California over 1,500 miles away from Harlingen, Texas without changing venue to that location. See Order of Release on Recognizance (JA at 274-75), which states that Petitioner was released to the care of Mr. & Mrs. Javier Hernandez-Zaldana in La Puente, California, providing Petitioner permission to travel to Los Angeles, California, and advising Petitioner not to change her residence from Los Angeles, California.

In adjudicating a motion to reopen, the Board must accept the truth of the alien's affidavit "unless it finds [the facts asserted] to be 'inherently unbelievable.'"

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Maroufi v. INS, 772 F.2d 597, 600 (9th Cir. 1985) (quoting Hamid v. INS, 648 F.2d 635, 637 (9th Cir. 1981)).

Illness of family members has constituted reasonable cause for failing to appear. Matter of Ruiz, 20 I&N Dec. 91 (1989). Villagran-Diaz v. United States INS, 1993 U.S. App. LEXIS 15961 (9th Cir. unpublished June 8, 1993) (finding that Petitioner's sworn statement that "she was unable to attend her deportation hearing because she had to stay home to take care of her two minor children who had become ill" required remand to the Board to determine whether she met the "reasonable cause" standard.).

Please note that under 8 C.F.R. § 1208.4(a)(5) (“extraordinary circumstances” exceptions to deadlines), an unaccompanied minor is considered to
have a legal disability and comes within the “extraordinary” circumstances exception to the filing deadlines. While this provision relates to reopening or applying for asylum in the first instance, surely if a minor’s legal disability constitutes an extraordinary circumstance exception to the filing deadlines, it also could meet the reasonable cause requirement here.

Although, the D.C. Circuit rejected the argument that an alien failed to attend a hearing because he was indigent and lived in Washington, D.C., when his hearing was in San Antonio, because he had 2 months notice and was capable of traveling from Washington, D.C. to San Antonio, Texas, in Maldonado-Perez v.

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INS, 865 F.2d 328, at 336 (D.C. Cir. 1989), Petitioner is distinguishable because she was taken to California by the relatives to whom INS released her, who then abandoned her and caused her to become indigent and unable to return to Texas. Moreover, unlike Maldonado-Perez, who had two months notice of the hearing, Petitioner here had less than a week from when she was made indigent in California to travel to or contact the Immigration Court in Harlingen.

Here, since Petitioner was barely 18 and was treated by former INS as an unaccompanied minor, the Petitioner's age alone should exceed the "reasonable cause requirement." Further, Petitioner was made suddenly homeless one less than
week before her scheduled May 31, 1989 hearing. Whereas an adult whose child was ill but unhospitalized, would likely be physically able to attend a proceeding yet was excused for failing to appear, an indigent barely-18-year-old made homeless a week before, and stranded more than 1,500 miles from, her hearing must clearly be considered to have been disabled, unable, or excused for failing to attend the hearing.

In light of the foregoing, faced with dire circumstances where she "was desperate to get off the streets and find shelter," (JA at 46), Petitioner has established there was reasonable cause for her failure to attend her hearing, which was more than 1,500 miles from the address of the family to whom Petitioner was released by INS.

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c.

The Board failed to consider the equities of Petitioner's case, which greatly outweigh her failure to appear at the 1989 hearing when she has been in valid TPS status since 1991, is married to a U.S. citizen, has 2 U.S. citizen children, has resided continuously in the United States for over 20 years, cannot be removed because of her TPS status, and is eligible to adjust status in the United States under INA § 245(a) pursuant to INA § 244(f)(4), and is eligible for NACARA.

The Board abused its discretion in failing to reopen this case because the Board failed to consider the positive equities of the case, and failed to correctly find Petitioner eligible for the relief of adjustment of status under INA § 245(a). Further, the Board failed to follow its own precedent. This court reviews the Board's denial of a motion to reopen for abuse of discretion. Singh v. Gonzales, 436 F.3d 484, 487 (5th Cir. 2006). A decision is an abuse of discretion if it is made "without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis… or on other considerations that Congress could not have intended to make relevant." Hang v. INS, 360 F.2d 715 (2d. Cir. 1966); Martinez-Montoya v. INS, 904 F.2d 1018 (5th Cir.1990); World Color Press, Inc. v. Dole, 489 U.S. 1011 (1989).

Agency decisions that depart from established precedent without a reasoned explanation must be vacated as arbitrary and capricious. World Color Press, Inc.

v. Dole, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989). Here, the Board violated its own precedent when it required Petitioner to show she was prima facie eligible for relief. Matter of Ruiz, 20 I&N Dec. 91 (1989) ("A motion

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to reopen may be denied on the basis that the applicant has not established a prima
facie case for the underlying substantive relief sought. INS v. Abudu, U.S., 108 S. Ct. 904 (1988). But in the context of a prior in absentia hearing, the underlying relief being sought by way of the motion to reopen is the opportunity to present the
applications for relief at a full evidentiary bearing."). Here, since Petitioner was ordered deported in absentia, she needed to show merely that she had reasonable cause for failing to appear at the hearing. Id.

The Board further abused its discretion in failing to consider and balance all of the equities of Petitioner's case against the sole negative factor of her failure to appear at the 1989 hearing. A decision by the Board may be found arbitrary if the Board fails to address meaningfully all material factors present. Luciano-Vincente

v. INS, 786 F.2d 706 (5th Cir.1986) (the Board's failure to consider a pertinent factor constitutes abuse of discretion); Mattis v. INS, 774 F.2d 965 (9th Cir.1985) (BIA discretionary denials must demonstrate that the BIA weighed both favorable and unfavorable factors). It is clear from the Board's single sentence addressing the merits of Petitioner's case that it only weighed a single positive equity (Petitioner's family ties) against her failure to appear for her hearing:
"While the respondent's family tries (sic) constitute significant
equities, her disregard of her obligation to attend her 1989 hearing is a significant adverse factor." JA at 4.

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In failing to consider Petitioner's grant and maintenance of TPS status for nearly 20 years, her lawful status in this country including authorization to work and remain, country conditions and in El Salvador and the almost-zero chance that
TPS for El Salvador will end in the foreseeable future, the fact that Petitioner cannot be removed from the United States and is likely to continue to remain here lawfully, the circumstances of her entry to the United States, the reasonable cause for her failure to appear at her 1989 hearing, the approved I-130 petition filed by her U.S. citizen husband and her prima facie eligibility for adjustment of status, the
Board has clearly abused their discretion and failed to weigh numerous positive factors.

Further, the Board failed to consider that unlike most non-citizens appealing the denial of motions to reopen deportation or removal proceedings, Petitioner is not seeking to delay her removal from the United States, as she cannot be removed
from the United States as a TPS grantee. See INS. v. Doherty, 502 U.S. 314 (1992):

"Motions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Abudu, 485 U.S. at 107-108. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." Id. at 323.

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Here, Petitioner is not reopening to challenge or delay her removal, but instead to apply for discretionary relief which would allow her to legalize her status and provide closure in this case. Petitioner's order of deportation remains unresolved, and without reopening the case, will remain unresolved into the foreseeable future, as Petitioner cannot be removed from the United States on account of her TPS status. Therefore, the only method by which the case can be fully resolved is for the 1989 hearing to be reopened and Petitioner permitted to apply for the discretionary relief of adjustment of status.

Therefore, in light of the Supreme Court's reasoning in affording the Board broad discretion to grant a motion to reopen, the Board abused their discretion when they failed to consider Petitioner's particular situation as a TPS grantee who ha s maintained a valid status since 1991, couple with her goal of legalizing her status and finalizing her case.

d.
The Board should have reopened proceedings sua sponte to allow Petitioner to apply for NACARA despite the deadline imposed by the Attorney General because she remains statutorily eligible and her former counsel failed to effectively assist her in applying timely for this relief.

Petitioner is eligible for NACARA relief as she was present in the United States prior to September 19, 1990, registered for TPS benefits before October 31, 1991, and filed an application for asylum before April 1, 1990. NACARA relief was enacted in 1996 to benefit Salvadorans. A person is eligible for NACARA relief if: the person is described in 8 C.F.R. § 240.61; is inadmissible or deportable;

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is not subject to certain statutory bars; is not convicted of an aggravated felony or was involved in the persecution of others; was physically present in the United States for a continuous period of 7 years; has been a person of good moral character during the period of continuous physical presence; and the alien's removal would result in extreme hardship to the alien, or their spouse or children who are U.S. citizens.

Here, Petitioner is described in 8 C.F.R. § 240.61(a)(2) because she is a Salvadoran national who filed an application for asylum on or before April 1, 1990, and has not been convicted of an aggravated felony. See Asylum Application filed March 20, 1989, JA 279-282.

Petitioner is not subject to any of the statutory bars enumerated in 8 C.F.R. § 240.66(a), as even if the 10-year bar from relief relating to failing to appear at a hearing applied to Petitioner, more than 10 years have passed since she failed to appear for her 1989 hearing and therefore such bar is inapplicable in this case. Petitioner has been continuously physically present in the United States since 1989, as she applied for and was granted TPS in 1991 and has continuously maintained her TPS status. See EAD Card Evidencing TPS Status Issued June 25, 1991, JA at 259. Petitioner has been of good moral character during the past 7 years, has never been arrested, and has been maintaining her valid TPS status, which affords her work authorization and authorization to remain lawfully in the

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United States. Under 8 C.F.R. § 1240.64(d)(1) the “extreme hardship” in this case is presumed unless rebutted by the Government since Petitioner is a national of El Salvador who filed for asylum “during the relevant period.” The Government has proffered no evidence to rebut the presumption, and therefore, Petitioner is prima facie eligible for NACARA relief as untimely. JA 248.

Under the regulations implementing NACARA, persons with final orders of deportation could file motions to reopen their proceedings until September 11, 1998 (see former 8 C.F.R. § 3.43(c)(1) (June 11, 1998); however, unfortunately in this case, while the Respondent is eligible for NACARA, the former attorney did not apply for NACARA benefits by the deadline (See Motion to Reopen to Apply for NACARA filed February 3, 2000, JA 250-272), and Petitioner’s motion to reopen was rejected.

The fact that Petitioner's motion to reopen was denied does not negate the fact that Petitioner remains prima facie eligible for the relief of NACARA, but instead merely that the regulations bar her from filing a motion to reopen her deportation proceedings based solely on her NACARA eligibility.

Since Petitioner’s motion to reopen is also to apply for adjustment of status, to request sua sponte reopening from the Board, and to challenge the May 31, 1989
hearing conducted in her absence which was not properly conducted as an in absentia proceeding, if her Petition for Review is granted and her case remanded

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and reopened, Petitioner would be prima facie eligible to pursue the relief of NACARA even if this court rejects her argument that she is also prima facie eligible for adjustment of status under INA § 245(a) pursuant to INA § 244(f)(4).

Further, the Board abused its discretion in refusing to reopen sua sponte because the legislative history of Extended Voluntary Departure ("EVD"), TPS, and then NACARA show Congress's intent in allowing Salvadorans who were present in the United States in the early 1990's the opportunity to adjust their status
and become permanent residents of this country. Congress first enacted TPS in response to the Attorney General's failure to grant EVD to all Salvadorans during the time of its civil war, and Congress designated El Salvador as the first TPS-eligible country. In the TPS legislation, Congress included INA § 244(f)(4), which
allows TPS grantees to adjust their status if relief became available during the time
they maintained their status. Note that TPS does not entitle all TPS grantees to adjust status based on TPS alone, but requires the grantee to become otherwise eligible to adjust status. Congress later enacted NACARA, which provided a direct method of adjustment of status for those who qualified. Therefore, since Congress intended Salvadorans who were here before 1990 and who were fleeing the civil war to adjust their status, the Board abused its discretion in failing to reopen deportation proceedings for Petitioner, who is exactly one of the persons Congress intended to allow to adjust her status in the United States.

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Therefore, since Petitioner remains prima facie eligible for NACARA relief, we respectfully request the Court consider all arguments made on appeal, since if Petitioner's case is reopened and remanded for any reason, Petitioner remains eligible to seek NACARA relief.

VIII. Conclusion

WHEREFORE, we respectfully request that the instant Petition for Review be granted, that Petitioner be found legally eligible to adjust her status under INA §
245 pursuant to INA § 244(f)(4), that Petitioner be found legally eligible for NACARA relief under 8 C.F.R. § 240.61, or in the alternative her 1989 deportation
proceedings be reopened and her case remanded to the Board of Immigration Appeals for consideration of her applications for discretionary relief.

Thank you for your kind consideration.

Very truly yours,

/s Barbara J. Brandes

Barbara J. Brandes

Brandes & Associates

225 Broadway, Suite 900

Dated: July 8, 2010 New York, NY 10007

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the Petitioner hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 9824 words in this brief in 875 lines.

/s Barbara J. Brandes
Barbara J. Brandes

CERTIFICATE OF COMPUTER VIRUS DETECTION

The undersigned counsel for the Petitioner hereby certifies that the electronic version of the instant brief has been scanned for computer viruses using "McAfee.com VirusScan Online" virus software, and the software has not detected
any computer viruses.

/s Barbara J. Brandes
Barbara J. Brandes

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two (2) copies of the foregoing APPELLANT'S BRIEF were mailed to the address below by Federal Express on July 8, 2010.

Susan Bennett Green, Trial Attorney

U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington D.C. 20044
/s Barbara J. Brandes
Barbara J. Brandes

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APPENDICES

Appendix A: Relevant Record Evidence and Decisions Below

Appendix B: Relevant Statutes, Regulation, and Caselaw

Appendix A

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ORDER OF RELEASE ON RECOCtXWNCE

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UNA-iD STATES DEPARTMENT OF JUSTlc
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMP1IGRATIOM JUDGE
HARLINGEN, TEXAS

+FRANCO-RAMIREZ, LILIAN
C/O RED CROSS CENTER
BRoWNSVILLE TX 78520

IN THE MATTER OF:

CASE NO. A29-956-731
+FRANCO-RAMIREZ, LILIAN
IN DEPORTATION PROCEEDINGS

ORDER

ON 05/31/89, PURSUANT TO PROPER NOTICE, THE ABOVE ENTITLED MATTER WAS SET ON THE COURT'S DOCKET FOR THE PURPOSE OF HEARING
ON THE MERITS RELATIVE TO RESPONDENT'S REQUEST FOR RELIEF, THE
IMMIGRATION SERVICE APPEARED BY AND THROUGH ITS TRIAL ATTORNEY.
RESPONDENT WAS NOT PRESENT.

WHEREFORE, UPON DUE CONSIDERATION, IT IS THE FINDING OF THIS
COURT THAT RESPONDENT, IN FAILING TO APPEAR AT THE HEARING
CONCERNING HIS REQUEST, HAS ABANDONED HIS CLAIM FOR RELIEF FROM
DEPORTATION.

WHEREFORE, THE ISSUE OF DEPORTABILITY HAVING BEEN RESOLVED, IT
IS HEREBY ORDERED THAT RESPONDENT BE DEPORTED FROM THE UNITED STATES
TO EL SALVADOR,
FOR REASONS SET FORTH UNDER THE ORDER TO SHOW CAUSE.

ALAN A. VOMACKA
IMMIGRATION JUDGE

-6-3-37
CC: DISTRICT COUNSEL

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EX~CUTIVEot.wc:r:FOR L~MIGRA'IloNRE\'LE\\'
IMMlGRATION COURT
201 EAST JACKSON STREET

HARLINGEN,TEXAS 78550

IN THE MATTER OF:)
LILIAh' FRANCO-RAMIREZ 1 CASE NO. A 29 956 731
RESPONDENT 1

)
IN DEPORTATION PROCEEDINGS)

TO: Jesus J. Pena, Esq. District Counsel
18-19 Roosevelt Ave. U.S. Immigration & Naturalization Service
Jackson Heights, NY 1 1372 P.O. Box 1711

Harlingen, TX78551

ORDER

Respondent's motion to reopen the proceeding is hereby DENIED.

Respondent is subject to a final order of deportation. On February 3,2000 respondent
filed a Special NACARA motion to reopen under Section 203 of NACARA. Respondent had
until September 11, 1998 to file the motion to reopen under Sectio 203 of NACARA.
Respondent did not file the motion to reopen on or before September 11, 1998. Therefore,
Respondent's motion to reopen is untimely. See 8 C.F.R. 3.43(c)(l)(June 11, 1998).

Dated this &g h
of February, 2000.

:Ak TOVAR
IMMIGRATION JUDGE

State of New York

County of New York

RE: FRANCO, Ana Lilian (married nqe Lopez)

A29 956 731

A94 434 421

I, Ana L. Franco, do under oath and duly sworn depose and say:

I entered the U.S. without inspection near Brownsville Texas on March 4, 1989.I was

apprehended and detained for almost three months. I was placed in a juvenile detention

facility at a Red Cross Shelter during that time.

After I was released on bond from the shelter, I lived at the house of my aunt and uncle,

Mr. and Mrs. Javier Hernandez-Zaldana in La Puente California. I do not remember an

Immigration Judge telling me ofa date to come back for a hearing. I believe my uncle

knew the date that I was supposed to come back but he never told me.

I lived at my aunt and uncle's home for only one week. My aunt threw me out of the

house because she was jedous of all the attention my uncle was giving me, such as

teaching me how to drive, cooking meals for me, and taking me out for dimer.

Because my aunt threw me out on the street, I missed my immigration hearing. I was

only eighteen years old, alone and homeless, with nowhere else to go, so I traveled to

New York to stay with my sister. It was not intention to be absent for my hearing.
1

forgot that I was supposed to attend a hearing after I went to New York. When I was

kicked out of my aunt's house and had nowhere to live, I was desperate to get off the

streets and find shelter.

I never hid from Immigration. From the time I was eligible to apply for TPS, I applied. I
have kept my TPS status since 1991. Since I do not read or write English, a church has
always filled out the TPS applications for me.

00 /-Fronfo
Ana Lilian Franco

Sworn to before e
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 WEST JEFFERSON AVENUE, SUITE 300
HARLINGEN, TEXAS 78550

IN THE MATTER OF
) February 3,2009

)
Lilian FRANC0 RAMIREZ) File No. 029 956 73I

)
RESPONDEh'T) In Deportation Proceedings

CHARGE:
Former Section 241(a)(2) of the Immigration and Nationality Act,
as Amended (1988): Entry Without Inspection

APPLICATIONS:
Motion to Reopen; Motion to Change Venue

ON BEHALF OF THE RESPONDENT ON BEHALF OF THE GOVERNMENT

Barbara J. Brandes, Esq.
Assistant Chief Counsel

225 Broadway, Suite 900
P.O. Box 1711

New York, NY 10007
Harlingen, TX 78551

DECISION OF THE IMMIGRATION JUDGE

AAer the Respondent was personally served with an Order to Show Cause (OSC) on

March 4, 1989, the Respondent appeared before this Court at several hearings. During the
course of these proceedings, the Respondent conceded receipt of the OSC, admitted the

allegations of fact contained therein, and conceded the charge of deportability. The Respondent
indicated that she wished to apply for asylum and the Court received her application on April 18,
1989. On May 9, 1989, the Respondent appeared before the Court. At the hearing, the
Respondent was ordered to return to the Court for a hearing on May 31, 1989 at 9:OO. The
Respondent was told that if she failed to appear for her hearing an order of deportation could be
entered against her. The Court warned the Respondent that if could not appear at her hearing,
she could file a motion for a continuance oi a change of venue. Nonetheless, the Respondent
failed to appear before the Court at the designated place and time. The Respondent was ordered
deported f.7 abrcnriir

The Respondent has filed a motion to reopen proceedings. To the extent that the Respondent avers that she failed to receive notice of her hearing, a review of the Court records
clearly indicates that she was ordered to appear before the Court on May 31, 1989 and was
advised of the consequences for failing to appear. Furthermore, the Respondent's inability to
attend her bearing because of her economic status at the time prevented her appearing before the
Court does not constitute reasonable cause. The Respondent was advised that she could bave
requested a change of venue or a continuance in order to obtain the funds to travel to her hearing.
Also, she has failed to establish that she exercised any due diligence in informing the Court of
her situation.

Additionally, the Respondent is not eligible for adjustment of status. She was not admitted to the United States, therefore she is ineligible for 245(a) adjustment. She has not
established that she is the beneficiary of a petition filed before April 30, 2001, therefore she is
ineligible for 245(i) adjustment.

Given the record, the Respondent did not demonstrate reasonable cause for her failure to
appear at her hearing or establish that she was not put on notice of her May 31, 1989 hearing.
Therefore, the Respondent's motion to reopen shall he denied. As these proceedings shall not be
reopened, the respondent's motion to change venue will be denied. Accordingly, the following
orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the Respondent's motion to reopen be DENIED.

IT IS FURTHER ORDERED that the Respondent's motion to change venue be DENIED.

CERTIFICATE OF SERVICE

BY: COURT STAFF

2.
ATTACHMENTS: () EOIR-33 () EOIR-28 ()LEGAL SERVICES LIST ( ) OTHER

U.S. ~e~rartrn;ntoT%usba Decision of i of immigration Appeals
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File: A029 956 73 1 -Hwlingen, TX Date:
MAR l S 20to

In re: LILIAN FRANC0 RAMIREZ

INDEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Barbara J. Bmndes, Esquire

ON BEHALF OF DHS:
Mark R. Whitworth
Assistant Chief Counsel

APPLICATION: Motion to reopen

The respondent, a native and citizen ofEl Salvador, appeals from the February 3,2009, decision
of the Immigration Judge which denied the respondent's motion 10reopen deportation proceedings
which were held in absentia on May 31, 1989. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the
Immigration Judge undera "clearly erroneous" standard. 8 C.F.R. 5 1003.I (d)(3)(i). We review all
other issues, including whether the parties have met the relevant burden of proof, and issues of
discretion, under a de novo standard. 8 C.F.R. 5s 1003.l(d)(3)(ii) and (iii); Matter of A-S-5-,
24 I&N Dec. 493 (BL4 2008).

The factual findings of the Immigration Judge are not clearly erroneous, and, exercising our de
novo review we adopt and affirm the legal conclusions in the Immigration Judge's thorough and
well-reasoned decision which is dispositive of the issues in the respondent's case. Mafrer of
Burbano, 20 I&N Dec. 872, 874 (BIA 1994); see generally 8 C.F.R. 5 1003.l(d)(3)(i). The

Immigration Judge correctly found that, in spite of the respondent's allegations that she did not
receive notice of the hearing, she was in fact orally advised by the Immigration Judge of the
continued hearing.' The Immigration Judge also found that the respondent did not act with due
diligence in moving to reopen proceedings.' The Immigration Judge also correctly found that the
respondent was ineligible for adjustment of status because she entered without inspection and was
not the beneficiary of section 245(i) eligibility. The respondent asserts that as she has temporary
protected status,pwsuant to section 244(f)(4) ofthe Act, she has lawful non-immigrant status. Such

' The respondent asserts that she was ajuvenile when she was apprehended in May 1989 but as she
was born in February 1971, she was 18 years old at the time of events in question.

In her motion the respondent claims eligibility for NACARA relief. An Immigration Judge in a
decision dated February 28,2000, in a prior motion to reopen denied this claim.

provision does not obviate her illegal entry and does not constitute an inspection and admission for
section 245 purposes. Finally, we find no basis to sua sponte reopen proceedings. While the
respondent's family tries constitute significant equities,her disregard ofher obligation to attend her
1989hearing is a significant adverse factor.

ORDER: The appeal is dismissed

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FOR THE BOARD

Appendix B

LEXSTAT 8 USC 1254A

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH PL 11 1-193, WITH A GAP OF PL 11 1-192, APPROVED 612812010 ***

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION
ADWSTMENT AND CHANGE OF STATUS

Go to the United States Code Sewice Archive Directory

5 1254a. Temporary prot, tcted status

(a) Granting of status.
(1) In general. In the case of an alien who is a national of a foreign state designated under subsection (b) (or in the
case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets
the requirements of subsection (c), the Attorney General, in accordance with this section-.
(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the
United States during the period in which such status is in effect, and
(B) shall authorize the alien to engage in employment in the United States and provide the alien with an
"employment authorized endorsement or other appropriate work permit.
(2) Duration of work authorization. Work authorization provided under this section shall be effective throughout the
period the alien is in temporary protected status under this section.
(3) Notice.
(A) Upon the granting of temporary protected stalus under this section, the Attorney General shall provide the alien
with information concerning such status under this section.

(EX) !f at !he time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a
national) is designated under subsection (b), the Attorney General shall promptly notify the alien of the temporary
protected status that may be available under this section.

(C) If, at the time of designation of a foreign state under subsection @), an alien (who is a national of such state) is
in a removal proceeding under this title, the Attorney General shall promptly notify the alien of the temporary protected
status that may be available under this section.
(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.
(4) Temporary treatment for eligible aliens.
(A) In the case of an alien who can establish a prima facie case of eligibility for benefits under paragraph (I), but for
the fact that the period ofregistration under subsection (c)(l)(A)(iv) has not begun, until the alien has had a reasonable
opportunity to register during the first 30 days of such period, the Anomey General shall provide for the benetits of

paragraph (I).

(B) In the case of an alien who establishes a prima facie case of eligibility for benefits under paragraph (I), until a
final determination with respect to the alien's eligibility for such benefits under paragraph (1) has been made, the alien
shall be provided such benefits.
(5) Clarification. Nothing in this section shall be construed as authorizing the Attomey General to deny temporary
protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being
granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of
otherrights under this Act. The granting of temporaiy protected status under this section shall not be considered to be
inconsistent with the granting of nonimrnigrant status under this Act.
(b) Designations.
(I) In general. The Attorney General, after consultation with appropriate agencies of the Government, may designate
any foreign state (or anypart of such forcign state) under this subsection only if--
(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict,
requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious
threat to their personal safety;
(B) the Attorney General finds that-.
(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in
a substantial, but temporary, disrnption of living conditions in the area affected,
(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals
of the state, and
(iii) the foreign state officially has requested designation under this subparagraph; or
(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that
prevent aliens who are nationals of the state from returning to the state in safety, unless the Attomey General finds that
permitting the aliens to remain temporarily in the United States is contraiy to the national interest of the United States.
A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless

notice of the designation (including a statement of the findings under this paragraph and the effective date of the
designation) is published in the Federal Register. In such notice, the Anorney General shall also state an estimate of the
number of nalionals of the foreign state designated who are (or within the effective period of the designation are likely
to become) eligiblc for temporary protected status nnder this section and their immigration status in the United States.

(2) Effective period of designation for foreign states. The designation of a foreign state (or part of such foreign state)
under paragraph (I) shall-.
(A) take effect upon the date of publication of the designation under such paragraph, or such later date as the
Attomey General may specify in the notice published under such paragraph, and
(B) shall remain in effect until the effective date of the termination of the designation under paragraph (3)p).
For purposes of this section, the initial period of designation of a foreign state (or part thereof) under paragraph (1) is
the period, specified by the Attorney General, of not less than 6 months and not more than 18 months.

(3) Periodic review, terminations, and extensions of designations.
(A) Periodic review. At least 60 days before end of the initial period of designation, and any extended period of
designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with
appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state)
for which a designation is in effect under this subsection and shall determine whether the conditions for such
designation under this subsection continue to be met. The Attorney General shall provide on a timely basis for the
publication of notice of each such determination (including the basis for the determination, and, in the case of an
affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.
(B) Termination of designation. If the Attomey General determines under subparagraph (A) that a foreign state (or
part of such foreign state) no longer continues to meet the conditions for designation under paragraph (I), the Attomey
General shall terminate the designation by publishing notice in the Federal Register of the determination under this
subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection

(d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of

the most recent previous extension under subparagraph (C).

(C) Extension of designation. If the Attorney General does not determine under subparagraph (A) that a foreign state
(or par? of such foreign state) no longer meets the conditions for designation under paragraph (I), the period of
designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney
General, a period of 12 or 18 months).
(4) Information concerning protected status at time of designations. At the time of a designation of a foreign state
under this subsection, the Attorney General shall make available information respecting the temporary protected status
made available to aliens who are nationals of such designated foreign state.
(5) Review.
(A) Designations. There is no judicial review of any determination of the Attorney General with respect to the
designation, or termination or extension of a designation, of a foreign state under this subsection.
(B) Application to individuals. The Attorney General shall establish an administrative procedure for the review of
the denial of benefits to aliens under this subsection. Such procedure shall not prevent an alien from asserting protection
under this section in removal proceedings if the alien demonstrates that the alien is a national of a state designated under
paragraph (1).
(c) Aliens eligible for temporaiy protected status.
(1) In general.
(A) Nationals of designated foreign states. Subject to paragraph (3), an alien, who is a national of a state designated
under subsection (b)(l) or in the case of an alien having no nationality, is a person who last habitually resided in such
designated state), meets the requirements of this paragraph only if--
(i) the alien has been continuously physically present in the United States since the effective date of the most
recent designation of that siate;
(ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;
(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not
ineligible for temporary protected status under paragraph (2)(B); and

(iv) to the extent and in a manner which the Attomey General establishes, the alien registers for the temporary
protected status under this section during a registration period of not less than 180 days.
(B) Registration fee. The Attorney General may require payment of a reasonable fee as a condition of registering an
alien under subparagraph (A)(iv) (including providing an alien with an "employment authorized endorsement or other
appropriate work pennit under this section). The amount of any such fee shall not exceed $ 50. In the case of aliens
registered pursuant to a designation under this section made after July 17, 1991, the Attomey General may impose a
separate, additional fee for providing an alien with documentation of work authorization. Notwithstanding section 3302
oftitle 31, United States Code, all fees collected under this subparagraph shall he credited to the appropriation to be
used in carrying out this section.
(2) Eligibility standards.
(A) Waiver of certain grounds for inadmissibility. In the determination of an alien's admissibility for purposes of
subparagraph (A)(iii) of paragraph (I)--
(i) the provisions of paragraphs (5) and (7)(A) of section 212(a) [8 USCSJ 1182(a)(S), (7)(A)] shall not apply;
(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 212(a) [8
USCSS 1182(n)] in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is
otherwise in the public interest; but
(iii) the Attorney General may not waive-.
(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section,
(11) paragraph (2)(C) of such section (relating to dmg offenses), except for so much of such paragraph as relates
to a single offense of simple possession of 30 grams or less of marijuana, or
(111) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to national security and participation
in the Nazi persecutions or those who have engaged in genocide).
(B) Aliens ineligible. An alien shall not he eligible for temporary protected status under this section if the Attoniey
General finds that-.

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, Or
(ii) the alien is described in section 208(b)(2)(A) [8USCSJ 1158(b)(2)(A/].
(3) Withdrawal of temporary protected status. The Attorney General shall withdraw temporary protected Status
granted to an alien under this section if--
(A) the Attorney General finds that the alien was not in fact eligible for such status under this section,
(B) except as provided in paragraph (4) and permitted in subsection (f)(3), the alien has not remained continu~~~ly
physically present in the United States from the date the alien first was granted temporary protected status under this
section, or
(C) the alien fails, without good cause, to register with the Attomey General annually, at the end of each 12-month
period after the granting of such status, in a form and manner specified by the Attomey General.
(4) Treatment of brief, casual, and innocent departures and certain other absences.
(A) For purposes of paragraphs (l)(A)(i) and (3)(B), an alien shall not be considered to have failed to maintain
continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United
States, witllout regard to whether such absences were authorized by the Attorney General.
(B) For purposes of paragraph (l)(A)(ii), an alien shall not be considered to have failed to maintain continuous
residence in the United States by reason of a brief, casual, and innocent absence described in subparagraph (A) 01 due
merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control ofthe
alien.
(5) Construction. Nothing in this section shall be construed as authorizing an alien to apply for admission to, 01to be
admitted to, the United States in order to apply for temporaty protected status under this section.
(6) Confidentiality of information. The Attomey General shall establish procedures to protect the confidentiality of
information provided by aliens under this section.
(d) Documentation.
(1) Initial issuance. Upon the granting of temporary protected status to an alien under this section, the Attorney

General shall provide for the issuance of such temporary documentation and authorization as may be necessary to cany
out the purposes of this section.
(2) Period of validity Subject to paragraph (3), such documentation shall be valid during the initial period of
designation of the foreign state (or part thereof) involved and any extension of such period. The Attorney General may
stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of sucll
documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a
designation of a foreign state (or any part of such foreign state).
(3) Effective date of terminations. If the Attorney General terminates the designation of a foreign state (01 part of such
foreign state) under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued
or renewed after the effective date of the publication of notice of the determination under that subsection (01, at the
Attorney General's option, a€ter such period after the effective date of the determination as the Attorney General
detennines ta be appropriate in order to provide for an orderly transition).
(4) Detention of the alien. An alien provided temporary protected status under this section shall not be detained by the
Attorney General on the basis of the alien's immigration status in the United States.
(e) Relation of period of temporary protected status to cancellation of removal. With respect to an alien granted
temporary protected stahls under this section, the period of such status shall not be counted as a period of physical
presence in theunited States for purposes of section 240A(a) [8 USCSJ 1229b(a)] unless the Attomey General
determines that extreme hardship exists. Such period shall not cause a break in the continuity of residence of the period
before and after such period for purposes of such section.
(0Benefits and status during period of temporary protected status. During a period in which an alien is granted
temporary protected status under this section-.

(I) the alien shall not be considered to be permanently residing in the United States under color of law;
(2) the alien may be deemed ineligible for public assistance by a State (as defined in section 101(a)(36) 18 USCS§

IIOI(o)(36)]) or any political subdivision thereof which furnishes such assistance;

(3) the alien may travel abroad with the prior consent of the Attorney General; and
(4) for purposes of adjustment of status under section 245 [8USCSJ 12551 and change of status under section 248 [8
USCSj12581, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.
(g) Exclusive remedy. Except as otherwise specifically provided, this section shall constitute the exclndve authority of
the Attorney General under law to permit aliens who are or may become oihenvise deportable or have been paroled into
the United States to remain in the United States temporarily because of their particular nationality or regian of foreign
state of nationality.
(h) Limitation on consideration in the Senate of legislation adjusting status.
(I) In general. Except as provided in paragraph (2), it shall not be in order in the Senate to consider any bill,
resolution, or amendment that-.
(A) provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary
protected status under this section, or
(B) has the effect of amending this subsection or limiting the application of this subsection.
(2) Supermajority required. Paragraph (1) may be waived or suspended in the Senate only by the affirmative vote of
three-fifths ofthe Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate
duly chosen and sworn shall be required in the Senate to sustain an appeal of the ruling of the Chair on a point of order
raised under paragraph (1).
(3) Rules. Paragraphs (I) and (2) are enacted-.
(A) as an exercise of the rnlemaking power of the Senate and as such they are deemed a pnrt of the rules of the
Senate, but applicable only with respect to the matters described in paragraph (1) and supersede other rules of the
Senate only to the extent that such paragraphs are inconsistent therewith; and
(B) with full recognition of the constitutional right of the Senate to change such rules at any time, in the same
manner as in the case of any other rule of the Senate.
(i) Annual report and review.
(I) Annual report. Not later than March 1 of each year (beginning with 1992), the Attorney General, after consultation

with the appropriate agencies of the Government, shall submit a report to the Committees on the Judiciary of the House
of Representatives and of the Senate on the operation of this section during the previous year. Each report shall
include-.
(A) a listing of the foreign states or parts thereof designated under this section,
(B) the number of nationals of each such state who have been granted temporary protected status under this section
and their immigration status before being granted such status, and
(C) an explanation of the reasons why foreign states or pans thereof were designated under subsection (b)(l) and,
with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended
nuder subsection (b)(3).
(2) Committee report. No later than 180 days after the date of receipt of such a report; the Committee on the Judiciary
of racl~ House of Congress shall report to its respective House such oversight findings and legislation as it deems
appropriate.
HISTORY:

(June 27, 1952, ch 477, Title 11, 6 244 [244A], as added Nov. 29, 1990, P.L. 101-649, Title 111, 5 302(a), Title VI, 5
603(a)(24), 104 Stat. 5030, 5084; Dec. 12, 1991, P.L. 102-232, Title 111, 5s 304(b), 307(1)(5), 105 Stat. 1749, 1756; Oct.
25, 1994, P.L. 103-416, Title 11, 5 219(i), (2)(2), 108 Stat. 4317,4318; Sept. 30, 1996, P.L. 104-208, Div C, Title In,
Subtitle A, $5 308(b)(7), (e)(l)(G), (1 I), (g)(7)(E)(i), (8)(A)(i), 1 I0 Stat. 3009-615,3009-619,3009-620,3009-624.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

LEXSTAT 8 USCS 5 1255

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*** CURRENT THROUGH PL 11 1-193, WITH A GAP OF PL I I I-i92, APPROVED 6/28/2010 **"

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
IMMIGRATION
ADJUSTMENT AND CHANGE OF STATUS

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$ 1255. Adjustment of status of nonimmigrant to that of person admined for permanent residence

(2) Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an
alien who was inspected and admitted or paroled into the United States or the status of any other alien having an
approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his
discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence
if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is
admissible to the United States for permanent residence, and (3) an immigrant visa is imn~ediately available to him at
the time his application is filed.
(b) Record of lawful admission for permanent residence; reduction of preference visas. Upon ihe approval of an

application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for
permanent residence as of the date the order of the Attorney General approving the application for the adjustmenl of
status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued
under sections 202 and 203 18 USCSjjiiiS2, //S3: withln me class to which the alien is chargeable for the fiscal year
then current.
(c) Alien crewmen, aliens continuing or accepting n~~anthorized employment, and aliens admined in transit without a
visa. Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall
not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as
defined in section 20I(b) [8 USCS51151@)] or a special immigrant described in section 101(a)(27)(H), (I), (J), or (K)
[8USCSf IIO;(a)(27)(H), (I), (J),or (K)]) who hereafter continues in or accepts unauthorized employment prior to
filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the
application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to

maintain continuously a law!% status since entry into the United States; (3) any alien admitted in transit without visa
under section 212(d)(4)(C) [8 USCSP; 1182(d/(4)(C)]; (4) an alien (other than an immediate relative as defined in
section 201(b) [X USCSJ lijlfi)]) who was admitted as a nonimmigrant visitor without a visa under section 212(1) or
section 217 [X USCSP; 1182(() or 1187l;(5) an alien who was admitted as a nonimmigrant described in section
lOl(a)(l5)(S) [X USCSP; IlOl(a)(l5)(S)],[;] (6) an alien who is deportable under section 237(a)(4)@) [8 USCSJ
1227(u](4](B)];(7)any alien who seeks adjustment of status to that of an immigrant under section 203@) [X USCSJ
Ilj3(b)]and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an
unauthorized alien, as defined in section 274A(h)(3) [X USCSJ 1324o(hl(3)], or who has otherwise violated the terms
of a nonimmigrant visa.

(d) Alien admitted for permanent residence on conditional basis; fiancee or fiance of citizen. The Attorney General may
not adjust, under subsection (a), the status of an alien lawfully admitted to the United States for pennanent residence on
a conditional basis under section 216 [X USCS J ll86u]. The Attorney General may not adjust, under subsection (a), the
status of a nonimmigrant alien described in section lOl(a)(lS)(K) [X USCSJ 11 Ol(a)(l5)(K)] except to that of an alien
lawfully admitted to the United States on a conditional basis under section 21 6 [X USCSJ 11860] as a result of the
inaniage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord
that alien's nonimmigrant status under section 101(a)(15)(K) [8 USCS 5 llOl(a)(l~)(K)].
(e) Reshktion on adjustment of status based upon marriages entered while in admissibility or deportation proceedings;
bona fide maniage exception.
(1) Except as provided in paragraph (3), an alien who is seeking to receive an immigrant visa on the basis of a
marriage which was entered into during the period described in paragraph (2) may not have the alien's status adjusted
under subsection (a).

(2) The period described in this paragraph is the period during which administrative orjudicial proceedings are
pending regarding the alien's right to he admitted or remain in the United States.
(3) Paragraph (I) and section 204(g) [X USCSJ 1154(g/] shall not apply with respect to a marriage if the alien
establishes by clear and convincing evidence to the satisfaction of the Attomey General that the mam'age was entered
into in good faith and in accordance with the laws of tl~e place where the marriage took place and the marriage was not
entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was
given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the
filing of a petition under section 204(a) [X USCSP;1154(a)]or subsection (d) or @) of section 214 [8 USCS J1184]
with respect to the alien spouse or alien son or daughter. In accordance with regulations, there shall be only one level of
administrative appellate review for each alien under the previous sentence.
(0Limitation on adjustment of status. The Attomey General may not adjust, under subsection (a), the status of an alien
lawfully admitted to the United States for permanent residence on a conditional basis under section 21 6A [B USCSJ
1186b].

(g) Special immigrants. in applying this section to a special immigrant described in section 101 (a)(27)(K) [X USCSJ
lIOi(a)(27)(K)],such an immigrant shall be deemed, for purposes of subsection (a), to have been paroled into the
United States.
(h) ~~~lica'tion
with respect to special immigrants. In applying this section to a special immigrant described in section
lOl(a)(27)(J) [8 USCS 5 1101(a)(27)(J)]--

(I) such an immigrant shall be deemed, for purposes of subsection (a), to have been paroled into the United States;
and
(2) in determining the alien's admissibility as an immigrant--
(A) paragraphs (4), (5)(A), (6)(A), (6)(C), (6)(D), (7)(A), and (P)(B) of section 21 2(a) [X USCSJ 1182(aj] shall not
apply; and
(B) the Attorney General may waive other paragraphs of section 212(a) [X USCS P; llX2(a)] (other than paragraphs

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(2)(A), (2)(B), (2)(C) (except for so much of such paragraph as related to a single offense of simple possession of 30
grams or less of marijuana), (3)(A), (3)(B), (3)(C), and (3)(E)) in the case of individual aliens for humanitarian
purposes, family unity, or when it is otherwise in the public interest.

The relationship between an alien and the alien's natural parents or prior adoptive parents shall not be considered a
factor in making a waiver under paragraph (2)(B). Nothing in this subsection or section 101(a)(27)(J) [8 USCSf
]10](aj(27)(J)]shall be constmedas authorizing an alien to apply for admission or be admitted to the United States in
order to obtain special immigrant status described in such section.

(i) Adjustment in status of certain aliens physically present in the United States.
(1) Nowithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United

States-.
(A) who--
(i) entered the United States without inspection; or
(ii) is within one of the classes enumerated in subsection (c) ofthis section;
(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under
section 203(d) [8 USCf 1153(d/l)of--
(i) a petition for classification under section 204 [8 USCf 11541 that was filed with the Attorney General on or
before April 30,2001; or
(ii) an application for a labor certification under section 212(a)(5)(A) [8 USCJ 1182(a)(5)(A)]that was filed
pursuant to the regulations of the Secretary of Labor on or before such date; and
(C) who, in the case of a beneficiary of a petition for ciassification, or an application for labor certification,
described in subparagraph (B) that was filed after January 14, 1998, is physicaily present in the United States on the
date of the enactment of the LIFE Act Amendments of 2000 [enacted Dec. 21,20001;
may apply to the Attorney Gencral for the adjustment ofhis or her status to that of an alien lawfully admitted for
permanent residence. The Anomey General may accept such application only if the alien remits with such application a
sum equalling $ 1,000 as of the date of receipt of the application, but such sum shall not be required from a child under
the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or
permanent resident status under section 210 or 245A ofthc Iinmigration and Nationality Act [8USCSJ 1160 or 1255aI
or section 202 of the immigration Reform and Control Act of 1986 [8 USCSJ lZ55a note] at any date, who-.

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent
resident status under section 210 or 245A of the Immigration and Nationality Act [8 USCSJ 1160 or 125501 or section
202 of the immigration Reform and Control Act of 1986 [8 USCSJ 1255a note];
(ii) entered the United States before May 5, 1988, resided in the United Slates on May 5, 1988, and is not a lawful
permanent resident; and
(iii) applied for benefits under section 301ia) ofthe Immigration Act of 1990 [8 USCSJ 1255a note]. The sum
specified herein shall be in addition to the fee normally required for the processing of an application under this section.
(2) Upon receipt of such an application and the sulll hereby required, the Attorney General may adjust the status of the

alien to that of an alien lawfully admitted for permanent residence if--
(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence;
. .

and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.
(3) (A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to
process an application under !his section and is remitted to the Attorney General pursuant to paragraphs (I) and (2) of
this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (0) of section 286
[8 USCSJ 13561.

(B) Any remaining portioii of such fees remitted under such paragraphs shall be deposited by the Anorney General
into the Breached BondDetention Fund established under section 286(r) [8 USCSJ1356(r)], except that in the case of
fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for
labor certification, described in paragraph (I)(B) was filed aAer January 14, 1998, one-half of such remaining portion

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shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section
286(m) [8 USCSJ /356(m)].

0) Adjustment to permanent resident status.

(I) If, in the opinion ofthe Attorney General-
(A) a nonimmigrant admitted into the United States under section 1Ol(a)(l5)(S)(i) [8USCS J llOl(a)(l5)(S)(i)] has
supplied information described in subclause (I) of such section; and
(B) the provision of such information has substantially contributed to the success of an authorized criminal
investigation or the prosecution of an individual described in subclause (111) ofthat section,
the Attomey General may adjust the status of the alien (and the spouse, married and unmarried sons and daughters,
and parents of the alien if admitted under that section) to that of an alien lawfully admined for permanent residence if
the alien is not described in section 212(a)(3)(E) [X USCSJ 1182(0)(3)(E)].

(2) If, in the sole,discretion of the Attorney General-.
(A) a nonirnmigrant admitted into the United States under section iOl(a)(lS)(S)(ii) [X USCS I IOI (cx)(l5)(S)(ii)]
has supplied information described in subclause (I) ofsuch section, and
(B) the provision of such information has substantially contributed to--
(i) the prevention or frustration of an act of terrorism against a United States person or United States property, or
(ii) the success of an authorized criminal investigation of, or the prosecution of, an individual involved in such an
act of terrorism, and
(C) the nonimmigrant has received a reward under section 36(a) of the State Department Basic Authorities Act of
1956 [22 USCSJ 27OX(u)],
the Attorney General may adjust the status of the alien (and the spouse, mal~ied and unmarried sons and daughters,
and parents of the alien if admitted under such section) to that of an alien lawfully admitted for permanent residence if

the alien is not described in section 212(a)(3)(E) [8 USCSJ 1182(0)(3)(E)].

(3) Upon the approval of adjustment of status under paragraph (1) or (2), the Attomey General shall record the alien's
lawful admission for pennanent residence as of the date of such approval and the Secretary of State shall reduce by one
the number of visas authorized to be issued under sections 201(d) and 203(b)(4) [8 USCSJJ II5l(@ and ll53(b)(4)]
for the fiscal year then current.
(k) Inapplicability of certain provisions for certain employment-based immigrants. An alien who is eligible to receive
an immigrant visa under paragraph (I), (2), or (3) of section 203(b) [8 USCS$1153(1)(1), (2), or (3)] (or, in the case of
an alien who is an immigrant described in section 101(a)(27)(C) [8 USCSf 1101(a)(27)(C)], under section 203(b)(4) [8
USCSJ 1153(b)(4)]) may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2), (c)(7), and
(c)(8), if-.
(I) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a
lawful admission;
(2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days--
(A) failed to maintain, continuously, a lawful status;
(B) engaged in unauthorized employment; or
(C) otherwise violated the terms and conditions of the alien's admission.
(I) Adjustment of status for victims of trafficking.
(1) If, in the opinion of the Secretary of Homeland Security, or in the case of subparagraph (C)(i), in the opinion ofthe
Secretary of Homeland Security, in consultation with the Attorney General, as appropriate[,] a nonimmigrant admitted
intothe United States under section lOl(a)(lS)(T)(i) [8USCSJ IlOl(a)(l5)(~(i)]--
(A) has been physically present in the United States for a continuous period of at least 3 years since the date of
admission as a nonimmigrant under section lOl(a)(lS)(T)(i) [X USCSJ llOl(a)(l5)(T)(~], or has been pliysically
present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and
that, in the opinion of the Attorney General, the investigation or prosecution is complete, whichever period of time is
less;

(B) subject to paragraph (6),has, throughout such period, been a person of good moral character; and
(C) (i) has, during such period, complied with any reasonable request for assistance in the investigation or
prosecution of acts of trafficking;
(ii) the alien would suffer extteme hardship involving unusual and severe harm upon removal from the United
States; or
(iii) was younger than 18 years of age at the time of the victimization qualifying the alien for relief under section
1Ol(a)(l5)(T).t91
the Secretary of Homeland Security may adjust the status of the alien (and any person admitted under section
lOl(a)(lS)(T)(ii) [S USCS 5 IlOl(a)(l5)~(ii)] as the spouse, parent, sibling, or child of the alien) to that of an alien
lawfully admitted for permanent residence.

(2) Paragraph (1) shall not apply to an alien adminedunder section 10l(a)(15)(T) [S USCSJ llOl(a)(l5)(T/] who is
inadmissible to the United States by reason of a ground that has not been waived under section 212 [8 USCSJ 1/82],
except that, if the Secretary of Homeland Security considers it to be in the national interest to do so, the Secretary of
Homeland Security, in the Attomey General's [Secretary's] discretion, may waive the application of--
(A) paragraphs (I) and (4) of section 212(a) [8USCSJ 1182(a)J; and
(B) any other provision of such section (excluding paragraphs (3), (10)(C), and (lO[)](E)), if the activities rendering
the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section
101 (a)(l5)(T)(i)(I) [8 USCSJ 1lOl(a)(l5)(T)(i)(l)].
(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under
paragraph ())(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods
in the aggregate exceeding 180 days, unless--
(A) the absence was necessary to assist in the investigation or prosecution described in paragraph (l)(A); or
(B) an official involved in the investigation or prosecution certifies that the absence was otherwise justified.
(4)

(A) The total number of aliens whose status may be adjusted under paragraph (1) during any fiscal year may not
exceed 5,000.
(B) The numerical limitation of subparagraph (A) shall only apply to principal aliens and not to the spouses, sons,
daughters, siblings, or parents of such aliens.
(5) Upon the approval of adjustment of status under paragraph (I), the Secretary ofHomeland Security shall record
the alien's lawful admission for permanent residence as of the date of such approval.
(6) For purposes of paragraph (l)(B), the Secretary of Homeland Security may waive consideration of a
disqualification from good moral character with respect to an alien if the disqualification was caused by, or incident to,
the trafficking described in section lOl(a)(lS)(T)(i)(I) [8 USCSJ llOl(a)(l5)jT)fi)(I)l.
(7) The Secretary of Homeland Security shall permit aliens to apply for a waiver of any fees associated with filing an
application for relief througl~ final adjudication of the adjustment of status for a VAWA self-petitioner and for relief
under sections lOl(a)(lS)(T), 101(a)(15)(U), 106,24OA(b)(2), and 244(a)(3) (as in effect on March 31, 1997) [8 USCS
$5 lIOl(a)(5)(r), IlOl(a)(15)(Uj, 1229b(41(2), and former 8USCS.f1254(~)(3jl.
(m) Adjustment of status for victims of crimes against women.
(1) The Secreraq of Homeland Securiw may adjust the status of an alien admitted into the United States (or otherwise
provided nonimmigrant status) under section IOl(a)(l5)01) [8 USCS J IlOl(a)(l5)((i/] to that of an alien lawfully
admitted for pennanent residence if the alien is not described in section 212(a)(3)(E) [8USCSJ1182(a)(3)(E)], unless
the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a
criminal investigation or prosecution, if--
(A) the alien has been physically present in the United States for a continuous period of at least 3 years since the
date of ad~nission as a nonimmigrant under clause (i) or (ii) of section 101(a)(15)(LJ) [8 USCS J llOl(a)(lS)(U)I; and
(B) in the opinion of the Secretary of Homeland Security, the alien's continued presence in the United States is
justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.
(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States under
paragraph (I)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods

(B) subject to paragraph (6),has, throughout such period, been a person of good moral character; and
(C) (i) has, during such period, complied with any reasonable request for assistance in the investigation 01
prosecution of acts of trafficking;
(ii) the alien would suffer extreme hardship involving unusual and severe harm upon removal from the United
States; or
(iii) was younger than I8 years of age at the time of the victimization qualifying the alien for relief under section
I Ol(a)(l5)(T).[.l
the Secretary of Homeland Security may adjust the status of the alien (and any person admined under Section
lOl(a)(l5)(T)(ii) [8 USCSf IlOl(c~)jlS](T)(ii)] as the spouse, parent, sibling, or child of the alien) to that of an alien
lawfully admitted for permanent residence.

(2) Paragraph (1) shall not apply to an alien admitted under section lOl(a)(lS)(T) [8 USCSf 1!0l(oj(!Sj~J who is
inadmissible to the United States by reason of a ground that has not been waived under section 212 [8 USCSg 11821,
cxcept that, if the ~ecretary of Homeland Security considers it to be in the national interest to do so, the Secretary of
Homeland Security, in the Attorney General's [Secretary's] discretion, may waive the application of--
(A) paragraphs (I) and (4) of section 212(a) [8 USCSP;ll82(0)]; and
(B) any other provision of such section (excluding paragraphs (3), (10)(C), and (10[)](E)), if the activities rendering
the alien inadmissible uuder the provision were caused by, or were incident to, the victimization described in section
IOl(a)(l5)(T)(i)(I) [8 USCSP;1!0l(aj(l5)(Tj(ij(ll].
(3) An alien shall be considered to have failed to maintain continuous physical presence in the United States under
paragraph (l)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods
in the aggregate exceeding 180 days, unless--
(A) the absence was necessary to assist in the investigation or prosecution described in paragraph (I)(A); 01
(B) an official involved in the investigation or prosecution certifies that the absence was othenuisejustified.

(4)
(A) The total number of aliens whose status may be adjusted under paragraph (1) during any fiscal year may not
exceed 5,000.
(B) The numerical limitation of subparagraph (A) shall only apply to ~rincipal aliens and not to the spouses, sons,
daughters, siblings, or parents of such aliens.
(5) Upon the approval of adjustment of status under paragraph (I), the Secretary of Homeland Securiw shall record
the alien's lawful admission for permanent residence as of the date of such approval.
(6) For purposes of paragraph (l)(B), the Secretary of Homeland Security may waive consideration of a
disqualification from good moral character with respect to an alien if the disqualification was caused by, or incident to,
the trafficking described in section IOl(a)(lS)(T)(i)(I) [8 USCSg 1101(a)(15)(T/(ij(I/1.
(7) The Secretary of Homeland Security shall ~ermit aliens to apply for a waiver of any fees associated with filing an
application for relief through final adjudication of the adjustment of status for a VAWA self-petitioner and far relief
under sections lOl(a)(lS)(T), lO!(a)(l5)(U), 106,24OA(b)(2), and 244(a)(3) (as in effect on March 31, 1997) [8 USCS
$§I!Ol(a)(S)(T,), I!Ol(o)(!S)(~~, 1229h(b)(Z), and former 8 USCSg 1254(aj(3)].
(m) Adjustment of status for victims of crimes against women.
(1) The Secretary of Homeiand Security may adjdst the status of an alien admitted into the United States (or otherwise
provided nonimmigrant status) under section 10!(a)(15)(U) [8 USCSP;1101 (a)(ljj(Uj] to that of an alien lawfully
admitted for permanent residence if the alien is not described in section 212(a)(3)(E) [8 USCSJ 1182(a)(3)(E)], unless
the Secretary determines based on affirmative evidence that the alien unreasonably refused to ~rovide assistance in a
criminal investigation or prosecution, if--
(A) the alien has been ohvsicallv oresent in the United States for a continuous period of at least 3 vears since the
\~-, . , >. ---,

date of admission as a nonimmigrant under clause (i) or (ii) of section 101(a)(15)&) [8 USCSJ IlOJ(a)(l5)(~1; and

(B)in the opinion of the Secretary of Homeland Security, the alien's contitlued presence in the United States is
justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

(2) An alien shall be considered to have failed to maintain continuous physical presence in the United States uuder
paragraph (1)(A) if the alien has departed from the United States for any period in excess of 90 days or for any periods

in the aggregate exceeding 180 days unless the absence is in order to assist in the investigation or prosecution or unless
an official involved in the investigation or prosecution certifies that the absence was otherwise justified.

(3) Upon approval of adjustment of status under ~aragraph (1) of an alien described in section 101(a)(15)(lJ)(i) (8
UC§ IlOl(a)(lS)(Ul(i)] the Secretary of Homeland Security may adjust the stahls of or issue an immigrant visa to a
spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section
lOl(a)(15)Oi)(ii) [8USCSg- IlOl(a)(I5)(U)(iij] if the Secretary considers the grant of such status or visa necessary to
avoid extreme hardship.
(4) Upon the approval of adjustment of status under paragraph (1) or (3), ihe Secretary of Homeland Security shall
record the alien's lawful admissionfor permanent residence as of the date of such approval.
(5) (A) The Secretaxy of Homeland Security shall consult with the Attorney General, as appropriate, in making a
determination under paragraph (1) whether affirmative evidence demonstrates that the alien unreasonably refused to
provide assistance to a Federal law enforcement official, Federal prosecutor, Federal judge, or other Federal authority
investigating or prosecuting criminal activiiy described in section 1
Ol(a)(lS)(U)(iii) [8 USCS .f 1101(~)(15)~)(iii)].
(B) Nothing in paragraph (l)(B) may be construed to prevent the Secretary from consulting with the Attomcy
General in making a determination whether affirmative evidence demonstrates that the alien unreasonably refused to
provide assistance to a State or local law enforcement official, State or local prosecutor, State or local judge, or other
State or local authority investigating or prosecuting criminal activity described in section lOl(a)(lS)(U)(iii) [8USCS J
llOl(a)(l5j~j(iii)l.
HISTORY:

(June 27, 1952, ch 477, Title 11, suhch 5, 5 245,66 Stat. 21 7; Aug. 21, 1958, P.L. 85-700, 5 1,72 Stat. 699; July 14,
1960,P.L. 86-648, 5 10,74 Stat. 505; Oct. 3, 1965, P.L. 89-236, Q 13, 79 Stat. 918; Oct. 20, 1976, P.L. 94-571,s 6,90

Stat. 2705; Dec. 29, 1981,P.L. 97-116, Q 5(d)(2), 95 Stat. 1614; NOV. 6, 1986,P.L. 99-603, TitleI, PartB, $ 117,Title 717, Part B, g 313(c), 100 Stat. 3384,3438; Nov. 10, 1986, P.L. 99-639, 5s 2(e), 3(b), 5(a), 100 Stat. 3542,3543; Nov. 6, 1986, P.L. 99-603, Title 111, Part B, 3 313(c); Nov. 10, 1986, P.L. 99-639, 5 3(b), 100 Stat. 3542; Oct. 24, 1988, P.L. 100.525, 5$2(f)(l), (p)(3), 7(b), 102 Stat. 261 1,2613,2616; Nov. 29, 1990, P.L. 101-649, Title I, Subtitle B, Part 2, 5 121(b)(4), Subtitle E, 5 162(e)(3), Title VII, Q 702(a), 104 Stat. 4994, 501 1,5086; Oct. 1, 1991, P.L. 102.1 10, 5 2(c), 105 Stat. 556; Dec. 12, 1991, P.L. 102-232, Title I11,gQ 302(d)(2), (e)(7), 308(a), 105 Stat. 1744, 1746, 1747; Aug. 26, 1994,P.L. 103-317, Titlev, 3 506(h), 108 Stat. 1765; Sept. 13, 1994, P.L. 103-322, TitleXll7, 4 130002(c), 108 Stat. 2025; Oct. 25, 1994, P.L. 103-416,Title 11, Q 219(k), 108 Stat. 4317; April 24, 1996, P.L. 104-132, Title IV, Subtitle B, Q 413(d), 110 Stat. 1269; Sept. 30, 1996, P.L. 104-208, Div C, TitleIII, Subtitle A, 5 308(fJ(1)(0), (2)(C), (g)(lO)(B), Subtitle F, $5 375,376(a), Title VI, Subtitle E, 5 671(a)(4)(A), (5), 110 Stat. 3009-621,3009-625,3009-648,3009-721; Nov. 26, 1997,P.L. 105-119, TitleI, $5 110(3), lll(a),(c), 111 Stat.2458;Oct.28,2000,P.L. 106-386,DivA, § 107(f), Div B, Title V, $4 1506(a)(l), 1513(fl, 114 Stat. 1479, 1527, 1536; Dec. 21,2000, P.L. 106-553, Q I(a)(2), 114 Stat. 2762; Dec. 21,2000, P.L. 106-554, Q l(a)(4), 114 Stat. 2763; Dec. 19,2003, P.L. 108-193, $5 4(b)(3), 8(a)(4), 117 Stat. 2879.2886; Jan. 5,2006, P.L. 109-162,TitleVIII. Subtitle A, 5 803, 119 Stat. 3054;Aug. 12,2006, P.L. 109-271, g 6(Q, 120 Stat 763.)

(As amended Dec. 23, 2008, P.L. 110-457, Title 11, Subtltle A, Q 201(d), (e), Suhtltle D, Q 235(d)(3), 122 Stat 5053, 5080.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Subsection . . . (p) of section 214", refened to in subsec. (e)(3), is subsec. (p) of Q 214 of Act June 27, 1952, ch 477 (8 USCSJ 1184), which was redesignafed subsec. (r) of such section by Act Dec. 19,2003, P.L. 108-193, g 8(a)(3), I17 Stat. 2886.

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LEXSTAT 8 C.F.R 244.10

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*** THIS SECTION IS CURRENT THROUGH THEJLJh'E 24,2010 ISSUE OF ***
***THE FEDERALREGISTER ***

TITLE 8 --ALIENS AND NATIONALITY
CHAPTER I --DEPARTMENT OF HOMELAND SECURITY (IMMIGRATION AND NATURALIZATION)
SUBCHAPTER B --IMMIGRATlON REGULATIONS
PART 244 --TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

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8 CFR 244.10

5 244.10 Decision by the director or Administrative Appeals Unit (AAU)

(a) Temporary treatment benefits. The director shall grant temporary treatment benefits to the applicant if the
applicant establishes prima facie eligibility for Temporary Protected Status in accordance with 5 244.5.
(b) Temporary Protected Status. Upon review of the evidence presented, the director may approve or deny the
application for Temporary Protected Status in the exercise of discretion, consistent with the standards for eligibility in
$4 244.2, 244.3, and 244.4.
(c) Denial by director. The decision of the director to deny Temporary Protected Status, a waiver of grounds of
inadmissibility, or temporary treatment benefits shall be in writing served in person or by mail to the alien's most recent
address provided to the Service and shall state the reason(s) for the denial. Except as otherwise provided in this section,

the alien shall be given written notice of his or her right to appeal a decision denying Ten~porary Protected Status. To
exercise such right, the alien shall file a notice of appeal, Form I-290B, with the director who issued the denial. If an
appeal is filed, tile administrative record shall be forwarded to the AAU for review and decision, pursuant to authority
delegated in 5 103.1(Q(2), except as othenvise provided in this section.
(1) If the basis for the denial ofthe Temporary Protected Status constitutes a ground for deportability or
excludability which renders the alien ineligible for Temporary Protected Status under 5 244.4 or inadmissible under 5
244.3(c), the decision shall include a charging document which sets forth such ground(s).
(2) If such a charging document is issued, the alien shall not have the right to appeal the director's decision denying
Temporary Protected Status as provided in this subsection. The decision shall also apprise the alien of his or her right to
a de novo determination of his or her eligibility for Temporary Protected Status in deportation or exclusion proceedings
pursuant to $8 240.1 1 and 244.1 8.

(d) Decision by AAU. The decision of the AAU shall be in writing served in person, or by mail to the alien's most
recent address provided to the Service, and, if the appeal is dismissed, the decision shall state the reason(s) for the
denial.
(1) If the appeal is dismissed by the AAU under 5 240.18(b), the decision shall also apprise the alien of his or her
right to a de novo determination of eligibil~ty for Temporary Protected Status in deportation or exclusion proceedings.
(2) If the appeal is dismissed by the AAU, the director may issue a charging document if no charging document is
presently filed with the Immigration Court.
(3) If a charging document has previously been filed or is pending before the Immigration Court, either party may
move to recalendar the case after the decision by the AAU.
(e) Grant of temporary treatment benefits. (1) Temporary treatment benefits shall be evidenced by the issuance of
an employn~ent authorization document. The alien shall be given, in English and in the language of the designated
foreign state or a language that the alien understands, a notice of the registration requireinents for Temporary Protected
Status and a notice of the following benefits:
(i) Temporary stay of deportation; and
(ii) Temporary employment authorization.
(2) Unless terminated under 5 244.13, temporary treatment benefits shall remain in effect until a final decision has
been made on the application for Temporary Protected Status.
(f) Grant of temporary protected status. (I) The decision to grant Temporary Protected Status shall be evidenced by
the issuance of an alien registration document. For those aliens requesting employment authorization, the employment
authorization document will act as alien registration.
(2) The alien shall be provided with a notice, in English and in the language of the designated foreign state or a
language that the alien understands, of the following benefits:
(i) The alien shall not be deported while maintaining Temporary Protected Status;
(ii) Employn~ent authorization;
(iii) The privilege to travel ahroad with the prior consent of the director as provided in 5 244.15;
(iv) For the purposes of adjustment of status under section 245 of the Act and change of starus under section 248 of

the Act, the alien is considered as being in, and maintaining, lawful status as a nonimmigrant while the alien maintains
Temporary Protected Status.
(v) An alien eligible to apply for Temporary Protected Status under 5 244.2(1)(2), who was prevented fiom filing a
late application for registration because the regulations failed to provide him or her with this opportunity, will be
considered to have been maintaining lawful status as a nonimmigrant until the benefit is granted.
(3)The benefits contained in the notice are the only benefits the alien is entitled to under Temporary Protected
Status.
(4) Such notice shall also advise the alien of the following:
(i) The alien must remain eligible for Temporary Protected Status;

(ii) The alien must register annually with the district office or service center having jurisdiction over the alien's
place of residence; and
(iii) The alien's failure to comply with paragraphs (Q(4) (i) or (ii) of this section will result in the withdrawal of
Temporary Protected Status, including work authorization granted under this Program, and may result in the alien's
deponatio~x from the United States.
HISTORY: [56FR 619, Jan. 7, 1991, as amended at 56FR23497, May 22, 1991; 58FR58937, Nov. 5, 1993; 60FR
34090. June 30,1995; redesignated at 62FR 10312. 10367,10382, March 6, 1997; 63 FR 63593, 63596, Nov. 16, 1998;
64FR 4780, 4782, Feb. 1,1999, as confirmed at 65FR 82256, 82257, Dec. 28,2000; 66FR 7863, Jan. 26,20011

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

8 U.S.C. 1103. 1254,.1254anofe, 8 CFRpart2.

NOTES: [EFFECTIVE DATENOTE: 64 FR 4780, 4782, Feh. 1, 1999, amended this section, effective Feb. 1, 1999;

66 FR 7863, Jan. 26,2001, delayed the effective date of the amendment appearing at 65FR 62256. 82257, Dec. 28,
2000, until Mar. 30,2001.1

[CROSS REFERENCE: This section was formerly 8 240.10.)
NOTES APPLICABLE TO ENTIRE TITLE:

Other regulations issued by the Department of Justice appear in title 4, chapter 11, title 21, chapter 11, and t~tle 28,
chapters I, 111, and V.

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCE: For State Department regulations pertaining to visas and Nationality and Passports, see 22 CFR,

chapter I, subchapters E and F.

This table shows sections of title 8 of the United States Code and corresponding sections of the Immigration and
Nationality Act and of parts in subchapters A, B, and C of chapter I of title 8 of the Code of Federal Regulations. Those
sections of title 8 of the United States Code bearing an asterisk do not have a corresponding paif in chapter I of title 8 of

the Code of Federal Regulations.
Section 8 USC Sections I. & N.
Act and 8 CFR
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ity specified under paragraphs (141, (20), and (21) of section 212(a) which were a direct result of that fraud or misrepresentation.

(B) A .waiver of deportation for fraud or misrepresentation granb ed under subparagraph (A) shal! a!so operate to waive deportation based on the grovlnds of madm~ss?h~lity
at entry described under
subparagraph (A)(ii) directly resulting from such fraud or misrepresentation.

(2) The provisions of subsection (a)(llJ as relate to a single offense of simple possession of 30 grams or less of marihuana may,, in the discretion of the Attorney General, be waive& for any alien (other than an alien described in subsection (a)(19)) who-
(A) is the spouse or child of a citizen of the United States or
of an alien lawfully admitted for permanent residence, or
(B) has a child who is a citizen of the United States or an
alien lawfully admitted for permanent residence,
if it is established to the satisfaction of the Attorney General that the alien's deportation would result ir. extreme hardship to the United States citizen or lawfully resident spouse, parent, or child of such alien and that such waiver would not be contrary to the national welfare, safety, or security of the United States.

(g) The provisions of subsection (a)(9)(13) shall not apply in the cases described in section 216(c)(4).
APPREIlENSION AND DEPORT>.TION OF ALIENS

SEC. 242. C8 U.S.C. 12521 (a)(l) Pending a determination of deportability in the case of any alien a7 provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided.in paragraph (21, any such alien taken Into custody may, in the discretzon of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or [B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on cond~tional parole. But such bond or parole, whether heretofore or hereafter authoyized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned Jo custody under the warrant which initiated the proceedings against him and detained

until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(2)'" The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's

sentence for such conviction. Notwithstanding subsection (a) log*, the Attorney General shall not release such felon from custody.
(3j(Aj'09 The Attorney General shall devise and implement a

(i) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;
(ii) to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and
(iii) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony and who have been depcrted; such record shall he made available to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any such previously deported alien seeking to reenter the United States.
(Bj The Attorney General shall submit reports to the Committees on the Judiciary of the House of Representatives and of the Senate atthe end of the 6-month period and at the end of the 18-month period beginning on the effective date of this paragraph which describe in detail specific efforts made by the Attorney General to implement this paragraph.

(hj A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall he made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were

present. In any case or class of cases in which the Attorney General believes that such procedure ~rould be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall

be construed to diminish the authority conferred upon the special

'*'* Rereicnce should be to "paragraph (1)" rather than in "subsection fey'.

inquiry officer conducting such procedings. No special inquiry ofiicer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shzll have participated (except as provided in this suhsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent w~thChis Act, as the Attorney General shall prescribe. Such regulations shall include requirements that-

(1)the alien shall he given notice, reasonable under all the circumstances, of the nature of the charges against him and of the-time. .and olace at which the uroceedin~swill be held;
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.. ...

(2) the ded shall have the of heing represented (at no exnense to the Government) by such counsel, authorized to practLe in such proceedings, as he shall choose;
(3) the alien shall have a reasonable oppoftunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Govrnrnenc and
(4) no decision of deportability shall be valid ullless it is based upon reasonable, substantial, and probative evidence.
The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the A.ttorney General shall be final. In the discretion of the Attorney General, and under such regulations &he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not he required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at liis own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (51, (61, ('71, (111, (121,

(14), (151, (161, (17), (181, or (19) of section 241(a1. If any alien who is

authorized to depart voluntarily under the preceding sentence is financially unable, to depart at his own expense and the Attorney General deems hls removal to be in the best interest of the United States, the expense of such removal may he paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may he detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determinat~onof the Attorney General concerning detention, release on bond, or other release during such six-month
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period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may he warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U.S.C. 51, or section 322 of the Act of June 30, 1932, as amended (40 U.S.C. 278a), to expend, from the appropriation provided for the administration and enforcement of the imm~gration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (ipcluding living auarters for officers where none are otherwise ava~lable), and adhnct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter

entered aeainst an alien in leg31 detention or conrillernent, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

(d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulatipns prescribed hy the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identlfication; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or imprisoned not more than one year, or both.'aSB
'OQeThiscrime is classified as a Clsss E felony under B 3559(aIof title 18,United States Code,
find under $53571(b)aod 35716)of title 18,Uiiited States Code, the inasirnum fineis the gnoi-
er &Lhe ernount specified under this secticn or $250.000.

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(e) Any alien against whom a final order of deportation is out-

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-a. standing by reason of being a member of any of the classes described in paragraphs (4,(5), (61, (I),(111, !12), (14),,(15), i161, (171, (18, or (19) of section 241(a), who shall v~ll~fully fall or refuse to

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depart from the United States within a perlad of SIX months from the date of the final order of deportation under admlnlstrative
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processes, or, if judicial review is had, then from the date of the final order of the court, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall conn~ve or conspire, or take any other action, designed to prevent or hamper or with the PUTpose of preventing or hampering his departure Pu'suant to such order of deportation, or shall willfully fall or refuse to present himself for deportation at the time and place requ?red by the Attorney General pursuant to such order of deportatton, shall upon / conviction be guilty of a felony, and shall be imprisoned not more
! than ten years: Prouided, That this subsection shall not make it illegal for any dien to take any proper steps for the Purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his reiease from incarceration or custody: Provided further, That the court may for good cause suspend the sentence of such alien and order his release under such condi-

Lions as
In determlnlng whether good

the court may/ cause has been shown to justify releasing the alien, the court shall

take into accouilt factors as (1)the age,,he$th, and period of

detention of the alien; (2) the effect of the allen s release upon the

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national security and public peace or safety; (3) the likelihood of
the alien's resuming or foilowing a course of conduct which made
i or would make him deportable; (4) the character of the efforts
t made by such alien himself and by representatrves of the cauntry
1 or countries is which his deportation is directed to expedite the
alien's departure from the United States; 15) the reason for the in-

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ability of the Government of the United States to secure passporb,
i' other travel documents, or deportation fawhttes from the country
or countries to which the alien has been ordered deported and (6)

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the eligibility of the alien for discretionary relief under the imml-
gration laws.

(f) Should the Attorney General find that any alien has unlawful-
ly reentered the United States after havlng previously departed or
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a.
been deported pursuant to an order of deportation, whether before
or after the date of enactment of this Act, on any ground described
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in any of the paragraphs enumerated in subsection (el, the previous

order of deportation shall be deemed to be reinstated from its origi-
.$ nal date and such alien shall be deported under such previous
J order at any time subsequent to such reentry. For the purposes of

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subsection (e) the date on which the find~ng 1s made that such rein-

1 statement is appropriate shall be deemed the date of the final !i order of deportation.

r: (gj If any dien, subject to supervision or detention under subsec-
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tions (c) or (d) of this section, is able to depart from the United States under the order of deportation, except that he is financially

unable to pay his passage, the Attorney General may in his discretion permit such alien to depart voluntarily, and the expense of

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such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this Act, unless such payment is otherwise provided for under this Act.

(h) An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole 'I0 supervised release, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.
(i) lil In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.
SEC. 242A. E8U.$.c. (a) IN GENERAL.--T~~

1252aJ Attorney
General shall provide for the availability of special deportation proceedings at certain Federal, State, and local correctional facilities for aliens convicted of aggravated felon~es (as defined in section 101(a)(43).113 Such proceedings shall be conducted in conformity with section 242 (except as otherwise provided in this section), and in a manner which eli~ninates the need for additional detention at any processing center of the Service and in a manner which assures expeditious deportation, where warranted, following the end of the alien's incarceration for the underlying sentence.

(b)IMPLEMENTAT~ON.-~I~~
respect to an alien convicted of an
aggravated felony who is taken into custody by the Attorney General pursuant to section 242(a)(2), the Attorney General shall, to the maximum extent practicable, detain any such felon at a facility at which other such aliens are detained. In the selection of such facility, the Attorney General shall make reasonable efforts to ensure that the alien's access to counsel and right to counsel under

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section 292 are not impaired.

(c) PRESUMPTION alien convicted of an ag-
OF DEPORTABILITY.-An

gravated felony shall be conclusively presumed to be deportable from the United States.

(d) EXPEDI~D PROCEEDINGS.-(1) Notwithstanding any other provision of law, the Attorney General sha!l provide for the initiation and, to the extent possible, the completion of deportation proceedings, and any administrative appeaIs thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.

(2) Nothing in this section shall be construed as requiring the Attorney General to effect the deportation of any alien sentenced to actual incarceration, before release from the penitentiary or correc-

L. 99-603, Nov. 6, 1986, 100 Stat. 3445).

lLZSection242A was inserted by §7347(a) of the Anti.Drug Abuse Act of 1938 (Pub. L. 100-690, Nov. 18. 1988. 102 Stat. 44711, applicable in the case of any aiien convicted of an aggravared felony on or after Nviember i8,1988.

'laClosed parenthesis mining&r "lOl(s)(49)".

69 No. 42 INTERREL 1400
69 No. 42 Interpreter Releases 1400

Interpreter Releases
November 2, 1992
*I400 I3 GRANTS ADJUSTMENT TO TPS SALVADORAN
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In Matter of Escobar-Turcios, ,424-848-532 (11 Oct. 21, 1992). [FN8] Immigration Judge (IJ) John M. BIY-
ant granted adjustment of status under INA $245 in deportation proceedings to a Salvadoran national who had
received temporary protected status (TPS) after initially entering without inspection. The decision is notewoflhy
because aMarch 4, 1991 legal opinion signed by INS Acting General Counsel Paul W. Virtue ruled that TPS ali-
ens who entered without inspection are ineligible for $245 adjustment. [FN9]

The respondent is a 33-year-old native of El Salvador who entered without inspection in 1983. The INS filed
an order to show cause against the respondent in 1983, and he was ordered deported in 1987 in deportation pro-
ceedings conducted in Warlingen, Texas. However, he has not been deported under that order. Pursuant to INA
Q244A, he applied *I401 for and was granted TPS. He is married to a U.S. citizen and has two U.S. citizen chil-
dren.

The respondent filed a federal court action seeking a declaratory judgment that he was eligible for INA 8245
adjustment based on his marriage to a U.S. citizen. The action was dismissed, without prejudice, pursuant to a
stipulation between the respondent and the INS in which the INS agreed to join the respondent in a motion to re-
open deportation proceedings to permit litigation of the issue before the Executive Office for lmmigration Re-
view. In June 1992 the deportation proceedings were reopened and venue was changed to Arlington, Va. The
sole issue before IJ Bryant was whether the respondent was eligible for $245 adjustment.

INA 5245 provides that:

The status of an alien who was inspected and admitted or paroled into the United States may he adjusted by
the Attorney General, in his discretion and under such regulations as he may prescribe, to that Of an alien law-
fully admitted for permanent residence if (1)the alien makes an application for such adjustment, (2) the alien is
eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an
immigrant visa is immediately available to him at the time his application is filed.

The IJ found that the respondent was the beneficialy of an approved 1.130 relative petition filed on his be-
half by his wife and that an immigrant visa was immediately available to him at the time his application for ad-
justment was filed. Accordingly, the 1J found that the only issue before the court was whether the respondent
was eligible to adjust status notwithstanding his entry without inspection.

Part of the TPS provisions, INA $244A(0(4), provides:

(0 BENEFITS AND STATUS DURING THE PERIOD OF TEMPORARY PROTECTED
STATUS.-During a period in which an alien is granted temporary protected status under this section-

(4) for purposes of adjustment of status under section 245 and change of status under section 248, the
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alien shall be considered as being in, and maintaining lawful status as a nonimmigrant
The I1 reasoned:

The plain language of this section of the Act places an alien under TPS into a nonimmigrant status. The re-
quirement that an alien be inspected and admitted into tile United States is subsumed into the congressional act
of grace conferring upon TPS recipients a nonimrnigrant status.

Unlike aliens who were afforded the privilege of extended voluntary departure, Congress has accorded
TPS aliens a nonimmigrant status. Accordingly, as the respondent before me is in status as a nonimmigrant, he
may adjust his status without the necessity of departure and re-entry.

The INS took the position that the respondent could only adjust if he first departed th? U.S., obtained an im-
migrant visa, and the11 entered the U.S. following inspection and admission. The Urejected this contention On
the ground that to require a TPS respondent to return to the country that the Attorney General had determined to
be in an "ongoing armed conflict" would be "internally inconsistent" and would "fly in the face of reason and
impose an unnecessary and unreasonable burden upon him." Accordingly, the IJ specifically held that INA
§244A(0(4) eliminated the need for the respondent to depart the U.S. before adjustment, and granted tile re-
spondent adjustment of status.

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The respondent is represented by Arlington, Va. lawyer Stanton Braverman. The INS is expected to appeal

theIJ's decision.

LFN81. This five-page decision is available through the IWAILA joint reprint service (reprint number IR-
03-1292). The cost is $2.30 by mail, plus $3.00 postagehandling per mail order (not per item); $12.30 by far.

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i /FN9]. See 68 rnierpreter Releases 461 (Apr. 22, 199 11.1 69 No. 42 Interpreter Releases 1400

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LEXSEE 405 F.3D 360,369

UNITED STATES OF AMERICA, Plaintiff -Appellee, versus JOSE NARCISO ORELLANA, Defendant -Appellant.
NO. 04-20094
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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405 F.3d 360; 2005 U.S. App. LEXlS 5436

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April 5,2005, Filed

PRIOR HISTORY: [**I] Appeal from the United States District Court For the Southern District of Texas.

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i COUNSEL: For UNITED STATES OF AMERICA,

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Plaintiff -Appellee: James Lee Turner, Assistant US Attorney, US Attorney's Office, Southern District of Texas, Houston, TX.

i For JOSE NARCISO ORELLANA, Defendant 1 Appellant: Lourdes Rodriguez, Houston, TX.

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i JUDGES: Before HIGGINBOTHAM, SMITH, and j BENAVIDES, Cil-cuit Judges.

OPINION BY: PATRICK E HIGGINBOTHAM

OPINION

[*361] PATRICK E HIGGMBOTHAM, Circuit Judge

I Defendant Jose Narciso Orellana appeals the district court's final judgment of conviction sentencing him to eighteen months' imprisonment. Orellana was indicted under 18 USC. J 922(gl(5)(A) for possessing a fircann 'while being an alien "illegally or unlawfully in the United States." Before trial, Orellana sought dismissal of his indictment on grounds that he was legally present on account of his temporary protected status. The district court denied this request, and Orellana was subsequently

convicted at a bench trial. Because we conclude ihat it is Uncertain whether Congress intended to criininalize the possession of firearms by aliens in receipt of lawful temporary protected status, we apply the [**2] mle of lenity and reverse.

Orellana is a citizen of El Salvador. He entered the United States without inspection at Douglas, Arizona, in Febmary of 2000, and has continuously remained in the United States. In March 2001, El Salvador suffered three severe earthquakes, substantially disrupting living conditions in the county In response to this disaster, the United States Attorney General exercised his authority under 8 U3.C. 5 12540 ("section 1254a") aud designated El Salvador for protected status. ' By virtue of this [*362] designation, nationals of El Salvador may apply for temporary protected status ("TPS"), allowing them to remain in the United States and obtain employment until the countq designation is lifted or their tcmporary protected status is withdrawn.

1 See Designatior~ of El Salvador Under

Temporary Protected Status Program. 66 Fed,

Reg. 14,214 (March 9, 2001).

Upon learning of El Salvadois designation, Orellana filed a TPS application along with an application [**3] for an Employment Authorization Document. In his TPS

application, Orellana disclosed that he was present in the

United States illegally. Both of his applications were granted, and Orellana secured employment as an armed security guard for Bayou City Patrol Division, a Houston private security company. *

2 It is unclear from the record whether Orellaria's applications were approved before or aAer he secured this employment.

The owner of Bayou City Patrol, Manuel Rodriguez, accompanied Orellana to a local pawn shop where he purchased a Taurus 9mm caliber handgun for Orellana's use in his role as a securityguard. Using a Social Secuiity Number that was not his own, Orellana obtained a Texas Commissioned Security Officer Card issued by the State ofTexas and required to be presented to law enforcement officers upon request by all armed security guards. Orellana then obtained a valid Social Security Number from the Bureau of Immigration and Customs Enforcement, but failed to change the number on file with the Texas [**4] Commission on Private Security.

On June 8, 2003, as a result of an ongoing investigation of private security firms employing and anning illegal aliens as security guards in the Ilouston area, federal and local law enforcement agents encountered Orellana while he was working outside a Houston nightclub. He was carrying his Taums 9mm handgun, and upon demand presented his Texas Commissioned Security Officer Card. The agents took Orellana into custody. After waiving his constitutional rights, Orellana admitted that he had entered the United States illegally, and that he had obtained his Commissioned Security Officer Card using a false Social Security Number. Orellana also informed the agents that he had obtained an Employment Authorization Document and had been granted TPS as a citizen of El Salvador.

Orellana was indicted under 18 'SC. 5 92Z(g)(5)(Aj ("seciion 922(gl(5)(AJK) for being an alien illegally or unlawfully in the United States in possession of a fiream. Orellana filed a motion to dismiss the indictment on grounds that he was not present in the United States illegally or unlawfully as he had been granted TPS. The district court denied Orellana's ["S]

motion to dismiss, finding that his TPS registration did not alter his status as an illegal immigrant. AAer a bench trial, Orellana was found guilty and sentenced to eighteen-months' imprisonment followed by a three-year tern of supervised release. He filed a timely notice of appeal.

The sole question we must address in this appeal is whether an alien who enters the United States without inspection and subsequently receives TPS is "illegally or unlawfully in the United States" under seciion 922(g)(S)(A). Orellana argues that the district court erred in failing to dismiss his indictment because he was legally and lawfully present in the United States at the time alleged in his indictment as a result of his temporary protected status. The Government dismisses this argument, contending that TPS confers nothing more than a temporary stay of removal and has [*363j no impact upon the legality of an alien's presence in the United States.

We address these contentions by first looking to the nature of the benefits conferred upon an alien who receives TPS. We then turn to consider whether receipt of TPS renders an alien's presence legal for purposes of

seclion 922(gl(5j(A).

We begin by looking [**6] to the TPS statute to determine the nature and effect of TPS upon a recipient alien. Congress first made TPS available via the Immigration Act of 1990 in response to the problem posed by the presence of aliens from "countries experiencing apparently temporary disruptions creating situations in which providing temporary refuge in the United States was an appropriate policy."

3 We note at the outset that the Government does not dispute that Orellana was properly registered for TPS at the lime of his arrest.
4 Pub. L. No. 101-649, 104 Stat. 4978.
5 RICHARD D. STEEL, IMMIGRATION LAW $ 8:16 (2d ed. 2002).

In order for an alien to be eligible fgr TPS, the alien must first be a national of a foreign state "designated" by the Attorney General. A foreign state may be designated only if certain conditions are present which, in general, prevent nationals of that state from returning in safety. In order to qualify for TPS, an alien who is a national of a designated foreign state must (I) be continuously [**7] present in the United States since the effective date of the most recent designation of that state;

(2) continuously reside in the United Stales from the date that the Attorney General designates; (3) be admissible as

.S. App. LEXIS 5436, **7

an immigrant, subject to certain exceptions; and (4) register during an appropriate registration period. An otherwise qualified alien will be ineligible for TPS if the alien has committed a felony or two misdemeanors in the United States, or is ineligible for asylum under 8 U,SC 5 II58(b)(2)(A).

6 8 U.S.C. 5 1254a(a)(l)

7 These conditions include ongoing armed conflict within the state, natural disasters such as earthquakes or floods, and other "extraordinary and temporarj conditions." See 8 USC. f I254a(b)(/)fA)-(C).
8 8 USC § 1254o(c)(I)(A)(i)-0. Technically, Orellana was not eligible for TPS because he had entered the country without inspection and was inadmissible at the time of his application. See 8

U.S.c j1254a(c)(l)(A)(ii). However, Orellana disclosed his illegal entry on his TPS application, and this application was subsequently granted. This..... raises an inference that Orellana's
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inadmissibility was waived by the Attorney General. See 8 USC 5 1254n(c)(2)(A)(ii) ("Except as provided in clause (iii), the Attorney General may waive any other provision of seclion

/182(nj ofthis title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest[.]").

[**El

9 8 USC 5 I2540(~)(2)(B). An alien will be ineligible for asylum if the Attorney General determines that, inter alia, (I) the alien has

somehow participated in the persecution of a person based on race, religion, nationality,

membership in a social group, or political opinion; (2) the alien has been convicted by final judgment of a "particularly serious crime" and constitutes a danger to the people of the United States; (3) there are serious grounds for believing that the alien committed a serious nonpolitical crime outside the United States prior to the alien's arrival; and (4) there are reasonable grounds for regarding the alien as a danger to U.S. security. 8

U.S.C. 5 1158(6)(2)(A)(~-(iY/.
An alien whose TPS application is approved receives a number of important benefits. First, the alien may not be removed from the United States so long as [*364] the registration is in effect. lo Second, the alien may seek

Third, the

authorization to engage in employment.

alien may travel abroad with the prior consent of the Attorney General. 12 ~~"fih, [**9] the alien is considered to be in lawful immigration status as a non-immigrant for purposes of adjustment of status under

8 7lS.C. $5 1255, 1258. 13

10 See 8 U.S.C. 5 1254a(qi(l)(A).

I I See 8 U.S.C.5 1254a(o)(l)(B).

12 See 8 USC. $ 1254a(i)(3).

13 See 8 USC 5 1254aO)(4).

These benefits are tempered, however, in several ways. TI'S may be withdrawn if the Attomey General finds that a registered alien is statutorily ineligible, the alien fails to maintain continuous physical presence in the United States subject to ceflain exceptions, or the alien fails to register at the end of each twelve-month period foliowing his initial receipt of TpS. 14 Furthemore, as a practical matter, TPS registration necessarily discloses an

othenvise illegal alien's whereabouts, facilitating removal if the alien is later detemined ineligible or has his Status withdrawn, 15 [**lo]

14 See 8 USC g 1254o(c)(3)(A)-(Cl.

15 See STEEL, supra note 5, $ 8:16.

The Attorney General is required to provide all TPS recipients with infomation concerning their status. 16 Specifically, an alien must be provided with a registration document and a notice that lists the benefits of TPS and infomls the alien that failure to ,naintain TPS eligibility

and register annually will in withdrawal of TPS and possible depoltation. 17

An alien registered for TPS is not required to snnendei non-immigrant or any other status that he may previousi~ have been granted, and may acquire non-immigrant status if he has not already done so. l8 In addition, [**Ill while registered for TPS an alien may not "be detained by the .k,ttorney General on the basis of the alien's immigration status in the United States." l9 When the Attomey General terminates a country's TPS designation, registered nationals of that country return to the same immigration status they maintained before TPS, provided such status has not expired or been terminated, Or to any other stahs they may have been granted while registered for TPS. 20

405 F.3d 360, *364; 2005 U.S. App. LEXIS 5436, "'11

18 8 U.S.C. §1254a(a)(5).
19 8 U.S.C. §1254a(dj(4).
20 See 66 Fed Reg. at 14,214.

Although few courts have discussed the effect of TPS upon the legality of an alien's presence in the United States, those that have done so have generally found that TPS renders an alien's presence lawful. 21 In addition, aliens with TPS are considered to be in a "valid status" for purposes of applying for asylum, 22 and to be "lawfully [*365] present in the United States" for purposes of applying for Title [**I21 I1 Social Security benefits. 23 However, aliens with TPS are not considered to be "permanently residing in the United States under color of law," 24 precluding their receipt of such things as unemployment and SSI benefits. 25

21 See Okpa v. INS, 266 FF3d 313, 315 (4th Cir 2001) ("TPS allows an alien to remain in the United States legally . . . ."); Equal Access Educ.

v. Merten, 305 F Supp. 2d 585, 597 (ED. Va. 2004) (finding that an alien who enjoys TPS is "not unlawfully present in the United States," and "currently resides in the United States lenally"):
-. ..
League of United Latin Am. Citizens v. IVilson, 908 F Syop 755, 778 (CD. Cal 1995)

(describing TPS as a category of "lawful immigration status"); but see Saccoh v INS, 24 F. Supp. 2d 406, 407 (ED. Pa. 1998) (finding that an alien whose request for extension of voluntary departure was denied was unlawfully present but protected from removal under TPS).
22 See 8 C.F.R. §208.14(~)(2) (2004). TPS itself is described by the U.S. Citizenship and Immigration Service as a valid form of "temporary immigration status granted to eligible nationals of designated countries (or parts

thereof)" See U.S. Citizenship and Immigration Semices, What is Temporary Protected Status?, at

http:lluscis.govlgraphicslsemices/tps~inter.htm~hatistps (1997)) (citation

and internal quotation marks

(last visited March 25, 2005).

,*A,-,

1' ' 151

23 See 8 C.F.R. J 103.12(a)(4)(ii) (2004).
24 8 U.S.C. § 1254a(Jj(I).
25 See 26 USC. J 3304(0)(14)(A); 20 C.F.R. § ?16J619 (2004); see 8enerflily 20 CFR. § 416.1618 (2004).

In summary, aliens who apply for and receive TPS are allowed to remain in the United States and work,

provided that they register annually and their country of nationality remains designated. They are ineligible for most public assistance programs, but are allowed to apply for adjustment of status as if they possessed lawful non-immigrant status. While registered for TPS, an alien maintains any pre-existing immigration status he previously obtained, and may acquire a new immigration status. Once TPS is withdrawn, an alien reverts to any immigration status that he maintained or was granted while registered for TPS.

We now consider whether an alien's receipt of 'IPS renders his presence in the United States lawful under section 922(g)(j)(A). We review this question of [**I41 statutory interpretation de novo. 26

26 See See Rogers v, Sun Antonio, 392 F3d 758, 761 (5th Cir 2004); United Stores v. Banks, 339 F3d267, 269 (5th Cir 2003) ("Achallenge to an indictment based on the legal sufficiency of uncontested facts is an issue of law reviewed de

novo:').

When interpreting a statute, we begin with "the ianguage of the statute itself" 27 We follow the "plain and unambiguous meaning of the statutory language," interpreting undefined terms according to their ordinary and natural meaning and the overall policies and objectives of the statute. 28 If the statute is ambiguous, we may look to the legislative history or agency interpretations for guidance. 29

27 Consumer Prod. Safity Comm'n v. GTE Sylvania, Inc., 447 US 102, 108, 64 L. Ed. 2d 766, 100S. Cf. 2051 (1980).
28 United Slates v Kay, 359 F3d 738, 742 (Slh Cir. 2004) (quoting Salinas v. United States. 522 US. 52, 57, 139 L. Ed 2d 352, I18 S. Ct. 469

omitted).
[**I51
29 Id.

Section 922(g)(j)(A) provides: "It shall be unlawful for any person . . . who, being an alien . . . is illegally or unlawfully in the United States . . . [to] possess in or affecting commerce, any firearm of ammunition . . . ." 3Q The words ~illegal,yM

and uunlawfullynare not statutorily defined, and must therefore be given their ordinary and

natural meaning. We have observed that "dictionaries are a principal source for ascertaining the ordinary meaning of stac~tory language[.]" '1 Black's Law Dictionary defines "illegal" as "iorbidden by law; unlawful," 32 and defines "unlawful" as [*366] "not authorized by law; illegal." 33 Webster's Collegiate Dictionary defines "illegal" as "not according to or authorized by law," 34 and "unlawful" as "not lawful; not morally right or conventional." 35 Read within the context of seclion 922(gi(j)(A), these definitions indicate that an alien "illegally or unlawfully in the United States" is an alien whose presence within the United States is-forbidden or not authorized by law. l6

30 18 U.S.C. .$922(gl(5)(Al.
[**I61
3 1 Thompson v. Goelznlann, 337 F3d 489, 497

n.20 (5th Cir. 2003).
32 BLACK'S LAW DICTIONARY 763 (8th ed. 2004).
33 id at 1574.
34 MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 577 (10th ed. 1993).
35 Id. at 1294.
36 This definition is consistent with our description of an illegal alien as one who is "in the United States without authorization." Unired Slates v. Igbatayo, 764 F2d 1039, 1040 (5lh Cir. 1983). In lgbarayo, we held that an alien who entered the United States on student non-immigrant statils and subsequenlly failed to maintain his status as a student as required by his visa was "in the same position legally as the alien who wades across the Rio Grande or otherwise enters fhe United States without permission." Id.

Here, Orellma entered the country without inspection, making his initial presence unlawful. However, he subsequently applied for and was granted TPS. As a result, Orellana was granted protection from

removal, authorized to seek employment, and given the ability to apply for adjustment of status as [**I71 if he were in lawful non-immigrant status. While it is true that upon withdrawal of TPS, Orellana would "revert" to his original illegal immigration status, he was in a form of lawful status throughout the time his TPS registration was effective. Thus, the plain language of seclion 922(gl(5)(A) provides support for the proposition that his presence in the United States was lawful at the time alleged in his indictment. At the very least, it does not

unambiguously indicate that his presence was unlawful.

Turning to the overall structure of I8 U.S.C. .$ 922 for additional guidance, we find that it sets forih many restrictions upon the possession, sale, delivery, shipment, transportation, or transfer of firearms by specific persons. In particular, seclion 922(g/ criminalizes the possession or receipt of firearms transported or shipped in interstate commerce by certain categories of persons, including convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated mentally defective, persons dishonorably discharged from the Armed Forces, persons who have renounced their United States citizenship, persons subject to certain restraining [**I81 orders, and persons convicted of misdemeanor crimes of domestic violence. 37 In addition to these categories, serfion 922(g)(5)(B) 38 prohibits aliens admitted under certain non-immigrant visas from possessing firearms without a waiver from the Government. 39 These provisions demonstrate that the objective of seclion 922(' is to prohibit persons within specifically defined groups from possessing, receiving, or transporting firearms. Moreover, the specific types of groups selected for disqualification indicate that the purpose of the statute is that of keeping firearms out of the hands of those typically considered dangerous or irresponsible.

37 18 U.S.C. .$ 922(g)(l)-(41, (6)-(9).
38 This section was added by Congress in 1998.

See Omnibus Consolidated and Emergency Supplemental Appropriations Acl, 1999, Pub. L. No. 105-277, 5 101(b), I12 Stat. 2681 (1998).
39 See 18 U.S.C. 3922(gl(5)(B), (yJ(3).

This understanding of the purpose of section [**I91 922(@(5)(A) is reinforced by examining the statute's legislative history. Section 922(&(5)(A) [*3671 had its origins in Title Vii of the Omnibus Crime Control and Snfe Streets Acr of 1968, 40 as amended by the Gzin Control Acr gf 1968. 41 The Crime Control and Safe Streets Act "started its life as a measure designed to aid state and local governments in law enforcement by means of financial and administrative assistance." 42 Title VII of the Act, introduced as a floor amendment by Senator Russell Long from Louisiana, was "hastily passed, with little discussion, no hearings and no report." 43

40 Pub. L. No. 90-351, 82 Stat. 197 (1968).
41 Pub. L. No. 90-618, 82 Stat. 1231 (1968).
42 UnitedS~atesv. Bass. 404 U.S. 336, 344 n.11,

405 F.3d 360, *367; 2005 U.S. App. LEXIS 5436, **I9

30 L. Ed. 2d 488, 92 S Ct. 515 (1971).
43 Id at 344.

Title VII criminalized the receipt, possession or transportation of a firearm in or affecting interstate commerce by various persons, including convicted felons, mental incompetents, and "aliens [**20] . . . illegally or unlawfully in the United States." 44 Senator Long indicated that his introduction of Title VIl was motivated by the rise of political assassinations and violence in the United States, 45 and his desire to keep firearms away from likely perpetrators. 46 Senator Joseph

Tydings reiterated this concern, noting that the broad purpose of the 1968 Act was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." 47 Echoing Senator Tydings' remarks, Congressman Emanuel Celler, the House Manager of the Act, stated that the "bill seeks to maximize the possibility of keeping firearms out of the hands of such persons" as "drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses . . . ."48

44 18 USC App. g 1202(a)(5), repealed by Fireann Owner's Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (May 19, 1986).
45 See Lewis v. United Stares, 445 US. 55, 63, 63 L. Ed. 2d 198, 100 S CI. 915 (1980) ("It is not without significance, furthermore, that Title VII, as well Title IV of the Olunibus Act, was enacted in response to the precipitous rise in political assassinations, riots, and other violent crimes involving firearms, that occurred in this country in the 1960's."); Bass, 404 U.S.at 345 ("On the Senate floor, Senator Long, who introduced s

1202, described various evils that prompted his statute . . . [including] assassinations of public figures and threats to the operation of businesses

significant enough in the aggregate to ~ffect con~merce.").

[**21]

46 114 Cong. Rec. 14,773-74 (1968) ("Under Title VII, every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny evely assassin, murderer, thief and burglar of the right to possess a firearm in the future. . . . Despite all that has been said about the need for controlling firearms in this Country, no other amendment

heretofore offered would get at the Oswalds or the Gale. They are the types of people at which Title VII is aimed.")
47 S. Rep. No. 1501, at 22 (1968).
48 114 Cong. Rec. 21,784 (1968).

The U.S. Supreme Court has frequently cited to and expounded upon this legislative history when interpreting Title VII. InHuddleslon v. UniiedSlates, the Court noted that "the principal purpose of the federal gun control legislation. . . was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" 49 In Barren v. UnitedStates, the Court declared that "the very structure of the Gun Control Act demonstrates that [**22] Congress did not [*368] intend merely to restrict interstate sales but sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." In Scarborough v. Uniled States, the Court observed that the "legislative

history [of Title VlI] . . . suppoiis the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not he trusted to possess a firearm without becoming a threat to society.'" 51

49 415 U.S. 814, 824, 39 L. Ed. 2d 782. 94 S Ct. 1262 (1974) (quoting S. Rep. No. 1501, at 22 (1968)).
50 423 US 212, 218, 46 L. Ed 2d 450, 96 S. CI.

498 (1976).
51 431 US. 563, 573, 52 L. Ed 2d582, 97s CI. 1963 (1977) (quoting 114 Cong. Rec. 14,773 (1968) (remarks of Senator Long)).

By including illegal aliens within the ambit of Title VIPs prohibitions, Congress evidently believed that such aliens came within the class of untmstworthy persons whose possession of firearms would constitute a threat to society. In upholding section 1202(a)(5), section [**23] 922(gl(5)(A)'s predecessor statute, against an equal protection challenge, the Second Circuit validated this proposition, noting that "illegal aliens are aliens who have already violated a law of this country." 52 The couit observed that illegal aliens are "likely to maintain no permanent address in this country, elude detection through an assumed identity, and --already living outside the law --resort to illegal activities to maintain a livelihood." 53

52 United Slates v. Toner, 728 F2d 115, 128 (2d

Cir. 1984).
53 Id. at 128-29 (quoting United Stotes v. Toner, No. CR82-377 (E.D.N.Y. May 17, 1983) (order denying motion to dismiss a portion of an indictment)).

Congress's decision to include illegal aliens within the categories of persons who are prohibited from possessing firearms does not necessarily indicate an intent to include within the prohibition aliens in receipt of TPS. Unlike illegal aliens who attempt to avoid detection, aliens registered for TPS have [**24] purposefully revealed their whereabouts to the government with the intent of receiving legal protection From deportation and authorization to seek employment. As a result, such aliens are not part of an underground population of persons who, unable to secure lawful employment, have a greater likelihood to engage in criminal conduct. Further, an alien's application for TPS will be denied if it is determined that the alien has committed a serious crime, or otherwise represents a danger to the people of the

United States. s4 Little in this structure signals a Congressional purpose of criminalizing tiream ownership by aliens present under a lawful status. Nor are we aided by the fact that the TPS statute was enacted long after the passage of the Gun Control Act.

54 See supro note 9.

The Govemment urges that we should look for guidance to a regulatory definition of seclion 922(g)(5)(A) promulgated by the Bureau of Alcohol, Tobacco and Firearms. This regulation provides in relevant part that "aliens who are [**25] unlawfully in the United States are not in valid immigrant, non-immigrant or parole status." 55 The regulation further provides that this "term includes any alien . . . who unlawfully entered the United States without inspection or authorization by an immigration officer and who has

not been paroled into the United States under section 212(@(5) ofthe Immigratio~l and Nationoiity Act (INA)." 56 The Govemment argues that this regulation clearly provides that Orellana [*369] is illegally present as he entered without inspection and has not been paroled.

55 27 C.FR. J 478.11 (2004)
56' id.

We decline the Governments invitation to afford weight to the ATF regulation for a number of reasons. First, the legal status of an alien who is granted TPS is

uncertain. It is clear that an alien in receipt of TPS is in a valid status of some type. "The word "immigrant" in the regulation likely refers only to those aliens who are in lawful permanent residents. 58 However, "immigrant" is [**26] also used in the INA as a generic catchall word to refer to "any alien except one who is classified in one of the specified nonimmigrant categories." 59 That is, we do know the breadth ofthe term from the regulation.

57 Seesupra note 21 and accompanying text.
58 See STEEL, supra note 5, 5 2:24 ("The terms or concepts immigrant, permanent resident, permanent resident alien, 'green card' holder, or 'blue card' holder, are synonymous.").
59 id.; see also 8 U.S.C. J IlOl(oJ(l5) ((listing the forms of valid non-immigrant status).

Second, although some deference is due an agencyss interpretation of a criminal statute, 60 the level of deference due an agency's interpretation of a statute imposing criminal liability is uncertain, particularly when the agency lacks expertise in the subject

matter being interpreted. " While the ATF was delegated ,uthority to implement seclion 922(&1, 62 its field of expertise lies outside the realm of immigration [**271 law. Further, given that the plain language and legislative history of section 922(&1(5)(A) lend support to the

that an alien who is granted TPS is legally present in the United States, affording conclusive weight

to a questionable interpretation of an agency regulation cutting the opposite way for the purpose of imposing

liability is inappropriate.

60 See Babbit v Sweet Home Chapter of Cm*. for a Great Or.. 515 US. 687, 703, 132 L. ~d.

2d

597, 115 S Ct. 2407 (1995) (agency regulation interpreting provisions of the Endangered Species AC~imposing criminal liability entitled to "some degree of deference").
61 See Nat'l Labor Relatiom Bd P. Okio. Fixture Co.. 332 F3d 1284, 1287 (10th cir. 2003) (noting that it is "not entirely clear exactly how the Chevron analysis is affected by the presence of criminal liability in a statute being interpreted by an agency," and that deference may depend upon "considerations of the agency's particular expertise").
62 See 18 USC. $" 926jn) (1994), anzended by

nomeland Security Act of 2002, Pub. L. N~. 107-296, 5 11 12(1)(6), 116 Stat. 2135 (striking

405 F.3d 360, $369; 2005 U.S. App. LEXIS 5436, **27

"Secretary" and inserting "Attorney General" throughout the statute).

[**28] Third, we note that in a recent case, the Govemment expressed resenations as to whether the ATF regulation as a whole is entitled to any level of deference whatsoever. 63 Taken together, these considerations militate against affording the ATF regulation dispositive weight in the present case.

63 See United States v. Gayle, 342 F3d 89. 93

n.4 (2d Cir. 2004) ("We requested briefing from [the Government and the defendant] on the import of [27 C.F.R. .f 478.111, and both parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under Chevron . . . even if the statute were ambiguous.").
We are also directed to our court's recent decision in United Sfares v Flores 64 holding that an alien who has received temporary benefits on account of his application for TPS is not lawfully present for purposes of section 922(&(5)(A). In Flores, we found that an alien's receipt of such temporary benefits as protection from removal [**29] and authorization to seek employment did not render him immune to [*370] prosecution under sectio17 922(gi(5)(A) when he had entered the country illegally and had not received a valid form of immigration status. 65

64 404 F3d 320, 2005 US. App. LEX1S 4315, No. 04.20109. 2005 WL 603073 (5th Cir March

We find this decision unassailably correct. Receipt of temporary benefits such as employment authorization or a temporary stay of removal does not render an otherwise illegal alien's presence lawful. 66 Here, however, we are not dealing solely with the temporary extension of benefits pending an administrative ruling upon an application; rather, we are faced with an alien who was actually granted TPS. Unlike an applicant for TPS, whose

benefits are limited to protection from removal and

status may be (and often is) in an unlawful immigration status. We find these differences not without significance, and therefore decline to extend our holding in Flores to the facts of this case.

66 See Hussein v. INS, 661 F3d 377, 381 (5th Cir. 1995) (holding that a temporary stay of removal did not change an alien's previous illegal status into a legal status); United States v. Bazargan, 992 F.2d 844. 848-49 (8th Cir. 1993)

(holding that an alien was illegally present under section 922(&(5)(A) despite his receipt of empluyment authorization).
67 See 8 C.F.R. gF 244.10(e)(i)-(ii) (2004).
68 See 8 U.S.C. .f 1254aItj(3)-(4); 8 C.F.R. Q' 244.10Itj (2004).

Turning to the balance of cases addressing the legality of an alien's presence pursuant [**3l] to section 922(g)(5)(A), we find no authority for the proposition that an alien who has acquired a valid status is "illegally" or "unlawfully" present in the United States. Rather, we find that these cases deal exclusively with scenarios in which an alien has been extended benefits pending the outcome of his or her application for valid status, or lacks any status whatsoever. 69

69 See, e.g., United States v. Aiandi, 376 F.3d 1186, I188 (10th Cir. 2004) (alien whose wife had filed an 1-130 pelition on his behalf but who had neglected to file an application for adjustment of status was illegally present); United States v. Hernandez, 913 F.2d 1506, 1513 (10th Cir. 1990)

(alien who entered illegally was illegally present when he acquired a handgun prior to filing his application for amnesty); Unired States v. Garcia, 875 F2d 257, 257-58 (9th Cir. 1989) (illegal alien not entitled to jury instruction that he was legally present if the jury found that the lNS was aware of his presence and consented to it); Igbatayo, 764 F2d at 1040 (alien whose

non-immigrant student status had expired was present illegally); United States v. Revuelta, 109

F. Supp. 2d 1170, 1174-77 (ND. Cal 2000) temporary

work authorization,

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an

alien whose

application for TPS is granted also receives the privileges

(alien whose wife had filed an 1-130 petition on

his behalf but who was not yet eligible to file an

of applying for adjustment of status and of traveling abroad with prior consent. Importantly, an alien in receipt [**30] of TPS is in lawful status, whereas an alien who has merely been extended temporary benefits awaiting the disposition of his application for lawful

application for adjustment of status was illegally present); United States v. Brissett, 720 F Supp. 90, 90 (SD. Tex. 1989) (alien whose visitor's visa had expired was legally present when he was in

the process of seeking adjustment of status to
lawful permanent resident).

[X*32] 111

Given the ambiguity Of section 922(g)(5ifA), the questionable interpretation and weight of the ATF regulation, and the absence of binding case law on point, we are constrained to apply the rule of lenity in this case. The rule of lenity provides that "when [a] choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to. require that Congress [*371] should have spoken in language that is clear and definite." 70 The policy underlying the rule of lenity is that of fairness to the accused:

Although it is not likely that a criminal
will carefully consider the text of the law
before he murders or steals, it is
reasonable that a fair warning should be
given to the world in language that the
common world will understand, of what
the law intends to do if a certain line is
passed. To make the warning fair, so far as
possible the line should be clear.

70 Jones v, United States, 529 US 848, 849-50, 146 L. Ed 2d 902, 120 Ct, 1904 (2000j (citing United Stotes v. Universal CIT Credit Corp., 344 US 218, 221-22, 97 L. Ed 260, 73 S. Ct. 227

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(lY2iJJ.

1**33]
71 McBoyle v. UnitedStntes, 283 US. 25, 27, 75

L. Ed 816, 51'~. Ct. 340 (1931) (Holmes, I.).
The rule of lenity should not be applied haphazardly,

however, but should be reserved "for those situations in which a reasonable doubt persists about a statute's

intended scope even oflev resort to 'the language and structure, legislative history, and motivating policies' of the statute." 72 Consequently, we will resort to the rule of lenitv onlv "if the text of a statute is o~aaueor

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ambiguous." 73 "The rule-of-lenity is a rule of statutory construction," and should be employed only other canons of have proven unsatisfactory in

ofa criminal statute's 74

72 Moskal v. United Slates, 498 US. 103, 108, 112 L. Ed 2d449. 111 S. Ct. 461 (1990) (quoting BifuIco v. United States. 447 US 381, 387, 65 L. Ed. 2d 205. 100 S. Ct. 2247 (1980)); see also United States v Reedy. 330 FF3d 358, 368 8.13 (5th Cir. 2002) Wespite its status as a tool of last resort, [the rule Of lenity] has a long and established history in the Supreme Court and this circuit. Where, after seizing everything from which aid can be derived, the statute remains ambiguous, the rule of lenity may be applied.").

["*34]
73 ~dminisiafC0s.V. MY.Joint Bd, Shirr & Leisurewear Div.. 337 F3d 454, 457 (5th Cir. 2003).
74 United Stales v. Rivera, 265 F3d 310, 312 (5th Cir. 2001).

Afler conscientiousl~ applying our circuit's rules of statutory construction, we cannot say with certainfi that Coneress intended to crilllinalize the nossession of

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firearms by aliens who have been granted temporary protected status. It ma)' be sound policy, hut as such its wisdom has no call upon the judicial power. When

Congress does una~nhiguously render conduct illegal
throueh anorovriate legislation, it is not our task to offer

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supplementary and clarifying amendments.

IV

For the foregoing reasons, we REVERSE the
judgment of the district court and REMAND with
instructions to dislniss o ~ ~indictment,I ~ ~

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LEXSEE 108 F.3D 63 I

Eugene.WELLINGTON, Petitioner, v. IWGRATION AND NATURALIZATION
SERVICE, Respondent.
No. 95-60795
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

108 F.3d 631; 1997 U.S. App. LEXIS 6090

April 1,1997, Decided

SUBSEQUENT HISTORY: [**I] Rehearing Denied June 19, 1997, Reported at: I997 U.S.App. LEXIS 16985.

PRIOR HISTORY: Petition for Review of an Order of the Board of Immigration Appeals. A29-399-834.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For EUGEN WELLINGTON, Petitioner: David A M Ware, David Ware & Associates, Metairie, LA.

For IMMIGRATION AND NATURALIZATION SERVICE, Respondent: Janet Reno, Oifice of the United States Attorney General, Civil Division, Appellate Staff, Washington, DC. Robert L Bombough, Director, Office of Immigration Litigation, Civil Division, Washington, DC. John B Z Caplinger, Director, Immigration and Naturalization Service, new Orleans, LA. Norah Ascoli Schwarz, United States Department of Justice, Washington, DC.

JUDGES: Before JOLLY, JONES and WIENER, Circuit Judges.

OPINION

[*633] E. GRADY JOLLY, Circuit Judge:

Eugene Wellington asks this court to review and

reverse the decision of the Board of Immigration Appeals (the "BIA") affirming an immigration judge's decision to deny Wellington's motion to reopen his deportation proceedings. Finding a lengthy list of errors in the processing of Wellington's application, we conclude that the BIA abused its discretion when it denied Wellington's motion to reopen.

Wellington was born in Zaire, but is a citizen of Sierra Leone. Wellington first entered the United States as a visitor in July 1986. In August 1989, Wellington maxied Sandra Caridad Baptist, who was then an alien admitted for lawful permanent residence. Wellington and his wife have two daughters together, ages six and seven, both of whom were born U.S. citizens.

One year later, in August 1990, the Immigration and Naturalization Service ("INS") placed Wellington in deportation proceedings. In November 1990, Mrs. Wellington filed a petition to have Wellington classified as an "immediate [**2] relative" for immigration purposes. The petition was approved on February 1, 1991. ' In the meantime, Wellington's deportation hearing was twice rescheduled, ultimately to July 11, 1991. At the July 11 hearing, Wellington conceded that he was deportable for violating the terms of his visitor's status by working as a shoe salesman. The immigration judge ordered Wellington deported, but permitted

voluntary departure by June 16, 1992.

1 Under the Immigration and Naturalization Act (the "EVA"), the spouse of a lawful permanent resident may receive an adjustment of status to lawful permanent resident when an immigrant visa becomes available. 8 U.S.C. § 1154(a)(l)(B) Because the number of such visas is limited, an applicant may have to wait two years or more before a visa is available. See $;S 1151(bj, 1152(a)(4), and 1153(a). The immediate relatives of U.S. cilizens, however, are not subject to worldwide limits on the availability of immigrant visas. $ IlSl(a).

By that date, no immigrant visa had become available. [**3] Wellington did not depart as required. Wellington's wife became a naturalized citizen on Se~tember 16, 1992. Because of his wife's naturalization, Wellington was no longer subject to a waiting Bst, and became immediately eligible for an immigrant visa. 8 USC. $ 115l(b)(2j(A)(i).

On March 4, 1993, Wellington filed a motion to reopen his deportation proceedings on the ground that he was now the beneficiary of an immediate relative immigrant visa, and [*634] was therefore eligible for adiustment of status. INS indicated that it did not oppose reopening, so long as Wellington provided a copy of his wife's naturalization certificate. The immigration judge concluded that Wellington had presented a new fact that was material to his deportation proceeding, and granted the motion to reopen on July 21, 1993.

Wellington's hearing on the reopened proceeding was initially scheduled for September 9, 1993. Wellington states that he and his attorney appeared, but that the INS attomey informed the immigration judge that INS was not ready to go forward. 2 The hearing was then rescheduled to October 14. The hearina was subsequently

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rescheduled two additional times--neither time at Wellington's request--to [**4] December 17 and, finally, January 2f, 1994. Notices of all changes were sewed upon Wellington's attorney, but not

Wellington

himself

The record does not contain any transcript of this hearing, but INS does not dispute Wellington's statement, and the notice of rescheduling is itself dated September 9.

Wellington's attomey misplaced the notice of the January 21 hearing. The attorney submitted an affidavit in which he swore that he had contacted the INS attomey to inquire about the hearing date, and was informed that the hearing was set for January 24. Neither Wellington nor his anorney appeared on January 21. Wellington states that both he and his anorney appeared on January

24. On January 25, the immigration judge issued a form order on which the selection for "neither the respondent nor the respondent's representative was present" was checked. The order continues as follows:
Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request [**5] for relief, I find that the respondent has abandoned any and all claim(s) for relief from deportation.

Wherefore, the issue of deportability having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Nationalization Sewice charging document that the respondent be deported to SIERRA LEONE.

Rec. 7 1 (capitalization in original)

Wellington did not directly appeal the January 25, 199q order, Instead, through his attorney, ~ ~ l l i ~ ~ a second motion to reopen, in which ~ ~ l l i ~ ~ again documentation of his wife's

naturalization and the birth certificates of his Mi0 daughters. Wellington additionally offered the "new fact" of the misinformation provided by the lNS attomey, and the fact that his counsel would have been unable to attend a January 21 hearing. Wellington attached an a affidavit from his attorney attesting to the facts surrounding the

missed hearing.

INS filed its response opposing Wellington's second motion to reopen one week late. ~h~ response was accepted and considered, despite an INS regulation that indicates that to reconsider or reopen "shall be

deemed unoo~osed unless timely response is .1**61.

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made." 8 C.F.R. 6 3.23(b). In its response, INS argued that Wellington's deportation proceedings should not be reopened because Wellington had not established "good cause, within the meaning of the Act" for his failure to appear at the January 21 hearing. The response, filed by

the trial attorney, indicated that she had "no recollection" of any conversation with Wellington's attorney.

The immigration judge denied Wellington's second motion to reopen in a written decision filed April 14, 1994. The ruling first observed that an immigrant seeking to reopen a deportation proceeding must make a prima facie showing of eligibility for the relief sought. The immigration judge further stated that "when the basis for the motion to reopen is that the immigration judge held the hearing in absentia, the alien must establish that he had reasonable cause for his absence from the proceeding." The immigration judge concluded that Wellington had not met the "statutory requirement" of showing reasonable cause for his failure to appear. The court found that it was therefore unnecessary to determine whether Wellington had made the requisite prirno facie showing of eligibility, and denied the [**7] motion to reopen.

The BIA dismissed the appeal on November 22, 1995. The BIA found "no prejudice" to Wellington in the immigration judge's consideration [*635] of the

untimely response. The BIA further observed that

Wellington had been in deportation proceedings for some

time, and should have known the importance of

appearance. The BIA therefore questioned Wellington's

"apparent failure to be independently aware of the

hearing date." The BIA concluded, like the immigration judge, that Wellington had failed to establish "reasonable cause for his failure to appear."

This appeal followed.

I1

We have jurisdiction to review the agency's refusal to reopen under the judicial review provisions of the Administrative Procedure Act, 5 USC. §§ 702-706. The APA specifies, in relevant part, that the reviewing court shall sct aside agency aciiun found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] without observance of procedure required by law." 5 USC § 706(2)(A) and (D). Although MS enjoys broad discretion over motions to reopen, in this case the agency's decision was both arbitrary and based upon a series of actions that did not accord [**8] with the procedures required by law.

The MA permits an alien to apply for an adjustment of status if the alien is eligible to receive an immigrant visa, and a visa is immediately available. 8 USC. f 1255jaj. The parties agree that Wellington is statutorily eligible for adjustment of status. The NA does not specify the procedures by which an alien may apply for adjustment. MS practice requires that aliens who have been found deportable in deportation proceedings seek adjustment of status through the mechanism of reopening their deportation proceedings. See Yahkpua v. INS, 770 F2d 1317, 1318 (5th Cir.1985) (application for adjustment of status construed as request for reopening).

The motion to reopen is not created by the INA itself, but by the regulations enacted pursuant to the MA.

See 8 C.F.R. $5 3.23(b), 242.22. Wellington's deportation proceedings were "reopened" as of July 21, 1993. The much-rescheduled adjustment hearing that Wellington failed to attend was a "deportation proceeding" to which the procedures specified in 8 U.S.C. § 1252 apply. Subsection (b) of this provision indicates that

> ... If any alien bas been given a reasonable opportunity to be [*'9] present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present.

If an alien fails without reasonable cause to appear for a hearing of which he had notice, the immigration judge may properly conduct an in absentia hearing.

If an alien is found deportable or denied discretionary relief in an in absentia hearing, he still may move for reopening. However, an alien who seeks to reopen a deportation hearing that was held in absentia mlrst, in addition to mectinz the normal standards for reopening, demonstrate "reasonable cause" for his failure to attend the previous hearing. US. v. Estrada-Trochez. 66 F3d 733, 736 (5th Cir1995); Patei v. INS, 803 F2d 804, 806 (5th Cir.1986). INS argues on this basis that the BIA properly denied Wellington's motion to reopen because Wellington had failed to establish "reasonable cause" for his failure to appear at the January 21 hearing.

We agree with INS that the enor of an applicant's counsel in misplacing the hearing notice does not

constitute ['*lo] "reasonable cause" for the applicant's failure to appear. 'That point, however, is inapposite to ['6361 this appeal. A demonstration of "reasonable

cause" is a prerequisite to reopening a determination reached in an in abseniia hearing. But no in absentia hearing was held in this case.

3 We do question, however, whether INS' failure to provide Wellington with prrsonal semice of the notice would not constitute "reasonable cause." Under the amended 5 1252h(a)(2), INS is required to provide, "in person," written notice of the time and place of deportation proceedings, and of the consequences of failing to appear. The notice in this case complied with these requirements, except that it was delivered only to Wellington's attorney, and not to Wellington himself--although Wellinrton had nrovided his

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current address in his application for adjustment of status. MS apparently takes the position that the personal notice requirement applied only to Orders to Show Cause. In re Grgalvo, Int. Dec. 3246, 1995 WL 3143S8, at *6 (BIA 1995). Yet 5 l252b applies by its tenns to "deportation

proceedings" (as does g 1252, which the INS repeatedly cites as applicable to this case), and states that "written notice shall be given in person to the alien ... in the order to show cause or otherwise ..." 5 1252b(a)(Z)(A). Also, we have previously applied the provisions of 5 1252b in appeals concerning relief from deportation. See Estrada-Trochez, 66F.3d or 736n. 1.

[**I11 The statute specifically authorizes in absentia hearings, permitting an immigration judge to

"proceed lo a determination in like manner as ifthe were presenf " As the cases cited bv the BIA in is

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decision plainly reveal, an in absenria hearing is a hearing on the merits of the record before the administrative court. See, e.g., Motrer of Baiibundi, 19 I & ?J Dee. 606, 607 (BIA 1988) (affirming decision of immigration judge who "adjudicated the resoondentrs persecution claim based on the written a~~lication

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submitted by the respondent"); Moirer of Naj. 19 1. & N. Dee. 430, 431 (BIA 1987) (alien found excludable in in absentia hearing). See also Pate/, 803 F.2d 01 806

Wellington's application for adjustment of status Was

adjudicated on the merits of the record before the immigration judge. On the contraw, the boilerplate order of January 25, 1994 states that Wellington's application was deemed "abandoned" due to his failure 10 appear.

4 That record contained a copy of Mrs. Wellington's nafuralization certificate, a copy of the Wellingtons' marriage certificate (which reveals that the couple had married before Wellington was first placed in deportation proceedings), and Wellington's application for adjustment of status, which indicates that the couple has two young children who are US. citizens.

Under 3 CFR. g 103.2(6)(13], an application or petition shall be considered "abandoned" if the applicant or petitioner fails to submit requested evidence 01 appear for an intentjew. Presuming that the adjustment hearing may be construed as an "interview," the inlmigration judge properly concluded that Wellin?.ton had "abandoned" his application within the meaning of the regulation. We have no occasion to determine

whether the regulation comports with the requirements of 8 U.SC g 1252(b), because Wellington has not appealed the decision of the immigration judge that his application for adjustment of stafus should be denied due to abandonment. 5 We conclude only that this decision is not the equivalent a detern,ination reached in an it2

obsentio hearing. Because no in obsentio hearing held, the rule that in absentia determinations may Only be reopened upon a showing of "reasonable cause" is inapplicablt..

j we obseme that the same regulation states that he

a denial due to abandonment InaY appealed, although the applicant may move lo reopen, as Wellington did in this case. 8 C.F,R. 103.2(b}(l5)

(**I31 B

The effect of the January 25; 1994 decision was

(immigration judge ordered alien deported in in absentia simply to reinstate the previous deportation
hearing "after reviewing the documentary evidence").

determination. The decision ordered deportation reasons set forth in the Immigration and ~aturaliza~~~"

There is no evidence in the record to indicate that

Service charging document"; the sole charging document

in the record is the August 1990 Order to Show Cause

Accordingly, we conclude that Wellington's February 23, 1994 motion to reopen, is (as it states) a motion to reopen the 1991 proceedings and the resulting December 1991 order of deportation. An alien seeking to reopen a deportation proceeding must both establish eligibility and demonstrate that the "equities" in his case will weigh in favor of granting the discretionary relief for which reopening is sought. Yahkpua, 770 F.2d a1 1320. We review denials of motions to reopen for abuse of discretion. INS v. Doherty. 502 US. 314, 323, 11'2 S Ct. 719, 725, 116L. Ed. 2d823 (1992).

[*637] In this case,the immigration judge and the BIA erred by holding Wellington's motion to reopen to the showing required to reopen a determination reached in an in absenfia hearing. Under the proper standard, it appears that Wellington's motion to reopen should be granted. In his motion, [**I41 Wellington offers the fact that an immigrant visa is now immediately available to him because of his wife's naturalization on September 16, 1992, combined with the visa petition approved in 1991. This fact is material because it makes Wellington eligible for an adjustment of status to lawful permanent resident, and it could not have been presented at the July 1991 hearing.

Wellington's motion additionally offers substantial evidence of "equities" weighing in his favor. He attached two Louisiana birth certificates that indicate that Wellington and his wife were married and had a child together before Wellington was ever placed in deportation proceedings, and that Wellington has two young daughters who are U.S. Citizens by birth. The equities weighing in Wellington's favor appear to exceed those in other cases where reopening has been granted so that an alien could pursue an "immediate relative"

adjustment of status. See Israel v. INS, 785 F2d 738, 740-41 (91h Cir.1986) (discussing "spouse of citizen"

cases).

Although decisions on motions to reopen are discretionq, an agency may not depart from its settled policies without offering a reasoned explanation. INS v. Ynng, [**I51 U.S. , ,117s. C1. 350, 3-73, 136L. Ed. 2d 288 (1996) ("an irrational departure from [settled] policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious [or] an abuse of discretion' within the meaning of the Administrative Procedure Act"); Israel, 785 F2d at 742 (holding BIA decision "arbitrary" for refusing reopening without explanation in case with facts "indistinguishable" from another in which reopening was granted).

The BIA and the immigration judge erred by applying the wrong legal standard to Wellington's motion to reopen. The immigration judge additionally erred by failing to consider the motion unopposed, as required by INS' own regulations. These errors were prejudicial to Wellington, for had his "unopposed" motion to reopen been reviewed under the proper standard, it should have been granted.

Accordingly, we conclude that the BIA abused its discretion when it affirmed the decision of the immigration judge to deny Wellington's motion to reopen. We therefore REVERSE thejudgment of the BIA and REMAND the case for further proceedings not inconsistent with this opinion.

[**I61 REVERSED and REMANDED.

Page l

LEXSEE 22 I&N DEC. 349

INTERIM DECISION: 3369

DEPARTMENT OF NSTICE,
BOARD OF IMMIGRATION APPEALS

October 30, 1998, Decided

HEADNOTES:

(1) Where an alien who did not receive oral warnings of the consequences of failing to appear at a deportation hearing
pursuant to section 242B(a) of the Immigration and Nationality Act, 8 U.S.C. $ 1252h(a) (1994), moves to reopen
depofiation proceedings held in absentia under section 242B(c) of the Act in order to apply for a form of relief that was
unavailable at the time of the hearing, the rescission requirements prescribed by section 242B(c)(3) of the Act are not
applicable. Instead, the motion to reopen is subject to the regulatory requirements set folth at 8 C.F.R. $5 3.2(c) and
3.23(b)(3) (1998).
are reopened to allow for an application for new relief, the

(2)Where deportation proceedings held in
Immigration Judge must determine in each individual case the weight to be accorded to the alien's explanation for
failing to appear at the hearing and whether such explanation is a favorable or adverse factor with respect to the ultimate
discretionary determination.

COUNSEL:

[*I1

William I. Anastasi, Esquire, Hartford, Connecticut, for respondent

JUDGES: Before: Board En Banc: SCHMIDT, Chairman; DUEINE, Vice Chairman; HOLMES, VILLAGEL.IU,

FILPPU, ROSENBERG, and GRANT, ~~~~d ~~~bers.

Concurring Opinion: GUENDELSBERGER, Board Member.
Dissenting Opinion: HURWITZ, Board ~ ~joined by VACCA, HEILMAN, COLE, MATHON, and JONES, b ~ ,

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Board Members.

OPINION:

[**349]
VILLAGELN, Board Member:

The respondent appeals from the decision of an Immigration Judge dated July 1, 1996, finding that she did not
satisfy the requirements for rescinding an in absentia deportation order prescribed by section 242B(c)(3) of the
Immigration and Nationality Act, 8 US.cJ 1252b(c)(3) (1994), nl and denying [**350] her motion to reopen and a

1998 BIA LEXlS 38, '1; 22 1. & N. Dec. 349, **350

appeal will be sustained, a~~d

the record will be remanded for further proceedings

request for a stay of deportation.

nl The provisions of section 242B were stricken from the Act by section 308(b)(6) of the Illegal (migration
Refom and Immigrant Responsibility ~ct

of 1996, Division C of Pub. L. No. 104-208,110 Stof. 3009-546,
3009-615 (enacted Sept. 30, 1996) ("11~1~~).

Similar provisions to address removal proceedings for aliens
issued a Notice to Appear on or after ~ ~1, 1997, were added by section 304(a)(3) of the IIRIRA, I10 i Slat. al

~l

589. which created section 240 of the Act, 8 U.S.C.J 1229a (Supp. I1 1996).
[*21

I. PROCEDURAL OVERVIEW
The respondent is a native and citizen of ~ h who entered the United States on October 22,1993, without a valid ~

~a
for asylum to the Immigration and Naturalization Service.

immigrant visa. She subsequently an
On August 16, 1995, the Service's asylum officer refened the asylum application, without approving it, to an
Ilnmigration Judge for adjudication in deportation proceedings, in accordance with 8 C.F.R. 5 208.14(b)(2) (1995).

an Order to Show Cause and Notice ofHearing (Fom 1-221),
scheduling the respondent for a January 17,1996, depoflation hearing. According to the Order to Show Cause, the
warnings of the consequences of failing to appear at the deportation hearh~g were not read to the respondent, whose

native language is Twi. See sections 242B(e)(l), (5) of the Act.

The asyluln officer served the respondent

On January 17, 1996, the respondent did not appear at her deportation hearing. The Immigration Judge found the
respondent deportable as charged by unequivocal, and convincing evidence under section 241 (a)(l)(A) of the Act,
8 U.S.C. 5 I25f(a)(l)(A) (1994), [*3]as an excludable at entry under section 212(a)(7)(A)(i)(I), 8 U.S.C. .f
immigrant visa. An in absentia order was issued in accordance with

1182(a)(7)(A)(i)(l) (l994), for not i1aving a
section 242B(c)(l) ofthe Act, and the respolldent was ordered deported to Ghana.

On December 15, 1995, the respondent married a United States citizen, who filed an immediate relative visa
petition on her behalf on February 27, 1996. on~~~~h 4, 1996, the respondent filed a motion to reopen accompanied
an application for adjustment of status and supporting documentation.

The respondent's motion also addressed her failure to appear at her Januaiy 17, 1996, hearing. The respondent
averred that she was told by the asylum officer that she would receive formal notice of her hearing in the mail. The
respondent claimed that she did not receive this formal notice, never saw that the hearing date was indicated in the

Order to Show Cause, and failed to appearbecause was unaware of the scheduled hearing. The Immigration Judge
denied the motion to reopen, finding that the respondent did not establish the exceptional circumstances for failing to
appear at her hearing that [*4] were required to

the in absentia order, and that she was not prima facie eligible
to adjust her status because she did not have an approved visa petition. [**3511

On May 24, 1996, the respondent's visa was approved. ni On May 3 1, !996, the respondent filed a new

motion to reopen and requested a stay of depoflation and a change of venue from Boston, Massachusens, to Hartford,

Connecticut. The Immigration ~~d~~ denied this motion to reopen, finding that the respondent had not established
that she had failed to appear at her deportation hearing on January 17, 1996, due to exceptional circumstances. The

respondent has appealed this decision ofthe Immigration Judge, arguing that she is eligible for adjustment of status.

n2 Pursuant to 8 C.F.R. $ 2~$5.2(~)(2)(i)

(1996), the adjustment application was deemed filed on February 27,
1996, the date when the visa was filed. See Mat/erofYodying, 171. & N. Dec. 155 (BIA

1979).

[*5j Ir. ISSUE PRESENTED

The issue before us is whether the exceptional circumstances requirements, res scribed by section 242B(c)(3) of the
Act for rescission of an in absentia deportation order, are applicable to a motion to reopen seeking adjushnent of status
by an alien who did not receive the oral warnings of the consequences of failing to appear at a deportation hearing.

111. APPLICABLE STATUTES
The statutes.in question are sections 242B(c)(l), (3)(A), (e)(l), and (5) of the Act, which read as follows:

(c) CONSEQUENCES OF FAILURE TO APPEAR. --
(I) IN GENERAL. --Any alien who, after written notice required under subsection (a)(2) bas been
providedto the alien or the alien's counsel of record, does not attend a proceeding under section 242,
shall be ordercd deported under section 242(b)(1) in absentia if the Service establishes by clear,
unequivocal, and convincing evidence that the written notice was so provided and that the alien is
deportable. The written notice by the Anorney General shall be considered sufficient for purposes of this
paragraph if provided at the most recent address provided under subsection (a)(l)(F).
(3) RESCISSION OF ORDER. --Such an order j*6] may be rescinded only -.
(A) upon a motion to reopen iiled within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional
circumstances (as defined in subsection (f)(2)), or
(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien
did not receive notice in accordance with subsection (a)(2) or the alien demonstrates that
the alien was in Federal or State custody and did not appear through no fault ofthe alien.
The filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation ofthe
alien pending disposition of the motion.
[**352]

(e) LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE TO APPEAR. -.
(I) AT DEPORTATION PROCEEDINGS. --Any alien against whom a final order of deportation is
entered in absentia under this section and who, at the time ofthe notice described in subsection (a)(2),
was provided oral notice, either in the alien's native language or in another language the alien
understands, of the time and place of the proceedings and of the consequences under this paragraph of
failing, other than because of exceptional [*7] circumstances (as defined in subsection (f)(2))to attend a
proceeding under section 242, shall not be eligible for relief described in paragraph (5) for a period of 5
years after the date of the entry ofthe final order of deportation.
(5) RELIEF COVERED. --The r?:icf described in this paragraph is -.
(A) voluntary departure under section 242(b)(1),
(B) suspension of deportation or voluntary deparmre under section 244, and
(C) adjustment or change of status under section 245,248, or 249.
IV. STATUTORY ANALYSIS
The issue before us is one of statuto~y ~0n~t~~tion.

The object of statutory constmction is to determine the
congressional intent with respect to the legislation enacted. If the statutory language is clear, that is the end ofthe

inquiry, as Immigration Judges and the ~oard, as %,ell as the courts, clearly "must give effect to the unambiguously

expressed intent of Congress." Chevron USA., Inc. v. Natura~Resources Defense Council. Inc.. 467 U.S. 837.843
(198.1). The paran~ount index of congressional intent is the plain meaning of the words used in the statute as a whole.
See INS v. Cardoza-Fonseca, 480 US. 421, 431 (1987); [*XI see also Matter of Grinberg, 201. & N Der YII (BIA
19941. And, it is assumed that the legislative pwpose is expressed by the ordinary meaning of the words used. INSv.
Phinpofhya.464 US. 183, 189 (1984). oreo over, in ascerlaining the "plain meaning" of the statute, the Board "must
look to the particular statuto~y language at issue, as well as the language and design of the statute as a whole." KMart
Gorp. v. Cartie?, Inc., 486 U.S. 281. 291 (1988).

As noted above, the language of section 242B(c)(3) of the Act states that an in absentia deportation order may only
be rescinded, for certain reasons, by way of a motion to reopen. However, section 242B of the Act does not indicate
whether an in absentia order must always be rescinded before reopening proceedings, or whether a motion to reopen
may be granted without first resdnding the deportation order where an alien is eligible for previously unavailable relief
and seeks only adjudication of the new application. Instead, the language of the statute merely prescribes the procedure
for rescinding an in absentia deportation order. Consequently, we start our analysis by examining [*9] the meaning of
the word "rescind" to delemine ~hether such rescission is an implied condition precedent to reopening deportation
proceedings for other purposes. [**353]

According to Black's Law Dictionary, "rescission" means to annul ah initio. Black's Law Dictionary 1306 (6th ed.
1990). The dictionary explains by example that rescission of a contract is "to declare a contract void in its inception and
to put an end to it as though it never were. A 'rescission' amounts to the unmaking of a contract, or an undoing of it from
the beginning, and not merely a termination. . . ." Id. (citation omitted). Thus, by the plain meaning ofthe words in

section 242B(c)(3) of the Act, to "rescind" an in absentia deporlation order is to annul from the beginning all of the
determinations reached in the in absentia hearing. The only reasons that will support such rescission are exceptional

circumstances which prevented the alien from appearing, the alien's incarceration which prevented her appearance, or
lack of notice of the hearing.

Once an in absentia order is rescinded, the alien is then given a new opporhmity to litigate the issues previously
resolved against her at the in absentia I*101 hearing. n3 In other words, the deportation proceedings go back to the Start,
the Service must proceed to prove deportability under the allegations in the original Order to Show Cause, and the alien
must establish any eligibility for relief Matter ofGrijalva, Interim Decision 3284 (BTA 1996). The alien Is returned to
the same status she had prior to the in absentia hearing, namely, an alien charged with deportability and subject to the
already-initiated deportation proceedings. n4

n3 At the in absentia hearing, the Service may present evidence of deportability "in likc manner as if the alien
were present," and all pending applications for relief from deportation are deemed abandoned. Section 242(b) of
the Act, 8 USC $1252(b) (1994); see also Matter ofNoj, 19I & N Dec. 430, 43! (BIA 1987); Mailer of
Jaliawaia, 14 1. & N. Dec. 664 (BIA 1974): cT. WeIIinglon v. INS, I08 F.3d631 (5ih Cir. 1997) (noting that the
alien failed to appear for his deportation hearing on an application for relief afier having conceded deportability).

[*Ill

n4 An analogy to rescission ofadjustment ofstatus under section 246 of the Act, 8 USC 5I256 (1994), is
useful here because Congress is presumed to intend identical meanings when it uses identical words. When
adjustment of status is iescinded, the alien is returned to the status he would have if he had not obtained
adjustment of status. A deportation order does not automatically ensue, and the Service siill needs to pursue the
alien's removal in deportation or removal proceedings where the alien may seek relief from deportation
unavailable in section 246 proceedings. See generally MatlerofBelenzo, 17 I. & N. Dec. 374, 383-84 (BIA

1980, 1981; A.G. 1981); X C.F.R. pt. 246 (1997); cf. 8 C.F.R. 8 242.17 (1997). Similarly, rescission of an in
absentia deportation order merely returns the respondent to the status he had if the order had not been issued,

i.e., an alien subject to proceedings. Also, in keeping with the concept ofannulment ab initio, the respondent's
derivative relatives in section 246 rescission proceedings Lose their status upon the rescission of the principal
alien's adjustment. See Matter of Valiyee, 14 I. & N. Dec. 710 (BIA 1974). In contrast, familial derivatives of a
lawful permanent resident do not lose their status if he is ordered deported and his status is terminated for
misconduct after his lawful admission into the United States.

In contrast, proceedings may be "reopened" when a new question has arisen that requires a hearing. Matter of Ku,

1.71. &N Der. 712 (BJA 1976): [**354] 8 C.F.R. $63.2(c), 3.23(b)(3) (1998). An order reopening proceedings is an
interlocutory order allowing for such a hearing and does not dispose of the merits of the application for relief from
deportation. Matter o/Ku, supra, at 713; see also Malrer ofPena-Diaz, 20 J Br N. Dec. 841 (BIA 1994). If, after
reopening, the requested relief is denied, the respondent remains subject to the original finding of deportability and the
respondent is ordered deported from the United States. When we reopen proceedings for a purpose other than rescission
of an in absentia order, what transpired at previously conducted proceedings is not necessarily abrogated.
There are also other significant differences between a motion to reopen for purposes of rescission and a motion to
reopen for other purposes. For example, the regulations specify that once there is a final administrative order of
deportation, the distiict director may exercise his authority to issue an order of deportation. [*I31 See 8 C.F.R. 3 243.2
(1997); see also 8 C.F.R. $ 241.2(a) (1998) (relating to removal proceedings); cf. 8 C.F.R. 3 242.25 (1997) (relating to
expedited deportation of aggravated felons). Absent a stay of deportation, a pending motion does not prevent the
Service from executing the deportation order except in limited circumstances. See 8 C.F.R. $5 3.2(f), 3.23(b)(l)(v),
(4)(iii)(A) (1998). A motion to reopen in order to rescind pursuant to 8 C.F.R. 5 3.23(b)(4)(iii)(A) is the only motion to
reopen for which an automatic stay of deportation ensues, see 8 C.F.R. $ 3.23(b)(4)(iii)(C), further evidencing that

motions lo reopen in order to rescind are different from motions to reopen for other purposes. See Matter of Rivera,
Interim Decision 3266 (BIA 1996); cf Matler ofRuiz, 20 I.& N Dec. 91 (BIA 1989) (discussing differences behveen
reopening because an in absentia order should be set aside and reopening because other relief may be available that
requires prima facie evidence of eligibility).

In the present case, the respondent was an alien charged with deportability for having entered the United States
without a [*I41 valid immigrant visa before her January 17, 1996, deportation bearing. If the January 17, 1996,
deportation order were rescinded, the finding of deportability would be annulled and proceedings would return to the
stair. However, the respondent's motion does not challenge the finding of deportability. It explains why the respondent
failed to attend her January 17, 1996, hearings, but only seeks reopening of the proceedings in order to address an
entirely new question, her eligibility for adjustment of status. The respondent does not claim that her failure to notice
that the Order to Show Cause contained a date for her previously scheduled deportation hearing constituted exceptional
circumstances for purposes of rescission pursuant to section 242B(c)(3) of the Act. She claims, instead, that she is
eligible for adjustment ofstatus, that such relieffrom deportation is warranted as a matter of discretion, and that her
deportation proceedings should be reopened so that she may establish her eligibility for such relief.

We agree with the respondent's contention that she may establish her [**355] eligibility for adjustment of status at
reopened deportation proceedings. We find that [*151 the requirements for rescission of an in absentia order are
inapplicable to a motion to reopen that does not seek rescission of that order. Where the respondent only seeks
reopening for relief from deportation without challenging the finding of deportability, the applicable section of lhe Act
is section 242B(e)(i), which identifies the aliens precluded from obtaining certain forms of relief from deportation. This
section specifies that if an alien fails to appear at a deportation hearing after receiving oral notice, in a language the
alien understands, of the consequences of failing to appear, the alien is ineligible for 5 years for the forms of relieffrom
deportation listed in section 242B(e)(5) of the Act. Conversely, if the oral warnings are not provided, relief is not

precluded. To mle othenvise would render surplusage the requirement of section 242B(e)(l) that the oral warnings be
given before the consequences ensue.

Section 242B(c)(3) of the Act, which only addresses the procedure for rescinding in absentia orders of deporlation,
cannot be read to negate the section 242B(e)(l) oral warnings requirement by implication. Any ambiguities in the
language ofsection 242B(c)(3) that [*I61 may imply that rescission ofan in absentia order is a condition precedent to
reopening an in absentia deportation order are removed by looking at the language of section 242B(e)(l), which
specifically addresses the preclusive effect of in absentia deportation orders upon future applications for relief from
deportation. The language of section 242B(e)(l) of the Act, requiring oral warnings of the consequences for failing to
appear before precluding relief from deportation, is clear. Without reopening deportation proceedings, there is no fomm
available for an alien who has been served with an Order to Show Cause to apply for voluntary departure, suspension of
deportation, or adjustment of status.

It is a well-settled rule of statutory construction that an entire statute must be read together because no part of it is
superior to any other part, and therefore, if the meaning of a particular phrase or section is clear, no other part of the
statute may be applied to create doubt. 2.4 N. Singer, Sutherland Statutory Constrnction (4th. ed. 1985); accord United
Stares v. Batchelder, 58 F2d 626 (7th Cir. 1978); Pretenn, Inc. v. Duknkis, 591 F.2d 121 (1st Cir. 1979). [*I71 "A
provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because
only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United
Sm. Ass'ri v. Tirnbersof/nwoodForesf, 484 US. 365, 371 (1988) (citations omitted); Pilot Life Ins. Co. v. Dedeaux,
481 US. 41. 54 (i987): Weinberger v. Hynson, Weslcott & Dunning, Inc., 412 US 609. 631-62 (1973); Jarecki v. G.D.
Searle & Co., 367 US. 303, 307-08 (1961). We should not interpret the rescission provisions of section 242B(c) of the
Act in such a way that they render the oral warnings language of section 242B(e)(l) surplusage. See Kungys v. United
Stores. 485 US. 759 [**356] (1988); Colautti v. Franklin. 439 US. 379 (1979); Jarecki v. G.D. Searle & Co., supra.

Applying the rule of statutory construction, expressio unins est exclusio alterius, to the statutory language, we conclude that rescission under section 242B(c)(3) of the Act, based on the limited circumstances listed therein, should not be [*I 81 implied as an additional limitation upon reopening for other purposes when section 242B(e)(l) of the Act expressly requires that oral warnings under section 242B(a) of the Act be given before preclusion of relief: When read in its entirety, the language of section 2428 impliedly excludes in absentia orders without such oral warnings from its prescribed preclusion. See Matter of Lazarte, Interim Decision 3264 (BIA 1996); Singer, supra, 5 47.23, at 194. The rules of statutory constrnction require that the whole statute be given effect to avoid absurd results. Singer, supra, $5 46.05,46.06,46.07, at 90, 104, 110. It would be absurd to preclude reopening by inference under section 242B(c)(3) of the Act where an alien is not precluded from relief under the express language of section 242B(e)(l) for the same conduct. Our finding is further supported by the holding of tbe United States Court of Appeals for the Ninth Circuit in Lahmidi v. INS, 149 F3d 1011 (9th Cir. 1998). In that case, the court concluded that "subsections (a), (c), and (e) [of section 242B of the Act] must be read together, that the provisions are inextricably interhvined, and that the [*I91 sanctions set forth in subsections (c) and (e) cannot be imposed unless the alien receives the procedural [notice] protections provided in subsection (a)." Id at 1015.

A limited interpretation ofsection 242B(c)(I) ofthe Act would also be consistent with the language of the newly amended statute at sections 240(b)(5)(C) and (7) of the Act, 8 U.SC, 5.f 1229a(b)(5)(C) and (7) (Supp. I1 l996), which retain the dichotomy in results between in absentia orders issued with or without such oral warnings. If Congress had intended that an alien ordered deported in absentia without oral warnings must nonetheless establish either exceptional circumstances, incarceration, or lack ofnotice for failing to appear before applying for new relief, it would not have repeated in a subsequent similar statute that in order to preclude relief the alien must receive oral notice that she may be barred from such relief

'i:APPLICATION OF FACTS TO LAW

Upon our review of the record and the respondent's motion, we find that the respondent is entitled to a hearing on

her application for adjustment of status. The respondent is not seeking, pursuant to section [*20] 242B(c)(3) of the Act,
to rescind the order of deportation lhat was entered in her absence. Thus, the requirements for rescission are not
applicable. Rather, the respondent is asking that her case be reopeiled so that she may apply for a form of [**357]

reliefwhich was unavailable to her at the time of her hearing. The respondent's motion to reopen on this basis is subject
to the regulatory requirements at 8 C.F.R. $5 3.2(c) and 3,23(b)(3). See also Matter of Gutienez, Interim Decision 3286
(BIA 1996); Matrer qfCoe1ho. 201 & N Dec. 464 (BIA 1992). Further, where an alien is seeking previously
unavailable relief and has not had an opportunity to present her application before the Immigration Judge, the Board
will look to whether the alien has proffered sufficient evidence to indicate that there is a reasonable likelihood of
success on the merits so as to make it worthwhile to develop the issues further at a fill evidentiary hearing. See Matter
ofL-0-G-, Interim Decision 3281 (BIA 1996).

In the present case, we find that the respondent has met the general motions requirements and has provided
sufficient evidence to indicate a reasonable likelihood [*21] that her application may succeed on the merits. In
particular, she has presented an approved visa petition as the spouse of a United States citizen,an application for
adjustment of status, and other documentary evidence. The approved visa petition was unavailable when the
Immigration Judge ordered the respondent deported in absentia on January 17, 1996, because it was only approved on
May 24, 1996. Thus, the respondent has not only proffered sufficient evidence regarding hcr statutory eligibility for
adjustment of status, but she has also presented new and previously unavailable information to demonstrate that
reopening is warranted.

Given our disposition of this case, we need not determine at this time whether the respondent's reasons for her
failure to attend her original deportation hearing would justify the denial of relief as a matter of discretion. The
1mmigrati011 Judge must determine in each individual case the weight to be accorded to the respondent's explanation for
failing to appear and whether such explanation is a favorable or adverse factor with respect to the ultimate discretionary
determination. See INS v.Doherfy, 502 US. 314 (1992); INS v. Rios-Pinedo. 471 US.444 (1985); [*22] INS v.

Phinpazhya, supra; INS v. Wang, 450 US. 139 (1981); Matter ofEdwards. 20 I. & N. Dec. 191 (BIA 1990); cf. Marfer
ofBarocio, 19I & N Dec. 255 (BIA 1985) (discussing deliberate flouting of immigration laws as a serious adverse
factor in discretionary determinations). Accordingly, we will sustain the respondent's appeal and grant her niotion to

reopen so that she may apply for adjustment of status. n5

n5 The respondent is free to renew her motion to change venue before the Immigration Court, without prejudice.

ORDER: The respondenrs appeal is sustained

FURTHER ORDER: The deportation proceedings are reopened, and the record is remanded to the Immigration
Court for krther proceedings consistent with this opinion.
[**358]
Board Member Lori L. Scialabha did not participate in the decision in this case.

CONCUR BY:

CONCUR:

CONCURRING OPINION: John Guendelsberger, Board Member

'I respectfully concur.

I fully concur [*23J in the majority's opinion in this case. I write separately to briefly address the dissent's assertion
?hat "section 242B(cj(3) of the Act clearly states that where an in absentia order of deportation has been issued against
an alien, the only relief available is to 'rescind' that order." The section contains no such statement. Section 242B(c)(3)
of the Immigration and Nationality Act, 8 U.S.C. J 1252b(cj(3) (1994), instead prescribes the exclusive method for

rescinding such an order upon a to reopen in order to rescind.AS the majority explains, rescission and reopening

are words with different meanings, and legislative purpose is derived from the plain meaning of the words used in the
stahlte as a whole. A" order reopening is an interlocutory order prescribing a hearing because a new
question must be resolved. see~~of K~,tr~ 712~ (BIA 1976); 8 C.F.R. $5 3.2(~), 3.23(b)(3) (1998). An

151,& N. D~~.

ab initio. Black's Law Dictionary 1306 (6th ed.

order to rescind, by contrast, is a substantive determination to

1990). To allow reopening of proceedings following tile issuance of an in absentia order where rescission [*241 b not
required by the statute does not congressional intent, because the totality of the circumstances of the failure
to appear may still be considered in the of discretion for purposes of both reopening and adjudicating the
underlying application for relief sought. ~ ~requires a ~narrower inquiry ~ as to whether exceptional circumstances i ~ ~ i ~ ~

existed for the failure to appear.

DISSENT BY:

HURWJTZ

DISSENT:

DISSENTWG OPMTON :~er~ld ~~~~d hfember, in which Fred W. Vacca, Michael J. Heilman,

S.
Patricia A. Cole, Lauren R. Mathon, and Philemina M. Jones, Board Members, joined
1 respectfully dissent.

The question now before the Board is whether an alien who failed to appear at her deportation hearing and was
ordered deported in absentia under section 242~(~)(1) and Nationality Act, 8 U.S.C. ($1252b(c)(I)

of the 1-igration
first being granted a rescission of the in absentia

(19941, could have her deportation proceedings reopened
deportation order pursuant to section 242~(~)(3) F~~the following reasons, I would find that such an alien

ofthe
must first have the deportation orderrescjnded before her deportation proceedings [*25] can he reopened. [**3591

1. CONGRESS~ONALINTENT
does not clearly indicate whether an in absentia

The majority stares in its opinion that section 242~ ofthe

deportation order must always be rescinded before reopening deportation proceedings. The majority also states that we
must look at Congress' intent in enacting this section the~ctto provide a reasonable interpretation and to resolve the
issue at hand. However, the majority focuses on the use of the word "rescission" in the Act,-and ignores the legislative

history and the language of the doing so, the majority's opinion does not properly reflect the intent of

as a who]e.
Congress in enacting section 242~. melnajo& effectively nullities the strict 242B rescission provisions of

the Act in the vast majority ofmotions to reopen.

It is obvious from the language of the ~~t that congress was concetxed with the aliens who failed to appear at their

deportation hearings. Before the ofsection 212~ to the Immigration and Nationality Act in 1990, Pub. L. No.

:0:-649,104 Sin:. 4978, ~!hich rpvised the procedures to be followed in deportation hearings, Congress asked the
United States General [*26] ti^^office ("GAI~) to examine the proceduiis used at the time to deport and
exclude aliens from the United states. 1989, the GAO its findings to the Subcommittee on immigration,
Refugees, and International Law of the H~~~~committee on the Judiciary. United States General Accounting Office,
GAO/GDD-90-18, Immigration control: ~~~~fiing

and Excluding Aliens From the United States (Oct. 1989)
[hereinafter GAO Report].

In its report, the GAO estimated that in 1987 about 27 percent of the aliens apprehended and placed in deportation
proceedings in New York and L~~A ~failed to appear~ for their hearings. Their nonappearance was due in ~ ~ part to

~]
the general lack of repercussions for failing to appear. GAO ~eport,supra, at 3. Before Congress passed the
Immigration Act of 1990, aliens who did not appear at their deportation hearings suffered no consequences. In fact,
when aliens failed to appear, ~ ~ ~ ~ i ~ ~ ~ t i ~ ~

~~d~~~ closed the aliens' cases, thereby allowing them to avoid

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LEXSEE 23 I&N DEC 253
In re Mario Eduardo VELARDE-Pacheco, Respondent
File A70 178 696 -San Diego
INTERiM DECISION: 3463
DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS

2002 BIA LEXIS 3; 23 1& N Dec. 253

March 6,2002, Decided

HEADNOTES:

A properly filed motion to reopen for adjustment ofstatus based on a marriage entered into afier the commencement of
proceedings may be granted in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the
alien's behalf, where: (I) the motion to reopen is timely filed; (2) the motion is not numerically barred by the
regulations; (3) the motion is not barred by Matrer ofShrhaor, 21 1. & N. Dec. 541 (BIA 1996), or on any other
procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is
bona fide; and (5) the Immigration and Naturalization Service does not oppose the motion or bases its opposition solely
on Matter ofArtbur, 20 I. & N. Dec. 475 (BIA 1992). Matter ofH-A-, Interim Decision 3394 (BIA 1999), and Matier of
Arthur, supra, modified.

COUNSEL:

[*I1

FOR RESPONDENT: Manuel Armando Rios, Esquire, San Diego, California.

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Alan S. Rabinowitz, Deputy District Counsel.

JUDGES: BEFORE: Board En Banc: Schmidt, Villageliu, Guendelsberger, Moscato, Miller, Brennan, and Osuna,
Board Members. Concurring Opinions: Holmes, Board Member, joined by Huwitz, Board Member; Rosenberg, Board

Member; Espenoza, Board Member. Dissenting Opinions: Grant, Board Member; Pauley, Board Member, joined by
Scialabba, Acting Chairman; Dunne, Vice Chairman; Filppu, Cole, Ohison, and Hess, Board Members.

OPINION:

[**253] VILLAGELIU, Board Member:

This case was last before us on June 12,2001, when we dismissed the respondent's appeal from an Immigration
Judge's decision finding him removable as an alien who was inadmissible at the time of entry and ineligible for any

number limits set forth in 8 C.F.R. § 3.2(~)(2).Matter ofH-A-, supra.

The effect of our policy in Matter ofArthur, supra, coupled with the regulation limiting respondents to one motion
to reopen filed within 90 days of a final administrative decision and the Service's inability to adjudicate many 1-130 visa
petitions within that time Frame, has been to deprive a small class of respondents, who are otherwise prima facie eligible
for adjustment, of the oppomnity to have their adjustment applications reviewed by an Immigration Judge. See sections
204(g), 24S(e) of the Act, 8 USC JJ 1154(@, 1255(ej (2000); Immigration Marriage Fraud Amendments of 1986,
Pub. L. No. 99-639, g 5, 100 Stat. 3537, 3543; Immigration Act of 1990, Pub. L.No. 101-649, 5 702, 104 Stat. 4978,
5086; 8 G.F.R. $5 3.2(~)(2), 3,23(b)(3) (2001); see also INS v. DoAerry. 502 US. 314 (1992); [*6] INSv Abudu, 485
US. 94 (1988); Malter oJ Gulierrez, 21 1. & N. Dec. 479 (BIA 1996); Marier of Coelho, 20 I. & N. Dec. 464 (BIA
1992);H.R. Conf. Rep. No. 101-955, at 128 (1990), reprintedin 1990 U.S.C.C.A.N. 6784, 6793.

The Service recently revised its policy on joining untimely motions to reopen for adjustnlent of status. in a

memorandum dated July 16,2001, the Service's General Counsel stated that, given changes to the Act, including the

"stop-time mle" of section 240A(d) of the Act, 8 U.S.C. $1229b(dj (2000), and repeated amendments to seciion 245(i)

of the Act, an amendment to the Service's guidance as it relates to adjustment of status and motions to reopen was

warranted. See Menzorandumfor Regional Counsel for Distribution lo Dislrict andSector Counsel. Office of the

General Counsel (July 16, 2001). The Service withdrew its "extraordinary and compelling circumstances" standard for

joining such a itlotion, stating that assistant district counsels may now join in a motion to reopen for consideration of

adjustment of status if that [**256] relief was not available to the alien at the former [*7] hearing, the alien is

statutorily eligible for adjustment, and the alien merits a favorable exercise of discretion. Id.

We conclude that a properly filed motion to reopen may be granted, in the exercise of discretion, to provide an alien
an oppomnity to pursue an application for adjustment where the following factors are present: (1) the motion is timely
filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Malter of'Shaar, 21 I.
& N Dec. 541 (BIA 1996). or on any other procedural grounds; (4) the motion presents clear and convincing evidence
indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the Service either does not oppose the
motion or bases its opposition solely on Marter ofA~thur, supro.

In the instant case, the respondent filed his first and only motion to reopen before this Board within 90 days of our
decision dismissing his appeal. The respondent was not granted voluntary departure during proceedings before the
Jmil~igration Judge, and he is therefore not barred from adjustment of status for overstaying a voluntary departure
period. See Matter ofShaar, supra. [*8] We find no other procedural bars to his motion to reopen.

Most importantly, the respondent has submitted clear and convincing evidence that his marriage is bona fide, based
on the evidentiary standard set forth at 8 C.F.R. ~5204,2(aj(J)(iiij(B).The respondent has submitted copies of his receipt
for the 1-485 filing fee; his receipt for the 1-130 filing fee that was submitted on his behalf by his wife; his receipt for the
additional sum prescribed by 8 C.F.R. J 24510(b) (2001); his marriage certificate; and the birth certificate of his United
States citizen son. He has also submitted an affidavit attesting that he has known his wife since 1995.

The Form 1-485 filed by the respondent indicates that he and his wife have lived together at their current address
since June 1999. Submission of such evidence, in compliance with the standards prescribed by 8 C.F.R. 5
204,2(a)(l)(iii;l(Bj for establishing the bona fide nature of a marriage by clear and convincing evidence, indicates a high
probability that the respondent's inarriage is bona fide. See Matter oflaureano, 19 I. & N Dec. 1 (BIA 1983); [*9]

Malter ofPhillis, 15 I. & N. Dec. 385 (BIA 1975). The respondent has therefore met the above requirements for
reopening of these proceedings.

We emphasize that we do not endorse granting adjustment of status in every case in which a respondent makes a
prima fake showing of eligibility, nor do we address motions to reopen filed after the 90-day deadline has passed.
Every application necessarily requires examination of the relevant factors and a determination of the weight such factors
should be accorded in the exercise of discretion, with respect both to reopening and to the ultimate determination on the

application for relief Similarly, motions submitted after the 90-day period prescribed by regulation present additional
considerations [**257] regarding the finality of proceedings, which can best be addressed through the Service's
recently announced policy on joining such a motion. he Service is in a better position to ascertain whether additional
factors, which may not be readily apparent, militate against reopening.

In addition, our decision today does not require Immigration ludges to reopen proceedings pending adjudication of
an 1-130 visa petition in every [*101 case in which the respondent meets ail five of the aforementioned factors.
Immigration Judges may still deny motions to reopen if they determine that a respondent's visa petition is frivolous or
that adjustment would be denied in any event, either on statutory grounds or in the exercise of discretion. A prima facie
showing of eligibility merely affords respondents who present sufficient evidence a single opportunity to have their
adjustment applications adjudicated. Such an opportunity is consistent with Congress' legislative intent in amending the
maxiage fraud provisions: that aliens who many after proceedings have been initiated, and who seek adjustment of
status, should be afforded one opportunity to present clear and convincing evidence that-their mamage is bona fide.
compare H.R. Rep. No.-101-723 (I), at 50-52 (1990), reprinted in 1990 u.s.s.C.A.N. 6710,6730-32, with H.R. Conf.

Rep. No. 101-955, at 128.

At the same time, the Service is also provided an opportunity to fully investigate a respondent's claim and present
the results of that investigation to the Immigration Judge, as suggested in the Service's Operations Instruction 245.2(0
(2001). Seegenerally [*I I] Matter ofcavazos, 171. & N DEC.215 (81. 1980) (finding the policy manifest in an
Immigration and Naturalization Service Operations Instruction appropriate for consideration by the Immigration Judge
and the Board in the exercise of discretion).

IV. CONCLUSION
Accordingly, we modify our decisions in Maner qfH-A; supra, and Matter ofArthur, supra, to ailow for the

granting of a motion to reopen to apply for adjustment of status, pending approval of the 1-1 30 vlsa petition by the
Service, in cases where an alien has satisfied the five factors listed above. The respondent has met the requiremen& for
reopening of the proceedings in this case. The respondent's motion to reopen will therefore be granted, and the record
will be remanded to the Immigration Judge for further proceedings.

ORDER: The motion to reopen is granted

FURTHER ORDER: The record is remanded to the immigration Judge for further ~roceedings consistent with the
foregoing opinion and for the entry of a new decision.

CONCUR BY:

HOLMES; ROSENBERG; ESPENOZA

CONCUR:

[**258] CONCURRING OPINION: David B. Holmes, Board Member, in which Gerald S. HurWitZ, Board
Member, [*I21 joined

I respectfully concur. In my view, the issue before us is whether those respondents who can satisfy all of the other
rigorous eligibility requirements for reopening proceedings to pursue an application for adjustment of status based 011 a
maxiage entered into while in proceedings should nonetheless be subject to an additional, absolute bar to reopening that
arises neither from statute nor regulation, but instead is solely ofthe ~0x8~

own creation. See Matter ofH-A-, Interim
Decision 3394 (BIA 1999); Matter ofArthur, 20 1. 81N Dec. 475 (BIA 1992). I find that such a bar is not appropriate
given the development oftbe law in this area.

In this regard, I ain guided by the fact that in 1986 Congress included in the Immigration and Nationality Act an

absolute bar to adjustment for respondents who entered into marriages during the course of deportation or exclusion

proceedings. See hnmigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, $5(b), 100 Stat. 3537,3543

(codified as amended at section 245(e) of the ~ct, 8 U.SC ;$1255(d (Supp. IV 1986)). This preclusion to adjustment

was easy for the Service, [*I31 the Immigration Judges, and the Board to administer because it was absolute.

Moreover, it was exceedingly effective at screening out suspect marriages because all marriages entered into during the

course of proceedings were included in its sweep. However, this same broad sweep also excluded from adjustment

many respondents, including those with United States citizen children, whose marital relationships were bona fide, with

obvious resulting hardship to citizens and lawful permanent residpmts of this country. In response, Congress amended

the Act in 1990 by exempting from the bar an alien who could Gablish "by clear and convincing evidence to the

satisfaction of the Attorney General that the marriage was entered &to in good faith and. . . was notentered into for the

purpose ofprocuring the alien's entry as an immigrailt." Immigration Act of 1990, Pub. LNo. 101-649, 5 702, 104 Stat.

4978, 5086 (codified as amended at section 245(e)(3) of the Act, 8 USC. J i255(e)(3) (Supp. I1 1990)).

This development of the law reflects Congress' intent to rigorously screen out fraudulent or suspect marriages from
eligibility for adjustment of status, but to not [*I41 do so in a manner that unnecessarily includes within its scope
genuine marital relationships. Given Congress' decision in 1990 to replace an absolute bar with one that instead imposes

a higher standard ofproof, it does not seem appropriate to me for the Board to create an absolute bar to reopening in
circumstances in which the statutory goals can similarly be met by the imposition of a more rigorous standard of proof.
Accordingly, I would modify the Board's decisions in Matter ofH-A-, supra, and Matter ofArtI~ur, supra, and apply the
standards enunciated by the Board in Matter of Garcia, [**259] 16 I, & N. Dec. 653 (BIA I978), to cases such as the
respondent's, with the additional requirement that the underlying visa petition be prima facie approvable under the more
rigorous "clear and convincing evidence" standard set forth in section 245(e)(3) of the Act, rather than under the
"preponderance of the evidence" standard that governs other motions within the scope of Matter of Garcia.

In the present case, but for the Board's decisions in Marter ofH-A-, supro, and Matrer ofArthur, supra, the
respondent appears [*I 51 eligible under Matter of Garcia, supra, to have his proceedings reopened to provide him the
opportunity to pursue an application for adjustment of statu's. I find a prima facie showing that the visa petition filed on
his behalf is approvable under the "clear and convincing evidence" standard. See 8 C.F.R. ;$ 204.2(a)(I)(iii)(Bl (2001).
Accordingly, I agree with the majority that the motion should be granted to permit the respondent an oppominity both to
establish his eligibility for adjustment of status and, if eligible, to demonstrate that he warrants such relief in the
exercise of discretion.

CONCURRING OPINION: Lory Diana Rosenberg, Board Member

I respectfuliy concur in the majority's decision to grant the respondent's motion to reopen, as I am in complete
agreement that reconsideration of our opinions in MatterofArthur, 201. & N. Dec. 475 (BIA 1992), and Matter OfH-A-,
Interim Decision 3394 (BIA 1999), is warranted. Upon reconsideration of those decisions, I also agree with the majority
that it is within our discretion to grant a timely motion to reopen seeking a remand to apply for adjustment of status
[*I61 based on a showing of "clear and convincing evidence . . . indicating a strong likelihood that the respondent's
marriage is bona fide." Matter ojVeiarde, 23 I. & N Dec. 253, 256 (BIA 2002).

However, I would not find it necessary to restrict our discretion by imposing the additional condition that "the

Service does not oppose the motion or bases its opposition to the motion to reopen solely on our decision in Matter of
Arthur, supra."Mattei. of Velarde, supra, ar 256. Such a restriction is not warranted by sections 204(g) and 245(e) of
the Immigration and Nationality Act, 8 USC. §J II54(' and 125j(e) (2000), which prompted our prior decision in
Matter of Arthur. supra.

First, the respondent's motion to reopen is timely, as it was filed within 90 days of our ruling on the respondent's
timely appeal from the October 27, 1997, decision of the Immigration Judge. See 8 C.F.R. 5 3.2(c) (2001). It is a
reasonable assumption that the considerations underlying the Immigration and Naturalization Service's current policy of
joining meritorious, untimely motions to enable [*I71 a respondent to apply for adjustment of status also would extend

to meritorious, timely motions. See Memorandum for Regional Counsel for Dishibution to District andsector Counsel,
Ofice of the [**260] General Counsel (July 16,2001) (authorizing the Service to join a motion to reopen seeking
adjustment of status if adjustment was not previously available, and the respondent is eligible and merits a favorable
exercise of discretion). Indeed, all things being equal, it is difficult to imagine a rational reason why the Service would
acquiesce in an untimely motion to facilitate the consideration of an adjustment of status application, but object to a
timely filed one.

Second, at the time we dismissed the respondent's appeal on June 12,2001, the respondent had been married to a
United States citizen for over 2 years, and the couple had a son who was 2 years old. In addition, the respondent had
filed an application for adjustment of status with the Immigration Judge under section 245(i) of the Act. See 8 C.F.R. 5
245.2(a)(l) (2001) (requiring that once an alien is in proceedings, the adjustment application shall be made and be
considered only ['I81 in such proceedings). His application had been properly filed originally in conjunction with his
wife's immediate relative petition seeking an exe~xption of the prohibition on approval of such petitions. See 8 C.F.R. 5
245.2(a)(2)(i) (instructing that adjustment applications filed simultaneously with immediate relative visa petitions are to
be retained when approval of the visa petition would make a visa immediately available at the time of filing the
adjustment application).

Although section 204(g) of the Act restricts the approval of a marriage-based visa petition when the marriage is
entered into during the period that administrative orjudicial proceedings are pending, section 245(e)(3) provides an
explicit exception to that restriction. Specifically, when a respondent establishes by clear and convincing evidence to the
satisfaction of the Attomey General that the marriage was entered into in good faith and in accordance with the laws of
the jurisdiction in which it took place, and that it was not entered into for the purpose of procuring the alien's admission

as an immigrant, the restrictions in section 204(g) of the Act and the prohibition on adjustment [*I91 of status under
section 245(e)(l) of the Act do not apply. Section 245(e)(3) of the Act; see also 8 C.F.R. 5 204,2(a)(l)(iiij(B) (2001)
(listing evidence to be relied upon to meet the bona fide marriage exemption to the inamage fraud provisions in sections
204(g) and 245(e) of the Act).

Accordingly, when a respondent supports a motion to reopen with documentation that contains clear and
convincitig evidence indicating the strong likelihood that his marriage is bona fide, he has made a prima facie showing
of eligibility consistent with the exception provided in section 245(e)(3) of the Act. Although 8 C.F.R. J 204,l(e)(l)
(2001) provides that jurisdiction lies with the Service office having jurisdiction over the petitioner's residence, and 8

C.F.R. 52042(a)(I)(iii)(C) allocates the ultimate authority to approve the visa petition to the Service director, the
Service's authority is not exclusive. See Matter of Obaigbena, 19 1 & N. Dec. 533 [**261] (BIA 1988); acrordMaiier
ofSoriano, I9 I & N. Dec. 764 (BIA 1988). But seeDodig v. INS. 9 F3d1418 (9th Cir. 1993) [*20] (holding that the
district director is charged exclusively with ultimately approving a visa petition). The exception to adjustment preclusion in section 245(e)(3) of the Act, and the regulatory provisions that permit
simultaneous filings and mandate that an adjustment application be filed with the Immigration Judge after an alien is in
proceedings, indicate that the Immigration Judge and the Board share some of the authority delegated to the Attomey
General under section 245(e)(3) of the Act. See 8 C.F.R. $5245.2(a)(l), (2)(i). As the Service explained in interim rules
issl~edon .Il?!y 23, !9e?, th~re is no req~irement that an adjustment applicant bi ihc bcncficiary of an approved, valid,
and unexpired visa petition in order to file an application for adjustment of status. Adjustment of Status to That of
Person Admitted for Permanent Residence; Temporary Removal of Certain Restrictions of Eligibility, 62 Fed. Reg.

39.41 7, 39,419 (1997). Obviously, if the visa petition is filed simultaneously with the adjustment application in
accordance with 8 C.F.R. 5245.2(a)(2)(i), the visa petition could not be already approved. [*21]
The submission of a pending visa petition accompanied by sufficient documentary evidence under 8 CFR. $7

204.2(a)(i)(iii)'(B)with a motion to reopen should suffice to establish prima facie evidence of a bona fide marriage for
purposes of reopening. Looking to such a prima facie showing to determine whether to grant reopening under 8 C.F.R.
5 3.2(c) is consistent with the statutory language in section 245(e)(3) of the Act, reflecting Congress'express intent that
an affected alien have an opportunity to provide clear and convincing evidence of a bona fide marriage. Id.

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In Motrer ofArthur, supra, we insisted on prior Service approval of a mamage-based visa petition before we would
grant reopening for adjustment of status in cases subject to the marriage fraud provisions. Id. a/ 479 (holding that we
would "hereafter decline to grant motions to reopen" until the Service approved the visa petition filed on the alien's
behalo. We found that, for purposes of reopening, a presumption that a marriage claimed on an unadjudicated visa
petition was bona fide in the absence of clear ineligibility conflicted with the terms of [*22] the marriage fraud
amendments. Id (modifying Matter oJGarcia, 161 & N.Dee. 653 (BIA 1978)).

With due respect, our reasoning in Matter oJArrhur confuses the district director's ultimate authoriiyto approve a
visa petition with the authority of the immigration Judge or the Board to determine that a hearing to consider the merits
of an adjustment application is warranted based on preliminary assessment that a respondent has made a prima facie
showing that his mariage is bona fide. MarterofArthur, supra, or 479. In Arthur, we reasoned that given the
respondent's burden of providing by clear and convincing evidence that his marriage is bona fide, a preliminary
evaluation to determine prima facie eligibility was untenable and would amount to a [**262] substantial and
unwarranted intrusion into the district director's authority. Id. ar 478-79 (finding that the "clear and convincing
evidence" standard is, of course, more stringent than the "preponderance of the evidence" standard ordinarily required to
establish a claimed relationship between a petitioner and a beneficiary).

In addition, our conclusion in Arthur [*23] that "an inquiry into whether the evidence submitted in support of a
visa petition is sufficient, in light of the heavy burden imposed on the petitioner, to demonstrate prima facie eligibility. .
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involve on in-depth eranrinafion into the merits of the petition" is erroneous. Id at 479 (emphasis
added). In my view, it distorts what is meant by "prima facie" eligibility.

Black's Low Diciionary defines "prima facie" as "at first sight; on first appearance but subject to further evidence or information." Blackk Law Dictionary (7th ed. 1999). "Prima facie case" is defined as "I. The establishment of a legally required rebuttable presumption" or "2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor."Id Therefore, a prima facie showing is made when the facts asselted, if later proven in a full hearing, would establish eligibility under the statutory standard. Matter of Coeiho, 20 1 & N.Dee. 464. 473 (BIA 1992) (tying prima facie eligibility to statutory eligibility).

The prima facie eligibility standard does not vary according to the particular [*24] substantive burden of proof that is applicable. Rather, it is demonstrated when facts sufficient to sustain the respondent's burden after a hearing are presented in his motion to reopen. In this case, the regulations specify quite clearly the kinds of facts necessary to sustain the respondent's burden ofproducing clear and convincing evidence of a bona fide marriage and trigger the exception allowing adjustment of status nnder section 245(e)(3) of the Act. There is no dispute that the respondent not only asserted such facts, but providedproof of them in connection with his motion to reopen.

We have led that reopening is warranted nnder the prima facie eligibility standard. See Martev ofL-0-G-, 21 I. & N Dec. 413 (BfA 1996). There is no question that we may determine prima facie eligibility under a clear and convincing evidence standard without ruling on the petition itself. Id at 418-19 (recognizing that "the Board historically has not required a conclusive showing that, assuming the facts alleged to be true, eligibility for relief has been established"). By finding prima facie eligibility, we are deciding only that there is a reasonable likelihood [*25] that the statutoly requirements for the relief sought will be satisfied. See MA. v. UnitedStates INS, 899 F.2d304 (4th Cir. 1990); Marcello v. INS, 694F.2d 1033 (5th Cir.), cerl. denied, 462 U.S. 1132 (1983).

Consequently, I must question the Board's unsupported conclusion in Matter ofArthur, supra, that a prima facie eligibility test cannot be used [**263] merely because the standard the petitioner must satisfy in order for the respondent to be eligible to adjust his status to that of a lawful immigrant is greater than a preponderance of the

evidence. Id. at 478-79. Moreover, instead ofrequiring prima facie evidence to support the motion to reopen, the Board
in Arthur required conclusive evidence of eligibility: an approved visa petition. See 8 C.F.R. 5 3.2(c). Such a conclusive
showing for reopening is an inappropriate basis on which to deny a motion to reopen.

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If the Service has serious concerns about the merits of the visa petition, the best way to defeat a motion to reopen is
to adjudicate the visa petition and deny it. Even if that cannot be accomplished during the time that the motion is
pending, the Service still could present evidence that would undermine the respondent's prima facie case. And, even if
ihe Service is unable to defeat a prima facie sbow,ng of eligibili3 before the motion to reopen is granted, the Service
can adjudicate the petition and issue a denial that would ultjmateiy defeat the application ior adjustment ofstatus before
it is adjudicated on its merits in a hearing before the Immigration Judge.

I conclude that, in view of section 245(e)(3) ofthe Act, as implemented by 8 C.F.R. §$2044.?(ql(l/(iii)(B),
245.2(a)(l), and 245,2(a)(2)(r), a respondent's motion 1'301 to reopen seeking an opportunity to apply for adjustment
of status in a case in whicli the marriage was entered aRerproceedings began should be granted when the motion is
supported by prima facie evidence, i.e., clear and convincing evidence indicating the strong likelihood that the
respondent's maniage is bona fide. Therefore, I concur in the majority opinion.

[**265] CONCURRING OPINION: Cecelia M. Espenoza, Board Member

I respectfully concur in the result reached by the majority for the reasons stated herein.

A hndamental interest in our immigration laws is the of the rights ofunited States citizens to Process
immigration visas for designated nlernbers oftheir families. nl The spouse of a United States citizen is a member of
such a class. It is our duty to ensure that the competing interests of immigration enforcement and rights of citizens be
recognized. The rule advanced today sets forth a reasonable, limited remedy.

nl In fiscal year 2000, 69% of all legal immigrants were family sponsored immigrants. SeeRnnualReport:
LegalInimigi-ation Fiscal Year 2000, issued by the Office of Policy and Planning, Immigration and
Naturalization Service, ovailabie at
http:/lu~nu,ins.gov/gril~hics/aboutins/stistic~lImmig~h

('Zegaf
Immigrario~?"). Furthermore, in Boddie v. Comzecrjcut, 401 U.S. 371, 376 (1971). the United States Supreme
Court recognized that "marriage involves interests of basic importance in our sokiety."

I recognize that the right to petition for a spouse is not absolute, as it is balanced against the interests ofthe
government to process and remove aliens who would/raudulentiy enter into marriages to evade immigration laws. See
Immigration Marriage Fraud Amendments of 1986, Pub. L. NO. 99-639, g 5(b), lo0 Stat. 3537,3543 ("IMFA"); see
also H.R. Rep. NO. 99-906 (1986) (on H.R. 3737). reprintediptpart in 1986 U.S.C.C.A.N. 5978-86; S. Rep. No. 99-491
(1986) (on S. 2270). However, the issue presented here is whether the respondent is an individual who meets the
exception to the rule because he has a bona fide marriage. See 8C.F.R. $§ 204.2(a)(I)(iii)(B), 245.I(c)(9)(vl (2001)
(setting forth the bona fide marriage exception and standards). In determining that this individual is entitled to relief, 1
agree with the analysis of Board Member Rosenberg regarding the error ofour prior holding in Matter ofArthur, 20 1.
& N. Dec. 475 (BIA 1992).

Consistent with the position of the majority, I believe that the evidence advanced by the respondent Warrants
reopening. The dissent essentially argues that [*32] the IMFA presumption justifies our prior holdings and can only be
overcome if a visa petition is approved within 90 days of the issuance of our decision. If this were the law, there would
be no need to set forth alternative evidence to demonstrate the bona fides of a marriage. See 8 CFR. §§
2042(a)(i)(iii)(B), 2411(c)(g)(v), n2

n2 The regulation setting forth these alternatives vias issued subsequent to our ruling in Matter qfArlhur,
supra, and was promulgated to specify the evidence that can meet the bona fide marriage exemption to the
marriage fraud provisions in sections 204(g) and 245(e) of the Immigration and Xationality Act, 8 USC. j.6
II54fg) and 1255je) (2000). See Petition to Classify Alien as Immediate Relative of a United States Citizen Or

Appendix C

lOOrn CONGRESS
18%.8.mm.

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To mend the Immigration and Nationality Act ro provide to aliens who are nationals of certain foreign states in crises authorization to remain rempo-rarily in the Uniled Slates.

IN THE HOUSE OF REPRESENTATNES

JULY 13, 1987
Mr.HAZZOLI(for hiniself, Mr.FISH,and Mr. SWINDALL)

introduced the
following bill; which was rdened to the Committee on the Judiciary

A BILL

To amend the Immigration and Nationality Act to provide to aliens who are nationals of certain foreign states in crises authorizatio~: to remain temporarily in the United States.

Be it enmled by the Senate and 'House of Represents-
2 tiwa of the Unilet! Stales of America in Congressassembled,

3 secrrniv1. SHORTTITLE.
4 This Act may be cited as the "Temporary Safe Haven
6 Act of 1887".

2
1 SEC. 2. ESTABLISHMENT OF STATUTORY PROCEDURE TO

PERMIT ALIENS WHO ARE NATIONALS OF CER-

2

TAlN FOREIGN STATES IN CRISIS TO REMAIN

3

4 TEMPORARILY INTHE UNITED STATES.
5 (a) INOENERAL.-T~~ Immigration and Nationality

6. Act is amended by inserting after section 244 the following
7 new section:
8 "AUTHOBIZATION TO REMAIN TEMPORABILY
9 "SEC.244A. (a) INGENEBAL.-111 tile case of tm alien
10 who is national of a country designated 71ode.r subsection 0)
11 and who meets the requirernellts or suhsr,?tion (c),tilt: Attor-
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2 ti f I IIIIIII I ~lcxii(rlrirr niiy irsr~,igii~IIIII,
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23 u~~tler 1)llly ir -

il~is~ubstl~lioll
$4 "(A) the Atter~arGet~oralfinds iha! there i:: an
291 ongoing armed conflict within the slnte nnd, due to
26 tuoh conflict, req~~irir~g

ihc return of alisn~who &rena-

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1 tionals of that state to that state would pose a substan-
2 tial threat ta their personal safety;
3 "(B) the Attorney General finds that-
4 "(i) there has been an earthquake, flood,
5 drought, epidemic, or other environmental disaster
6 in the state (or a portion of the state) resulting in
7 a substantial, but temporary, disruption of living
conditions in the area affected,
"(ii) the foreign state is unable, temporarily,
to handle adequately the return to the state of
aliens who are nationals of the state, and
"'if the foreign state oHieidly has reqt~ested
designation under this paragraph; or
"(C)the Attorney General finds that-
"(i) there exist extraordinary and temporary
16 conditions in the foreign atate, and
17 "(ii) taking into account immigration, human-
I8 itan'sn, and international concerns, requiting the
1B return of aliens who are nationals of that state
20 would not be in the national interest of the United
21 Btatarr.

22 A designation of a foreign stnte under this parmpb ahdl
28 not become effective unlesa notioe of the designation (helud-
24 ing sshhmont of the RnB(nSn under thin pragraph 4rho

4
1 effective date of the designation) is published in the Federal
2 Register.

3

"(2) The de n of a foreign sate under paragraph

4 (1) shall-
5 "(A) fake effect upon the date of publication of
6 the desi&sn under such paragraph, unless the At-
7 torney &nerd otherwise provides in the notice pub-
8 lished under such psmginph, and
9 "03) shdl re& in effect until the date of a de-
10 te-under pmpph (3m).
11 "(3XA1 Not less often than annually the Attorney Gen-

12 eral, for each foreign state for which s designation is in effect
13 under tbis suhetion, ahall review the conditions in that st&@
14 and shan determine whether the conditions continue to justify
15 designation of tho State under this subeection.
16 "@) If the Attorney General determines under subpa*
17 graph (A)that a foreign stste no longer meets the conditions
18 for designation under parsgraph (I), the Attorney Gienerd
19 shd terminate the designation by publishing notice in the

20 Federal Register of tbe determination under this subpms-

21 graph (including the bash for the determination). Such wrmi-
22 nation is effective in accordance with nubsection (as).
23 "(0Ifthe Attorney (fenera1 determines under subpar*
24 gaph (A) that a foreign state continues to meet the condi-
25 tions for the designation, the Attorney Q8nfir~l my extend

5
1 the designation md shall provide on a timely basis for the
2 publication of notice of the determination (including the basis
3 for the extensiw) in the Federal Register.
4 "(c) ALIENSELIGIBLE

POB BENEFITB.--(~) Subject to
5 paragraphs (2) and (3),an alien. who is a national of a state
6 designated under subsection (b), meets the requirements of
7 this paragnrph only if-
8 "(A) the &en has been continuously physically
9 present in the Unitad States since the effective date of

10 the most recent deaiguation of that state; and

11. "(B)to the extent and in a manner which the At-
12 torney General establishes, the alien registers for the
13 benefits of this section.
14 The Attorney General may require payment pf a reasonable
15 fee as a condition of registering an alien under subparagraph
16 (B)or otherwise providing an alien with an 'employment au-
17 thorized' endorsement or other appropriate work permit
18 under this section.
19 "(2) An alien is not eligible for the benefits of this see-
20 tion if the Attorney General finds that-
21 "(A) the alien is deportable on any ground other
22 than under-
23 "6)paragraph (1) of section 241(a) as such
24 paragraph relates to a ground for exclusion de-

6
1 mibed in h (14), (20), (211, (25). or (32)
2 of secrioa ZlfMd, or
3 "C$ b (2). (9), or (10) of aection
4 241(& or
"(B)tbe &is dewibed in seetion 243(hX2).

6 An alien wh wa~Lmnitted to the United Statea as a no&-
7 tiam for the benefit0 of thia section untiI the
8 dien'e pariod of UIM

ahy as such a nonimdgrant hss

9-

"(3) The Attomay &nerd shall withdraw any benefits
11 provided to andienunder thin section if-
12 "'(A) the Atkmey (hued finds thst the alien
13 wss noL in ker eligiile for such benefits under this
14 e,

"(B) except as provided in pangraph (4) tmd sub-
16 section (e)(4), the dien baa not remained continuously
17 phyxicdly present in the United States from the date
18 the &en 6rst wsir provided benefits under this section,
19 or

"(0)the alien fails to register with the Attorney
21 &nerd muslly, in a form and manner specified by
22 &he Attorney &nerd.

28 . "(4) For purposae of pmp~pba(NA) and (3)(A)of this
24
subsection 8nd subseation (0, an alien ahdl not be considered
to have failed to maintain continuous phyaied presence in the

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7
1 United States by virtue of brief, casud, and innocent ab-
2 sences from the United Stntes.
3 "(d) Docvrarr~~~~io~.--@)

At the time of approval of

4 bemfite with respeet to an alien under subsection (c), the

5 Attorney Genera! shall provide for the issuance of such tern-

6 porary documentation and authorization as may be necessary

7 to ccarry out the ppurposes ofthis section.

"(2)Subject to paragrnphs (3) and (4), such doeumenta-

9 tion and authorization shall be valid for an initial period of
10 not less than 6 months (or 3 months in the case of an alien
11 who is a national of a state designated under subsection
12 @)(I)@)) and not more than 18months. The Attom~y Oen-
13 era1 may stagger the periods of validity of the documentation
14 and authorization in order to provide for an orderly renewal
15 of such documentation ad authorization and for an orderly
16 transition (under paragraph (3)) upon the termination of a
17 designation of a foreign state.

"(3) If the Attorney General terminates the designation
19 of a foreign state under subsection @)(3@), such termination
20 shall only apply to documentation and authorization iasued or
21 renewed after the date of the publieation of notice of the
22 determination under that subsection (or, at the Attorney
23 hneral'a option, sfter such period after the date of the find-
24 ing as the Attorney General determines to be appropriate in
26 order to provide for an orderly transition).

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"(e) BBNE~ OF EX-

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2 TBNEION.--DU~~~~

1

a priod in which an alien is provided
3 bedbundarthis &-

4 "(1) tlia dienshPll aot be conaidered to be pem-
5 d~ in the United States under wlor of law;
6 "(2WA) rha &en shJl not be eligible for any pro-
7 grim of m furnished under Federal Inw,
8 adIB) a SWa or politiml subdivision may treat the
9 &n as b&g &dully pressnt in the United States
10 fw purposes d &tarmining the alien's eligiiility for
11 SU md lwd progruns of public assistance;
IS "(3) the alien, with the prior consent of the Attor-
13 ney &nerd, my travel abroad temprarlfy; and
14 "(4) the pea sbsU not be eounted ss a period of
15 physicd p~e8emin the United States for purposes of
16 section 244($.
17 "(0 CONE~UCTIONOF Wom0~8.---(I)Nothing in

18 this sebtion &a3 be wnstrned 8s requiting that an alien must

19 be apprehended in order to become eligible for benefits under

20 this aeetion.

21 "(2) This section SWconstih~ta the exdusivc authon'ty
22 of the Attorney Oened under law to permit aliens (who are
23 otherwise deportable or who have been paroled into the
24 Umted States by virtue of $heir particular nationality or
25 rogion of foreign state of nntionality) to remain in the United

States tempody by virtue of their particular nationality or region of foreign state of nationality. The previous sentence shall specifically supersede the Attorney General's authority to extend periods ofvo1unts-y departure under the ninth sentence of section 2426) or under section 244(e)(l), or to provide for deferred action in cases covered under the previous sentence. hut shall not supercede section 243(h).

"(g) ANNUALRBWBT.-T~~Attorney General shall report to the Committees on the Judiciary of the House of Representatives and of the Senate annually on the operation of this section. Each report shall include a listing of the foreign states desigd under this section, the number of nationals of each such state who are provided benefits under this section, and an explanation of the reasons why foreign states were designated, or not designated, under subsection

(b) and, with respeet to foreign states previously designated, why the designation wm terminated or continued under such subsection.
"fh) NOR~mw.-There shall be no judicial review of any determination of the Attorney General under this section.".

0)CLEBICAL&ND?~ENT.-T~~table of contents of such Act is mended by inserting after the item relating to section 244 the following new item:

"8ec. 244A. Authorirstion to remain lemporarib.".

[The prepared statement of Ms. Meissner follows:]

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TITLE VI--CENSUS

Sec. 601. Prevention of congressional reapportionment distortions.
Sec. 602. Sevetability.

SEC. 102. NATIONAL LEVEL OF IMMIGRATION.

(a) WORLDWIDE LEVEL OF IMMIGRATION- (1) Section 201 (8 U.S.C. 1151) is amended to read as foilows:
'WORLDWIDE LEVEL OF IMMIGRATION

'SEC. 201. (a) IN GENERAL- Exciusive of aiiens described in sub&ction (b), aiiens born in a foreign state or dependent area
who may be issued immigrant visas or who mayotherwise acquire the status of an alien iawfuily admitted to the United States
for permanent residence are limited to--

'(1) family connection immigrants described in section 203(a) (or who are admitted under section 21l(a) on the basis of
a prior issuance of a visa to their accompanying parent under section 203(a)) in a number not to exceed in any fiscal year
the number specified in subsection (c) for that year, and not to exceed in any of the first 3 quarters of any fiscai year 27
percent of the woiidvride ievei under such subsection for ail of such fiscal year; and

'(2) independent immigrants described in section 203(b) (or who are admitted under section 2ll(a) on the basis of a
prior issuance of a visa to their accompanying parent under section 203(b)), in a number not to exceed in any fiscal year
the number specified in subsection (d) for that year, and not to exceed in any of the first 3 quarters of any fiscal year 27
percent of the woridwide level under such subsection for all of such fiscal year.

'(b) ALIENS NOT SUBIECT TO DIRECT NUMERICAL UMITATIONs- The following aliens are not subject to the worldwide leveis
or numerical limitations of subsection (a):

'(l)(A) Speciai immigrants described in subparagraph (A) or (0) of section 101(a)(27).

'(8)Aliens who are admitted under section 207(c) pursuant to a numerical limitation estabiished under section 207(b).

'(C) Aliens whose status is adjusted to permanent residence under section 210, 21OA, or 245A.

'(D) Aliens provided permanent resident status under section 249.

'(2)(A)(i) ALIENS WHO ARE IMMEDIATE RELATIVES- For purposes of this clause, the term 'immediate relatives' means
the children, spouses, and parents of a citizen of the United States, except that, in the case of Parents, such citizens shall

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FAMILY UNITY AND EMPLOYMENT OPPORTUNITY XMMIGRATION ACT OF 1990(House of Representatives -
October 02,1990)

....

Mr. BONIOR. Mr. Speaker, by direction of the Committee on Rules, Icall up House Resoiution 484 and ask for its immediate

consideration.

The Clerk read the resolution, as follows:

H.Res.484
Resolved, That at any time after the adoption of this resolution the Speaker may, pursuant to clause l(b) of rule XXIII,

declare the House resolved into the Committee of the Whole House on the State of the Union for the consideration of the bill

(H.R. 4300) to amend the Immigration and Nationality Act to revise the system of admission of aliens on the basis Of family
reuniflcation and to meet identified labor shortages, and for other purposes, and the first reading of the biil shall be dispensed
with. Ali points of order against consideration of the bill are hereby waived. After general debate, which shall be confined to
the biii and the amendmen& made in order by this resolution and which shall not exceed ninety minutes, with SiXW minutes
To be equally divided and controlied by the chairman and ranking minority member of the Committee on the Judiciary, and
with thirty minutes to be equally divided and controlled by the chairman and ranking minority member of the COmmittee On
Education and Labor, the bill shall be considered For amendment under the five-minute rule. It shall be in order to consider
the amendment in the nature of a substitute recommended by the Committee on the judiciary now printed in the bill, as
modified by the amen4ments printed in part 1of the report of the Committee on Rules actompanying this resolution, as an

Driginal bill for the purpose of amendment under the five-minute rule, said substitute, as modified, shall be considered as having been read, and ali points of order against said substitute, as modified, are hereby waived. No amendment to said substitute shali be in order except those printed in part 2 of the report of the Committee on Rules. Said amendments shall be 'considered in the order and manner specified in the report, shall be considered as having been read, shall be debatable for 'the period specified in the report, equally divided and controiled by the proponent and a Member opposed thereto. Said Bmendments shaii not be subject to amendment except as specifled in the report, and said amendments shall not be subject to a demand for a division of the question in the House or in the Committee of the Whole. All points of order are hereby :waived against the amendments printed in the report. It shall be in order to consider the amendments by Representative :Richardson of New Mexico numbered 18 and printed in the report of the Committee on Rules en bloc. At the C~ncl~Sion

Ofthe ;consideration of the biii for amendment, the Committee shall rise and report the bill to the, House with such amendments as may have been adopted, and any Member may demand a separate vote in the House on any amendment adopted in the :Committee or the Whole to the bill or to the amendment in the nature of a substitute made in order as original text by this resoiution. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without :intervening motion except one motion to recommit with or without instructions. ARer passage of H.R. 4300, it shall be in .order to take from the Speaker's table the bill 5. 358 and to consider the bill in the House. Itthen shall be in order to move to strike ail after the enacting clause of 5. 358 and insert in lieu thereof the provisions of H.R. 4300 as passed by the House, and all points of order against the motion are hereby waived. Itshail then be in order to insist on the House amendment and to request a conference with the Senate thereon.

The SPEAKER pro tempore (Mr. Montgomery) The gentleman from Michigan [Mr. Bonior] is recognized for f hour.

Mr. BONIOR. Mr. Speaker, for purposes of debate, I yield the customary 30 minutes to the gentleman from Tennessee [Mr.

:Quillen], pending which Iyield myself such time as Imay consume.

Mr Speaker, today we have an opportunity to cons~der pmfamily legislabon.

IH.R. 4300--the Family Unity and Employment Opportunity Immigration Act--substantially revises our Nation's laws to help
:unite immigrant families.
. .

?he number of slots wouid be expanded so that children and spouses of permanent residents may join their families in this

country.

The wait for family reuniflcation can be long and painful. For natives of most countries, the wait averages 3 years. For

'countries with long backlogs, such as Mexico, families can beseparated for as long as 15 years.

Not only is it ant,ifamily to allow such long separations, it is also counterproductive. For itonly encourages illegal immigration :
as the best way to become united with loved ones.

'1n addition to its famiiy unity provisions, H.R. 4300 would also help diversify our immigrant population by broadening the
numbers ailowed from countries who have been largely shut out in the last quarter century.

Visas are speciflcaliy set aside for natives of Eastern Europe, for instance. The end of the cold war and the dramatic changes :
,of the past year call For a revision in our existing East European immigration policies.

Ir~dividualsfrom countr~es adversely affected by current law--such as Ireland, Italy, Poland, and Argentina--will now have the
opportunity to apply for conditional res~dence status if they have a Rrm offer of employment for I year.

The rule under which this bill will be considered also makes in order legislation to extend the time that Salvadoran and other
:~oliticalrefugees may stay in this country.

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Mr. DORGAN of North Dakota. Mr. Chairman, would the gentleman go over that again'

Mr. SMITH of Texas. Mr. Chairman, because we are not certain how broad the amendment is, Iam going to still urge its
:rejection, but certainly would work with the gentleman between now and the conference committee to try to work out the :
situation that he described

Mr. DORGAN of North Dakota. Mr. Chairman, let me in just 30 seconds say that Ihave heard objections from the Immigration
Service as they insisted on their right to jail someone who had a 6-week-oid nursing infant. It is wrong in this Country to do
that. This legislation is protective of society against those who commit heinous crimes, those involved in drug traffic and
more.

Iurge that the House adopt this pollcy by adoptlng this amendment

Mr SMITH of Texas. Mr. Chairman, Iy~eldback the balance of my tlme

Mr. DORGAN of North Dakota. Mr. Chairman, 1 y~eld back the balance of my time.

The CHAIRMAN The question is on the amendment offered by the gentleman from North Dakota [Mr. Dorganl

The amendment was agreed to,

Mr. DAVIS. Mr. Chairman, Iask unanimous consent to engage the gentieman from Texas [Mr. Brooks], the chairman of the :

full committee, in a colloquy.

the CHAIRMAN. Is there objection to the request of the gentleman from Michigan?

There was no objection.

The CHAIRMAN. The gentleman from Michigan [Mr. Davis] is recognized.

:Mr. DAVIS. Mr. Chairman, may Isay to the gentleman from Texas [Mr. Brooks] this involves section 311, the amendment
!hat was adopted some time ago concerning the handling of cargo on tank vessels. Iwas not here when we brought that
.amendment up.

:Mr. Chairman, Irise in strong support of the amendment offered by Mr. Brooks on the loading and unloading of cargo on oil
tankers and hazardous chemical carriers. This amendment recognizes the significant safety and environmental problems
,relating to cargo handling on these types of vessels and wiil continue to recognize the critical role of the crew in these loadin(
and unloading evolutions. This amendment represents a significant improvement to this section of H.R. 4300; however, it
does not address an issue of significant concern to vessels transiting the Great Lakes. Although our respective staffs have
.been working over the last 4 days to deal with this complicated issue, we simply ran out of time. Inow the gentleman is well
aware of the concerns which relate specificaily to the transportation and loading of raw materials such as, iron ore and
!limestone. Is itthe gentleman's intention to address these issues in the conference report?

:Mr. BROOKS. Mr. Chairman, will the gentieman yield?

:Mr. DAVIS. Iam pleased to yield to the gentieman from Texas.

:Mr. BROOKS. Mr. Chairman, may Isay to my friend, the gentleman from Michigan [Mr. Davis], Iwant to thank the

'gentleman for his comments.

To answer the gentleman's specific question, it is in fact my intention to consider the concerns that arise with respect to the
'so-called self-unloaders which transit the Great Lakes, and Iwill continue to work toward that end. I would hope that we
couid reach an acceptable solution.

Mr. DAVIS. Mr. Chairman, I want to thank the gentieman from Texas, the chairman of the full committee, for his assurances.

;I again urge suppofi for this amendment.

The CHAIRMAN. It is now in order to consider amendment No. 16, printed in part 2 of House Report 101-786.

AMENDMENT OFFERED BY MR. MC COLLUM
Mr. McCOLLUM. Mr. Chairman, I offer an amendment.
The CHAIRMAN. The Cierk wiil designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. McCollum: Strike section 324 (relating to temporary protected status for nationals of El Salvador,
:Lebanon, Liberia, and Kuwait, and other designated foreign States).
The CHAIRMAN. Under the rule, the gentleman from Florida [Mr. McColium] will be recognized for 10 minutes, and a Membe

opposed will be recognized for 10 minutes.

The Chair recognizes the gentieman from Florida [Mr. McCollum].

Mr. McCOLLUM. Mr. Chairman, the amendment that Ihave proposed would strike a provision that has been put in this bill k

the chairman of the Rules Committee, the gentieman from ~as~~~h~~~ns

[~r.Moakley] to provide for extended voluntar~
departure for several countries, that is the illegals that are here from countries, that is El Salvador, Lebanon, Liberia,
and Kuwait.

Mr. Chairman, let me repeat, the amendment would strike the provision that would grant extended voluntary departure to El
Salvador, Lebanon, Liberia, and Kuwait illegals who are here for a period of 3 years, just a flat-out grant of that kind of
priviiege, which the Immigration Service and the Justice Department could do nothing about.

It would grandfather in all these folks and say, 'You can't deport any of them for any reason.'

Ithink that is fundamentally unsound policy and it is fundamentaliy wrong to do that.

:We have laws on the books to deal with people who may be in reasonable fear of political persecution or religious persecutjo
if they return to their countries of origin. Those laws on the books have been used time and again by the Immigration Servic
to protect those who are indeed in fear and could be jeopardized or harmed ifthey went back home.

:We would in this provision that has been put into this bill adopt a procedure that we have never adopted before and is

certainly not one that I think is good law or makes good sense.

:Last year we had a simiiar debate over this process, did not get it into law, but it was a biil that was out here to be debated

that included in addition to El Salvador, China and Nicaragua.

Now, that was also for 3 years, and in the intervening time conditions have changed in both those Countries. Most
dramatically, we know they have changed in Nicaragua now. The Government has changed, and we would not want to have
3-year amnesty for the illegals who are here from Nicaragua. That is why Isubmit they are not in this pr0poSai today.

The same thing could be true for one of these countries in the next year.

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,troubje and niake that work andnot bind their hand; behind kheir backsso that we have to keep everybody here.

:With regard to El Salvador in particular, we do not have people down there, very many of them, that are in this Country who
+re in fear of being persecuted at all when they go back. We have thousands of Salvadorans here today. Ido not advocate
that we kick them all out. They are not going to be kicked out under the present laws we have. We cannot even begin to get
:to them if we wanted to. We do not have the personnel to do it; but if they are in fear of persecution, and

there are some of them claiming that, there is a process to go through that is orderly in law today that would ailow Our
Justice Department and its Immigration Service to grant them the kind of extended stay here that is something that we woui(
:all want to see happen, and that is called political asylum. That Is a process again that is in Current law.

The Moakley provisions that my amendment would strike are not only unnecessary, but again that are bad policy. They keep

;lots of illegals here indiscriminately for extended periods of time.

The administration obviously is very opposed to this provision, and I would urge my colleagues to vote for the McColium
.amendment. Strike out this provision that has been put in there for a special 3-year sweetheart deal for amnesb of lliegals
irom these particular four countries and let us go on with procedures that are in law today, make them work. Let them work
.and not have some extraneous material iike this in this bill to clutter it up.

Mr. Chairman, Ireserve the balance of my time.

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Mr. BROOKS. Mr. Chairman, Irise in opposition to the amendment of the gentleman from Florida, which would delete the
provision to grant temporary protective status to certain nationals. Individuals who have fled from El Salvador. Liberia,
:Lebanon, and Kuwait should not be required to return to their war-torn homelands until the political situabon in those
,countries is stabilized. This grant of temporary protective status is a compassionate and humanitarian action on thepart of
the United States and is in keeping with the finest of our national traditions. I would urge that this provision remaln in H.R.
4300, and that the amendment be rejected.

;Mr. Chairman, Ireserve the balance of my time.

Mr. McCOLLUM. Mr. Chairman, Iyield such time as he may consume to the gentleman from Texas [Mr. Smith].

~r.

SMITH of Texas. Mr. Chairman, very briefly, Icertainly rise in support of the amendment of the gentleman from Florida
:[Mr. McCollom].

what we are dealing with here is just another amnesty program for another specific country. We seem to be piling on more
'special interest iegisiation on top of more special interest legislation tonight.

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Mr. Chairman, this is a situation where we have amnesty now provided for the third time just passed in H.R. 4300.

Amnesty is not the right way to determine our immigration policy. Amnesty is not the right way to be fair to those who have
been law abiding, and we should not reward lawbreakers to the detriment ofthe law abide=.

Mr Chairman, Isupport the amendment of my colleague, the gentleman from Florida

Mr. McCOLLUM. Mr. Chairman, 1 would just like to urge my coiieagues again to vote for this amendment. It is a VeV positive'
amendment. Itstrikes a provision out of this biii that has no business being in here, granting amnestv to a bunch of iilegals :
who are here from four for five countries and picking them out for 3 years.

Iam not teliing you these are bad peopie, but Iam telling you that if they are in fear and you want to protect them because 1
they are in fear of getting persecuted if they go back to their native countries, that you are talking about laws aiready on the
'books designed to protect that.

Instead what you are going to do is iock the hands of the administration and say absolutely under no conditions for 3 years ;
are you going to let these peopie go. As Isaid earlier, last year when this was out here on the floor for debate, China and
Nicaragua were included. Conditions have changed in iess than a year. They are not included this time.

'Suppose things change in these countries in iess than a year. This is not good public policy. This is bad public policy. We I
need to let the existing laws work.

They do work, and we have absolutely no business going forward with the kind of proposal that is in the bill today, to lock in :

3 years of amnesty for four special countries for aii the illegais who are here and not do that same thing for everybody. It is
ridicuious. It is absurd.

Iurge my colleagues to vote 'yes' on the McColium amendment and strfke this out of the bill

Mr. Cha~rman, Ireserve the baiance of my time

:Mr. BROOKS. Mr. Chairman, Iyield 2 minutes to the distinguished whip on the Democratic side, the gentleman from
:Pennsyivania [Mr. Gray].

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eiectricity, there is no government and practlcaiiy no hope

:Mr. Chairman, some 5,000 Liberian civilians have lost their lives In recent months as a result of the anarchy that has
descended upon their country. There is a three-sided civii war there.

In addition, tens of thousands have been displaced and hundreds of thousands have had to flee to neighboring countries. Th
'promises of the Department of Immigration and Naturaiization Services to provide safe haven to the 14,000 Liberians
stranded in this country have not borne fruit.

As a result, there are now as many INS pollcy responses to L~berlans as there are INS offices.

The promised safe-haven status provided by the luiy 27 INS policy memo has not been Implemented. What is needed now IS
the force of law to protect these peopie. They need to be removed from the whim ofprocedural discretion and administration
iethargy. This is a matter of human compassion.

:Mr. Speaker and my colleagues, we are not asking that these peopie be given permanent resident status in this country. We

'are not asking that they be allowed to live indefinitely in this country. we are simply asking that they be spared detention ant
:deportation until the war in their land subsides. No one knows how long that will be. But the Moakiey amendment provides a
3-year grace period in this bill.

Iurge that we support the language in the bill, the Moakiey amendment In H R. 4300, and relect the attempts of my
d~sttnguished coileague, the gentieman from Fiorlda, to strlke that section

I urge my colleagues to defeat the amendment of the gentleman from Fiorida.

Mr. McCOLLUM. Mr. Chairman, Iyield myself the balance of my time, and Iwould iike to take some time to engage the
'gentleman from Pennsylvania [Mr. Gray]. Iwouid appreciate it.

1 know the gentleman is sincere about that plea. I am as concerned as he is about nationals who are here from Liberia as I
am about those from Kuwait, for example. But Iam sure the gentleman is aware that there is a procedure in law that some o
!us helped crak calied political asylum, where each case individually has a right to be heard through a very extended process
that takes, in many cases, ail too iong, from my perspective, but years. Everyone who is here can go through that process if
they are in fear of being persecuted when they go back or are sent back.

Mr Chairman, 1s the gentleman aware of that being in law today, that they have the right to protect themselves and keep
from being deported under present law?

QJ,

Mr. GRAY. Mr. Chairman, win'the gentleman yield?

Mr. McCOLLUM. Iyield to the gentleman from Pennsylvania.

Mr. GRAY. Ithank the gentleman for yielding.

Mr. Chairman, asylum is not aiways fairly administered. There have been numerous examples of how it has been unfairly

administered to Salvadorans and others.

Second, not everyone who needs protection meets the strict standard of asylum which is 'well-founded fear of persecution.'

:In the case of Liberians, we are not talking about a well-founded fear of persecution which is the direct text of the law; we ar
'talking about going back to a countiy where there is a three-sided civil war. People are being butchered.

SO therefore the asyium method that the gentleman talks about really does not apply to many of these people. This bill is

designed to help those who may qualify for asylum but nonetheless need protection.

Mr. McCOLLUM. Reclaiming my time, Ithink the gentleman made my point for me. IF there is no well-founded fear of
:persecution, then maybe they ought to go back. If they are having a three-sided civil war over there, there is a well-founded
'fear of persecution, Ido not think our Immigration Service judges are going to let them go back and certainiy Our courts are
not. That is what that whole appeilate process is designed for. We had it structured in the old immigration law that has been
:around here a while, since Ihave been here.

I would submit that this is the process that we ought to be having work; that the gentleman's concerns are there maybe in

Some individual cases, but overall, the system works exceedingly well, and we ought to let it work.

'Mr. GRAY. ipoint out to the gentleman that my response was notto make his point but to point out the Strict nature Of the
asylum language. It is often left open to interpretation. It is not administered fairly, particularly in the case of certain groups
:of immigrants with regard to this country.

Ihave got to say to the gentleman that as Ihave looked at the INS policy, we have a hvofold policy with regard to defining

;persecution; one for Europe, one for the Caribbean, and one for the African people.

!Mr. BROOKS. Mr. Chairman, Iyield 1minute to the gentlewoman from Ohio [Ms. Oakar].

(Ms. OAKAR asked and was given permission to revise and extend her remarks.)

:Ms. OAKAR. Mr. Chairman, 1 rise in opposition to the McCollum amendment. Ithank Chairman Moakley for including my bill
regarding Lebanese nationals, H.R. 3267. An orderly, systematic procedure for providing temporary protected status for
nationals of countries undergoing war, civil war, or other extreme tragedy is needed to replace the current ad hOC haphazard
procedure.

The current procedure for extended voluntary departure is so arbitrary and discretionary that aliens are reluctant to come
forward. In the case of the Lebanese, this fear is compounded by the fact that Lebanese nationals in many areas of the
country are placed into deportation hearings once they apply for extended voluntary departure or deferred departure. These
are the same Lebanese nationals whose cases are supposed to be viewed sympathetically by the Immigration and
Naturalization Service because of an INS directive last October to that effect. Iask unanimous consent that the telex be
.entered into the Record.

jU.S. Immigration and Naturalization,

Washington, DC, October 12, 1989.

While there is still no blanket policy to grant deferred departure to nationals of Lebanon in the United States who have

;overstayed, the civil strife in Lebanon continues. This is to reaffirm that officers should, on a case-by-case basis, view
isympatheticaily requests for deferred departure where such requests are based upon compelling humanitarian need., This is
lesser standard than a fear of persecution based on race, reiigion, nationality, membership in a social group, Or polltlcal
opinion.

One-third of the population of Lebanon is displaced (one million people) and 15 percent have suffered casualties. The United
States Government recently withdrew Embassy personnel from Lebanon, the first time an American presence has been
:absent since Worid War 11. A travei ban for American passport holders has been in effect for three years. The cease-fire call@
'on September 23, 1989, has already been breached. However, there are some places of relative safety within Lebanon. Thes
:circumstances should be kept in mind when assessing individual requests for deferred departure from Lebanese natlonais.

.Gerald L. Coyle,
ilcting Commissioner.

The INS shouid not be placed into deportation proceedings, ifthey are supposed to be treated sympathetically. Orders to

:show cause should not be issued for any Lebanese national. ~y placing the Lebanese who are trying to obey the law in

:deportation proceedings, which are terrifying to them, we only cause more immigration lawyers to be hired in this country b

frightened peopie who face a horrible fate if they are forced to return to their home.

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Some immigration lawyers have told me that the Extended Voluntary Departure program is administered so badiy that their
ciient~ have appiied for political asylum, because it seemed that it wouid be easier for them to receive political asyium than t
receive extended voluntary departure. These appiications for extended voiuntary departure then for poiiticai asyiUm Only
creates more work for the INS.

:Immigration attorneys have aiso toid me about peopie at the INS, ranging from peopie in docketing to a regional INS
:Director, who had not heard of the October INS directive to treat Lebanese applications for extended ~OiUntaV departure
sympatheticaiiy and who had no idea which department within the regional INS Office wouid handle such a request. This
Problem is not confined to one office. I have heard this complaint from attorneys from many different areas of the Country.

As a resuit immigration lawyers are reluctant to advise Lebanese nationais to apply for extended voluntary departure, becau

they have no assurance that their ciients will be treated sympathetically.

,'Iand 12 other Members of Congress wrote to the President last year asking for a blanket grant of extended VolUntaV
departure for ail Lebanese who are currently in the United States for just 1year. This was within months of the most violent
Tighting in Lebanon's civil war.

:Five months iater 1received a response from the Justice Department denying that request. The Justice Department said tha
the Lebanese nationais wouid not return to Lebanon and that qranting the Lebanese Extended Voluntary Departure would se
a bad precedent for people from other strife-torn countries.

Whiie some peopie in the INS have been sympathetic to the plight of the Lebanese and have worked with the Arab-American

'community, their efforts have been rebuffed by the Justice Department.

:Because the Justice Department is opposed to helping these peopie, the only soiution is iegislative. The gentleman from
:Kansas and Ioffered a very reasonabie bill, H.R. 3267, to address these concerns. Iam gratefui to Chairman Moakle~ for
linciuding Lebanese nationals in his section of the biii.

:Under the Moakley section of the bili, peopie from Lebanon, Kuwait, EI Salvador, and Liberia wouid be ailowed to stay in the

'United States for at ieast the next 3 years, untii it is safe for them to return home.

These people wouid register with the INS and wouid be given a work authorization card so that they can Support themselves

They wouid not be eligible for any Federal benefits, and State and iocai governments wouid not be obligated to provide them

.with benefits. We are offering them a haven. They wiil not be a burden.

The program wouid not act as a magnet, because it is designed only for those peopie who are here now.

:Our Nation should act humanely toward those who are stranded at our doorstep. We cannot, in good conscience, send thes

:Penpie home to face their death.

:I urge Members to defeat the McCoiium amendment.

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:Mr. BROOKS. Mr. Chairman, Iyield 1minute to the gentleman from Connecticut [Mr. Morrison].

!Mr. MORRISON of Connecticut. Mr. Chairman, Irise in opposition to this amendment. Mr. Chairman, 1commend the

gentleman from Massachusetts [Mr. Moakley], for his aggressive pursuit of a better set of rules.

The gentieman from Fiorida suggests that we have rules to deai with these problems. We do not. We do not have a Set Of
:ruies to deai with just what the gentieman from Pennsylvania said, not individualized persecution but warfare or famine Or
some other form of pestilence of violence in the country.

This provision not onll. specifies four countries to be protected but estabiishes a standard ruie to be appiied in future cases is
:other countries. It is just the kind of legal provision that we need. The gentieman from Massachusetts had been responsible
for bringing itto the floor iast year, and this House passed it, and the House should stand by its eariier decision and not strik
it from the biii.

Mr. BROOKS. Mr. Chairman, Iyield 1 minute to the gentieman from West Virginia [Mr. Rahall].

:Mr. RAHALL. Mr. Chairman, 1 thank the gentleman for yielding time to me.

;Mr. Chairman, Irise today in strong opposition to the McCoiium amendment to H.R. 4300, which would strike temporary

Protection Provisions for nationais of Lebanon, Kuwait, Liberia, and El Saivador from the biii.

jpeopie who come to America from these countries are searching for some sembiance of security in their lives. Unless One is
compietely obiivious to world events, it is common knowiedge that ail four of the nations at issue are experiencing civii strife.
The United States has aiways been a leader in recognizing the rights of victims of inescapable violence, whether they are
Political prisoners or refugees of war, and we shouid continue to protect those who have no other choice than to leave their
homelands. Who are we to argue that those who are willing to leave their iives behind are not worthy of special proteciton in
'the U.S. immigration system? It is a major adjustment for most Americans to reiocate from one city to another, and it does
not make sense to chailenge the intentions of innocent victims of war who are merely looking for a safe home.

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Mr BROOKS. Mr. Chairman, Iyield such t~me as she may consume to the gentlewoman from Ohio [Ms. Kapturl

(Ms
KAPTUR asked and was given permission to revise and extend her remarks.)

Ms. KAPTUR. Mr. Chairman, I would like to rise in opposition to the McCollum amendment. The provisions ofthe bill to

:
suspend the detention and deportation of illegal immigrants from El salvador, Lebanon, Liberia, and Kuwait are very
important. This bill creates a systematic approach to providing temporary protected status for certain foreign nationals
whose countries are in the midst of a war or natural disaster.

Mr. Chairman, as you know, Icosponsored a similar piece of legislation that would have offered this same type of
remedy to the Lebanese immigrants who can not return to their homes because of the civil war raging there. I support
extending this same status to these four groups of people from Lebanon, EI Salvador, Liberia, and Kuwait. Imust
therefore oppose this amendment because it would continue a policy that is uncertain and arbitrary. Instead, 1supPoit
the Provisions contained in the bill H.R. 4300, because this arbitrary policy wiil be replaced with a systematic Set of
procedures that will end the confusion and uncertainty for everyone.

.Mr. BONIOR. Mr. Chairman, few of us could ever imagine the struggles faced daily by the peopie of Lebanon

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We could never imagine the daily battle for survival waged by peopie who can no longer afford food, find housing,
their children. Ail this while they pray that their family won't be killed in the war fought around them.

And it's hard to imagine the fear of Lebanese nationals residing in this country living under the threat of deportation back
to war, back to that daify battle

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It may be hard for us to imagine unless we've lived it. But today, with this bill we have a chance to help. We have an j
opportunity to assist people iiving in Lebanon to escape the war and join their families here.

Many of those who hope to join their famiiies here, must wait up to 15 years from the time they apply. Even those

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have had their visas approved have to wait up to 6 years because of the quota limitations.

Mr. Chairman, no family should have to wait that long to be reunited. And in the case of the Lebanese, it's not

lives are endangered.

The bill before Us would ailow visas for an additional 1,000 Lebanese each year beyond the increased number of visas
Provided for under the expanded preference system 1 would work toeliminate the backlog that is literally endangering
the lives of Lebanese applicants for visas.

'

We also have a chance to eiiminate the burden of fear for Lebanese nationals in the country. As a member Of the Rules
Committee, Iam proud to have worked with Chairman Moakley to include in this bill protection for the Lebanese llvlng I
here temporarily.

Under the Moakley provisions, Lebanese citizens residing in this country would not be sent back to their war torn

country. They would be provided extended voluntary department status for 3 more years.

* A5 the fighting escalated in Lebanon last year, Iwrote to the admlnistratj~n requesting that they act quickly to protect

the lives of the people of Lebanon here in this country. But the administration refused. The legislation before us may be
: our only chance.

.
Mr Chairman, Iurge my colleagues to support the Moakley provisions and to vote 'no' on the McColIUm amendment
that wouid remove the protection provlded for the Lebanese under this bill.

The CHAIRMAN. All time for debate on the amendment of the gentleman from Florida [Mr. McCollu~I has expired

The question is on the amendment offered by the gentleman from Florida [Mr. McCollurnl

The question was taken, and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. McCOLLUM. Mr. Chairman, I demand a recorded vote.

A recorded was ordered.

The vote was taken by electronic device, and there were--ayes 131, noes, 285, not voting 17, as follows:

Roll No, 402

lOlst CONGRESS
2d Session

S. 358
AMENDMENTS
S 358 EAH

In the House of Representatives, U. S.,

October 3, 1990.

]~esolved,That the bill-from the Senate (s. 358) entitled 'An Act to amend the ;Immigration and Nationality Act to change the level, and preference system for !admission, of immigrants to the United States, and to provide for administrative jnaturalization, and for other purposes do pass with with the following

Strike out all after the enacting clause, and insert:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the 'Family Unity and Employment Opportunity Immigrat~on Act of 1990'.
(b) TABLE OF CONTENTS- The table of contents of this Act is as ~O//OWS:

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!TITLE III--OTHER IMMIGRATION PROVISIONS

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Fubtitle A--Prowisions Relating to Marriage Fraud

Sec. 301. Battered spouse or child waiver of the conditional residence requirement.

i

Sec. 302. Bona fide marriage exception to foreign residence requirement for: marriages entered into during certain immigration proceedings.

i

,Subtitle B--Prowisions Relating to Immigration Reform and Control Act of 1986

A'.

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* TEMPORARY PROTECTED SIATUS
'SEC. 244A. (a) GRANTING OF STATUS-

'(I) IN GENERAL- In the case of an alien who is a national of a foreign state designated under subsection (b) and who meets the requirements of

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subsection (c), the Attorney General, in accordance with this section--

'(A) shall grant the alien temporary protected status in the United : States and shall not deport the alien from the United States during the period in which such status is in effect, and

'(5) shall authorize the alien to engage in employment in the United States and provide the alien with an 'employment authorized' endorsement or other appropiiate work permit.

'(2) DURATION OF WORK AUTHORIZATION- Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.

'(3) Notice of rights-

'(A) Upon the granting of temporary protected status under this section, the Attorney General shall notify the alien of the alien's rights and responsibilities under this section.

'(B) If, at the time of initiation of a deportation proceeding against an i alien, the foreign state (of which the alien is a national) is designated under subsection (b), the Attorney General shall promptly notify the alien of the alien's potential rights and responsibilities under this section.

'(C) If, at the time of designation of a foreign state under subsection I (b), an alien (who is a national of such State) is in a deportation proceeding under this title, the Attorney General shall promptly notify the alien of the alien's potential rights and responsibilities under this 1 section.

'(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.

(4) Temporary rights for eligible aliens-
'(A) In the case of an alien who can establish a prima facie case of ;

eligibility for rights under paragraph (I), but for the fact that the period of registration under subsection (c)(l)(A)(iv) has not begun, i until the alien has had a reasonable opportunity to register during the first 30 days of such period, the Attorney General shall provide for the)

\a

rights described in paragraph (1).

'(8)In the case of an alien who establishes a prima facie Case of eligibility for rights under paragraph (I), until a final determination with respect to the alien's eligibility for rights under paragraph (1)ha been made, the alien shall be provided such rights.

'(5) CLARIFICATION- Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected Status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant other status the alien may have or to execute any waiver of other rights under this Act. The granting of temporaly protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this Act.

'(b) DESIGNATIONS OF EL SALVADOR, LEBANON, LIBERIA, AND KUWAIT AND
FOREIGN STATES IN GENERAL-

'(1) DESIGNATION OF EL SALVADOR, LEBANON, LIBERIA, AND KUWAIT-
Salvador, Lebanon, Liberia, and Kuwait are hereby designated under this subsection.

'(2) DESIGNATION OFFOREIGN STATES IN GENERAL- The Attorney General, after consultation with appropriate agencies of the Government, i shall designate any foreign state (or, in the case of a finding under subparagraph (B), all or any part of such foreign state) under this subsection only if--

'(A) the Attorney General finds that there is an ongoing armed conflict: within the state and, due to such conflict, requiring the return of aliens: who are nationals of that state to that state would pose a substantial j threat to their personal safety;

' (B) the Attorney General finds that--

'(i) there has been an earthquake, flood, drought, epidemic, Or

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other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the ! area affected, I

'(ii) the foreign state is unable, temporarily, to handle adequately! the return to the state of aliens who are nationals of the state, and

' (iii) the foreign state oficially has requested designation under

this subparagraph; or

'(C) the Attorney General finds that there exist extraordinary and 'i temporary conditions in the foreign state that prevent aliens who are i

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nationals of the state from returning to the state in safety, unless the :
Attorney General finds that permitting the aliens to remain temporarily 'i
in the United States is contrary to the national interest of the United
States. . .

A designation of a foreign state (or, in the case of a determination under i
subparagraph (B), all or any part of such foreign state) under this
paragraph shall not become effective unless notice of the designation
(including a statement of the findings under this paragraph and the effective;
date of the designation) is published in the Federal Register. In such notice,
the Attorney General shall also state an estimate of the number of nationals
of the foreign state designated who are (or within the effective period of the:
designation are likely to become) eligible for temporary protected status :
under this section and their immigration status in the United States.

'(3) EFFECTIVE PERIOD OF DESIGNATION FOR EL SALVADOR,
LEBANON, i
LIBERIA, AND KUWAIT- The designation of El Salvador, Lebanon, Liberia, i
and Kuwait under paragraph (1) shall take effect upon the date of the
enactment of this section and shall remain in effect until the effective date i
of the termination of the respective designation under paragraph (5)(B). For
purposes of applying the succeeding provisions of this section, each of such;
states shall be considered to have been designated based upon findings
described in subparagraphs (A) and (C) of paragraph (2). For purposes of
this section, the initial period of designation for El Salvador, Lebanon,
Liberia, and Kuwait under paragraph (1) is 3 years. !

'(4) EFFECTIVE PERIOD OF DESIGNATION FOR OTHER FOREIGN
STATES-
The designation of a foreign state (or, in the case of a determination under
paragraph (2)(B), all or any part of such foreign state) under paragraph (2)
shall--

'(A) take effect upon the date of publication of the designation under ;
such paragraph, or such later date as the Attorney may specify in the :
notice published under such paragraph, and

'(5) shall remain in effect until the effective date of the termination of

the designat~on under paragraph (5)(B).

For purposes of this section, the initial period of designation of a foreign i

state (or part thereof) under paragraph (2) is the period, specified by

Attorney General, of not less than 6 months and not more than 18 months.

'(5) PERIODIC REVIEW, TERMINATIONS, AND EXTENSIONS OF DESIGNATIONS-

'(A) PERIODIC REVIEW- At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, i

after consultation with appropriate agencies of the Government, shall i

. review the conditions in the foreign state (or, in the case of a !

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determination under paragraph (2)(B), all or any part of such foreign state) for which a designation is in effect under this subsection and / shall determine whether the conditions for such designation under this '

subsection continue to be met. The Attorney General shall provide on a; timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an !

afirmative determination, the period of extension of designation under! subparagraph (C)) in the Federal Register.

'(B) TERMINATION OF DESIGNATION- If the Attorney General determines under subparagraph (A) that a foreign state (or, in the casl of a determination under paragraph (Z)(B), all or any part of such foreign state) no longer continues to meet the conditions for designation under paragraph (2), the Attorney General shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (dj(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C) and, with respect tc the designation of El Salvador, Lebanon, Liberia, and Kuwait under

paragraph (I),shall not be effective before the end of the 3-year

period beginning on the date of the enactment of this section.

'(C) EMENSION OF DESIGNATION- If the Attorney General does not determine under subparagraph (A) that a foreign state (or, in the case of a determination under paragraph (2)(B), all or any part of such foreign state) no longer meets the conditions for designation under paragraph (Z), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).

'(6) INFORMATION CONCERNING PROTECTED STATUS AT TIME OF DESIGNATIONS- Within the amounts otherwise appropriated to carry Out this Act, at the time of a designation of a foreign state under this subsectio~

(including the designation of El Salvador, Lebanon, Liberia, and Kuwait under paragraph (I)),the Attorney General shall make available information respecting the temporary protected status made available to aliens who are nationals of such designated foreign state.

'(7) REVIEW-

'(A) DESIGNATIONS- There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.

'(B) APPLICATION TO INDIVIDUALS- The Attorney General shall establish an administrative procedure for the review of the denial of ,

rights to aliens under this subsection; except that such procedure shall not prevent an alien from asserting rights under this section in deportation proceedings.

'(c) ALIENS ELIGIBLE FOR TEMPORARY PROTECTED STATUS-

'(1) IN GENERAL-

;

'(A) SALVADORAN, LEBANESE, LIBERIAN, AND KUWAITI NATIONALS- :
Subject to paragraph (3), an alien who is a national of El Salvador, Lebanon, Liberia, or Kuwait (for the period such respective state is i designated under subsection (b)(l)) meets the requirements of this paragraph only if--

'(i) the alien has been continuously physically present in the

United States since the date of the enactment of this section;

'(ii) the alien has continuously resided in the United States since

September 19, 1990;

'(iii) the alien is admissible as an immigrant, except as otherwise' provided'under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(5); and

'(iv) the alien registers under this section within the 270-day registration period (established by the Attorney General) beginning not later than 60 days after the date of the enactment of this section.

'(5) NATIONALS OF DESIGNATED FOREIGN STATES IN GENERAL-
Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(2), meets the requirements of this paragraph only if--

'(i) the alien has been continuousiy physically present in the / United States since the effective date of the most recent designatior! of that state;

'(ii) the alien has continuously resided in the United States since

such date as the Attorney General may designate;

'(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and

'(iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

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'(A) the Attorney General finds that the alien was not in fact eligible i for such status under this section, 1

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'(6)except as provided in paragraph (4) and permitted in subsection 1 (f)(4), the alien has not remained continuously physically present in the United States from the date the alien first was granted temporary

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protected status under this section, or I

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'(C) the alien fails, without good cause, to register with the Attorney General annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the Attorney General.

'(4) TREATMENT OF BRIEF, CASUAL, AND INNOCENT DEPARTURESAND

CERTAIN OTHER ABSENCES-

'(A) For purposes of paragraphs (l)(A)(i), (1)(B)(i), and (3)(B), an : alien shall not be considered to have failed to maintain continuous i physical presence in the United States by virtue of brief, casual, and i innocent absences from the United States, without regard as to i

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whether such absences were authorized by the Attorney General. I

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'(5) For purposes of paragraphs (l)(A)(ii) and (l)(B)(ii), an alien shal/; not be considered to have failed to maintain continuous residence in

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the United States by reason of a brief, casual, and innocent absence i described in subparagraph (A) or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

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'(5) CONSTRUCTION- Nothing in this section shall be construed as

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authorizing an alien to apply for admission to, or to be admitted to, the

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United States in order to apply for temporary protected status under this 1 section.

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'(6) RESTRICTION ON DISCLOSURE OF INFORMATION- The provisions of j
section 245A(c)(5) shall apply to information furnished by an alien in order 1 to be granted temporary protected status under this section in the same I manner as such provisions apply with respect to information furnished pursuant to an application section 245A.

'(d) DOCUMENTATION-

'(1) INITIAL ISSUANCE- Upon the granting of temporary protected status ! to an alien under this section, the Attorney General shall provide for the j issuance of such temporary documentation and authorization as may be necessary to carry out the purposes of this section.

'(2) PERIOD OF VALIDIW- Subject to paragraph (3), such documentation shall be valid during the initial period of designation of the foreign state (or ;

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part thereof) involved and any extension of such period. The Attorney General may stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of such documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a designation of a foreign state (or, in the case of a determination under subsection (b)(2)(8), all or any part 0 such foreign state).

'(3) EFFECTIVE DATE OF TERMINATIONS- If the Attorney General terminates the designation of a foreign state (or, in the case of a determination under subsection (b)(2)(B), all or any part of such foreign state) under subsection (b)(4)(B), such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at the Attorney General's option, after such period after the effective date o the determination as the Attorney General determines to be appropriate in order to provide for an orderly transition).

'(4) DETENTION OF THE ALIEN- Nothing in this section shall be construed to authorize the detention of any alien who is eligible for temporary protected status under this section, An alien provided temporary protected status under this section shall not be detained by the Attorney General on the basis of the alien's immigration status in the United States.

'(e) RELATION OF PERIOD OF TEMPORARY PROTECTED STATUS TO SUSPENSION OF DEPORTATION- With respect to an alien granted temporary protected status under this section, the period of such status shall not be counted as a period of physical presence in the United States for purposes of section 244(a), unless the Attorney General determines that extreme hardship exists. Such period shall not cause a break in the continuity of residence of the period before and after such period for purposes of such Section.

'(f) BENEFITS AND STATUS DURING PERIOD OF TEMPORARY PROTECTED
STATUS- During a period in which an alien is granted temporary protected statu under this section--

'(1) the alien shall not be considered to be permanently residing in the United States under color of law;

'(2) the alien shall not be eligible for any program of cash assistance I (furnished directly or through reimbursement) under Federal law, except for .treatment for an emergency medical condition as described in section 1903(v) of the Social Security Act;

'(3) the alien may be deemed ineligible for public assistance by a State (as defined in section 101(a)(36)) or any political subd~vision thereof which furnishes such assistance;

'(4) the alien may travel abroad with the prior consent of the Attorney

General; and

'(5) for purposes of adjustment of status under section 245 and change of ; status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

'(g) EXCLUSIVE REMEDY- Except as otherwise specifically provided, this Section !
shall constitute the exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled: into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality.

'(h) ANNUAL REPORT- Not later than March 1 of each year (beginning with 1991), the Attorney General, after consultation with the appropriate agencies of

the Government, shall submit a report to the Congress on the operation of this

section during the previous year. Each report shall include--

'(1)a listing of the foreign states or parts thereof designated under this

section,

'(2) the number of nationals of each such state who have been granted temporary protected status under this section and their immigration Status before being granted such status, and

'(3) an explanation of the reasons why foreign states or parts thereof were designated under subsection (b)(2) and, with respect to foreign States Or parts thereof previously designated, why the designation was terminated 01 extended under such subsection.

'(i) CONGRESSIONAL REVIEW OF REPORT-

'(1) REFERRAL OF REPORT- Each report, when submitted under subsection (h), shall be referred, in accordance with the rules of the respective House of Congress, to the standing committee or committees having jurisdiction over the subjects of the report, and the report shall be printed as a document of the House of Representatives.

'(2) COMMITTEE HEARINGS- No later than 90 days after the date of the ;

referral of a report to a committee, in accordance with the rules of the respective House, the committee shall initiate hearings, insofar as such ; committee has legislative or oversight jurisdiction, to consider--

'(A) the findings of the report,

'(B) the designations of foreign states under subsection (b), and

'(C) whether it is appropriate to change the designations of foreign states under subsection (b) or otherwise to change the protections : afforded under this section.

'(3)COMMITTEE REPORT- No later than 180 days after the date of the i referral of such a report to a committee, in accordance with the rules of the respective House, the committee shall report to its respective House its j oversight findings and any legislation it deems appropriate. '.

(b) CLERICAL AMENDMENT- The table of contents of such Act is amended by inserting after the item relating to section 244 the following new item:
'Sec. 244A. Temporary protected status. '

(c) NO AFFECT ON EXECUTIVE ORDER 1271 1-Notwithstanding subsection (g) 06
section 244A of the Immigration and Nationality Act (inserted by the amendment; made by subsection (a)), such section shall not supercede or affect Executive i! Order 1271 1 (April 11, 1990, relating to policy implementation with respect to ! nationals of the People's Republic of China).
SEC. 325. LIMITATION ON DETENTION OF CERTAIN ALIENS WITH DEPENDENT CHILDREN.

! (a) IN GENERAL- Section 242(c) of the Immigration and Nationality Act (8 U.S.C.;1 1252(c)j is amended--

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1

(1) by striking ' When'and inserting '(1) Except as provided in paragraph : I (2), when: and
I

(2) by adding at the end the following new paragraph:
! '(2)(A) The Attorney General shall not detain any alien described in

!

subparagraph (5) who is deportable under section 241, except in connection

j ;

i with the immediate departure of such alien. The period of such detention shall i

i

1 not exceed a reasonable amount of time (not to exceed 24 hours) based upon
j the particular circumstances of the alien and the alien's dependent children.

'(5)An alien described in this subparagraph is an alien--

i '(i) who is not deportable under paragraph (4), (5), (6), (7), (11), (12),
(14j, (is), (1 6), (171, (18), or (I3) of section 241 (a); and

! '

i (ii) who is the mother of any child in the United States if the child is not
older than 2 years of age and is dependent upon the alien for basic parent5
i care. '.

!

(b) EFFECTIVE DATE- The amendments made by subsection (a) shall apply to
i:
/ any alien subject to a final deportation order on or after the date of the

i

j enactment of this Act.

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SEC. 326. WAIVER OF ENGLISH LANGUAGE REQUIREMENT FOR
NA TURALIZA TION.

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Immigration Act of 1990 (Enrolled Bill [Final as Passed 60th House and Senate] - ENR)

SEC. 302. TEMPORARY PROTECTED STATUS.

(3) IN GENERAL- The Immigrat~on and Natlonallty Act is amended by afterseeton 244 the following new
'TEMPORARY PROTECTED STATUS

'SEC, 244A. (a) GRANTING OF STAiiiS-

nd who

'(1) IN GENERAL- In the case of an aiien who is a national of a foreign statedes~g~ated

under subsection (b) a
meets the requirements of subsection (c), the Attorney General, in accordance w~th this sectton--

..

tt"J

'(A) may grant the ailen temporary protected status in the Unlted States and shall not deport the from~zes8#c8
United States during the penod in whlch such status

in effect, and

'(B) shall authorize the alien to engage in employment in the united states and the aiien with an

'empioyment authorized' endorsement or other appropriate work permit.

'(2)DURATION OF WORK AUTHORIZATION- Work authorization provided under this section shall be effective

the period the alien 1s in temporary protected status under this

'(3) NOTICE-

.(A) upon the granting of temporary protected status under this section, the Attorney General shall provide the

allen with information concerning such status

this section.
alien is

' (0)If, at the time of initiation of a deportation proceeding again* an the foreign state (of which the

the temporary

a national) is designated under subsection (b), the ~ t t shaii ~ ~ ~ ~ ~

~~~~~~i notify the alien
Protected Status that may be available under this semion.

,h state)

' (C) If, at the time of designation of a foreign state under (b), an alien (who is a national Of SUemporaryis in a deportation proceeding under this title. the ~ tG ~t ~~ ~ ~ ~ ~~ I ~ ~

promptly notify the alien of the
Protected status that may be available under this section.

'(Dl Notlces under thls paragraph shalt be provided in a form and language
~~~~~~

that the alren can undestand

' (4) Temporan/ treatment for ei~gible aliens-

.(A) in the case of an alien who can establish a prima facie case of for benefits under paragmPh (I), a

hadbut
for the fact that the period of registration under subsection (c)(l)(~)(i~) has not begun, until the

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for the

reasonable oppomunity to register during the first 30 days of such period, the ~tt~~ney

General shall pm
benefits of paragraph (1).

' (8) In the case of an alien who establishes a prima facie case of eiigibiiity for benefits under Parag mph (I), until a
final determination with respect to the alien's eligibility for such benefits under paragraph (11 has been made' the
alien shall be provided such benefits.

ternp0"V

' (5) CLARIFICATION- Nothing in this section shall be construed as authorizing the Attorney General

Protected status to an alien based on the alien's immigration status or to require any aiien, as a condition of being

~aiverof

granted such status. either to relinquish nonimmigrant or other status the may have or to execute any

to be

other rights under this Act. The granting of temporary pmteded status under this section shall not be

incpnsistent with the granting of nonimmigrant status under this AC~.

'(b) DESIGNATIONS-

'(1) IN GENERAL- The Attorney General, after consultation with appropriate agencies of the ~overnme~~, designate

may
any foreign state (or any part of such foreign state) under this subsection only if--

conflict,

'(A) the Attorney Generai finds that there is an ongoing anned conflict within the state and, due
requiring the return of aliens who are nationals of that state to that state (or to Me part of the state) 5U$Uid a
serious threat to their personal safety;

(B) the Attorney General finds that--
' (1) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state ;
resulting in a substantial, but temporary, disruption of living conditions in the area affected,

' (11) the foreign state is unable, temporarily, to handie adequately the return ta the state of ailens who are

nationals of the state, and

' (lii) the foreign state officially has requested designation under this subparagraph; or

'(C) the Attorney General finds that there exist extraordinan/ and temporary conditions in the foreign state that
prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds
that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the
United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless
notice of the designatlon (including a statement of the findings under this paragraph and the effedive date of the
designation) is published In the Federal Register. In such notice, the ~ttorney General shall also state an estimate of the i
number of nationais of the foreign state designated who are (or within the effective period of the designation are ilkely to
become) eligible for temporary protected status under this section and their immigration status in the United States.

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'(2) EFFECTIVE PERIOD OF DESIGNATION FOR FOREIGN STATES- The deslgnation of a forelgn state (Or Part of such i
foreign state) under paragraph (1) shall--

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'(8)shall remain in effect until the effective date of the termination of the designation under paragraph (3)(5),

For purposes of this section, the initial period of designation of a foreign state (or part thereof) under paragraph (1) is the
period, specified by the Attorney Generai, of not less than 6 months and not more than 18 months.

'(3) PERIODIC REVIEW, TERMINATIONS, AND EXTENSIONS OF DESIGNATIONS-

'(A) PERIODIC REVIEW- At ieast 60 days before end of the initial period of designation, and any extended period of
designation, of a foreign state (or part thereof) under this section the ~ttarney General, after consultation with
appropriate agencies of the Government, shali review the conditions in the foreign state (or part of such foreign
state) for which a designation is in effect under this subsection and shall determine whether the conditions for such
designation under this subseaion continue to be met, The Attorney General shali provide on a timeiy basis for the
publication of notice of each such determination (including the basis for the determination, and, in the Case Of an
affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.

'(8) TERMINATION OF DESIGNATION- If the Attorney General determines under subparagraph (A) that a foreign
state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (11,
the Attorney General shall terminate the designation by publishing notice in the Federal Register of the
determination under this subparagraph (inciuding the basis for the determination). Such termination is effective in
accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is
published or, if later, the expiration of the most recent previous extension under subparagraph (C).

'(C) EXTENSION OF DESIGNATION- If the Attorney General does not determine under subparagraph (A) that a
foreign state (or part of such foreign state) no longer meets the conditions for designatlon under paragraph (I),the

period of deslgnation of the foreign state is extended for an additional period of 6 months (or, in the discretion of
the Attorney General, a period of 12 or 18 months).

'(4) INFORMATION CONCERNING PROTECTED STATUS AT TIME OF DESIGNATIONS-~tthe time of a designation of a
foreign state under this subsection, the Attorney General shall make availabie information respecting the temporary
protected status made available to aliens who are nationals of such designated foreign state.

'(5)REVIEW-

'(A) DESIGNATIONS- There is no judicial review of any determination of the Attorney General with WSPeCt to the

designation, or termination or extension of a designation, of a foreign state under this subsection.

'(B) APPLICATION TO INDIVIDUALS- The Attorney General shall establish an administrative procedure for the
review of the denial ofbenefits to aliens under this subsection. such procedure shall not prevent an alien from
asserting protection under this section in deportation proceedings if the alien demonstrates that the alien is a
nationai of a state designated under paragraph (1).

'(c) ALIENS ELIGIBLE FOR TEMPORARY PROTECTED STATUS-

'(1)IN GENERAL-

'(A) NATIONALS OF DESIGNATED FOREIGN STATES- Subject to paragraph (3), an alien, who is a national Of a

state designated under subsection (b)(l), meets the requirements of this paragraph only if--

'(i) the alien has been continuously physically present in the United States since the effective date of the most
recent designation of that state;

'(ii) the alien has continuousiy resided in the United States since such date as the Attorney General may
designate;

' (iii) the aiien is admissible as an immigrant, except as otherwise provided under paragraph (Z)(A), and is not

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#nei!glble for temporary protected status under paragraph (2)(B); and

'(iv) to the extent and in a manner which the Attorney Generai establishes, the alien registers for the

temporary pmtected status under this section during a registration period of not iess than 180 days.

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' (2) EUGIBILITY STANDARDS-
'(A) WAIVER OF CERTAIN GROUNDS FOR INADMISSIBILITY- In the determination of an aiien's admissibility for
purposes of subparagraph (A)(iii) of paragraph (I)--
'(i) the provisions of paragmphs (14),(15)- (20), (21). (25), and (32) of section 212(a) shall not apply;
' (ii) except as provided in clause (iii), the Attorney Generai may waive any other provision of section 212(a) ir

the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the
public interest; but
'(iii) the Attorney General may not waive-.

'(I) paragraphs (9) and (10) (reiating to criminals) of such section,
'(11) paragraph (23) of such section (relating to drug offenses), except for so much of such paragraph as
relates to a singie offense of simpie possession of 30 grams or iess of marijuana,

'(111) paragraphs (27) and (29) of such section (reiating to national security), or
'(IVj paiagmph (33) of such section (relating to those who assisted in the Nazi persecution).
'(8) ALIENS INEUGIBLE- An aiien shail not be eligible for temporary protected status under this section if the

Attorney General finds that--
'(i) the aiien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or
'(ii) the alien is described in section 243(h)(2),

'(3) WITHDRAWAL OF TEMPORARY PROTECTED STATUS- The Attorney General shail withdraw temporary protected

status granted to an aiien under this section if--

'(A) the Attorney General finds that the alien was not in fact eligible for such status under this section,
'(8) except as provided in paragraph (4) and permitted in subsection (f)(3), the alien has not remained
continuousiy physicaiiy present in the United States from the date the aiien first was granted ternporary protected
status under this section, or

'(C) the aiien fails, without good cause, to register with the Attorney General annually, at the end of each
12-month period after the granting of such status, in a farm and manner specified by the Attorney General.

-a::

'(4) TREATMENT OF BRIEF, CASUAL, AND INNOCENT DEPARTURES AND CERTAIN OTHER ABSENCES-

'(A) For purposes of paragraphs (l)(A)(i) and (3)(B), an aiien shall-not be considered to have faiied to maintain
continuous physical presence in the United States by vii?ue of brief, casuai, and innocent absences from the United
States, without regard to whether such absences were authorized by the Attorney General.

'(8) For purposes of paragraph (l)(A)(ii), an alien shall not be considered to have faiied to maintain continuous
residence in the United States by reason of a brief, casuai, and innocent absence described in subparagraph (A) or
due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control
of the alien.

'(5) CONSTRUCTION- Nothing in this section shali be construed as authorizing an alien to apply for admission to, or to be

admitted to, the United States in order to apply for temporary protected status under this section.

'(6) CONFIDENTIAUTY OF INFORMATION- The Attorney General shail estabiish procedures to protect the confidentiality
of information provided by aliens under this section.

'(d) DOCUMENTATION-

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out the purposes of this seaion.

'(2) PERIOD OF VALIDITY- Subject to paragraph (3), such documentation shail be valid during the initial period of
designation of the foreign state (or part thereof) involved and any extension of such period. The Attorney General may
stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of such
documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a
designation of a foreign state (or any pait of such foreign state).

'(3) EFFECTIVE DATE OF TERMINATIONS- If the Attorney General terminates the designation of a foreign state (or pa*
of such foreign state) under subsection (b)(3)(B), s13ch termination shall oniy apply to documentation and authorization

issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at i

'

the Attorney General's option, after such period after the effedive date of the determination as the Attorney General

determines to be appropriate in order to provide for an orderly transition).

'(4)DETENTION OF THE ALIEN- An aiien provided temporary protected status under this section shall not be detained by

the ~ttoiney Generai on the basis of the alien's immigration status in the United States.

'(e) RELATION OF PERIOD OF TEMPORARY PROTECTED STATUS TO SUSPENSION OF DEPORTATION- With respect to an aiien :
granted temporary protected status under this section, the period of such status shall not be counted as a period of physical i
presence in the United States for purposes of section 244(a), uniess the Attorney Generai determines that extreme hardship
exists. Such period shall not cause a break in the continuity of residence of the period before and after such period for
purposes of such section.

'(f) BENEFITS AND STATUS DURING PERIOD OF TEMPORARY PROTECTED STATUS- During a per~od In whlch an allen is
granted temporary protected status under thts sectton--

' (1) the allen shaii not be considered to be permanently resldlng in the Unlted States under color of law,

'(2) the alien may be deemed ineiigible for public assistance by a State (as defined in sedion 101(a)(36)) or any political

subdivision thereof which furnishes such assistance;

'(3) the aiien may travel abroad wlth the prior consent of the Attorney Generai; and

'(4) for purposes of adjustment of status under section 245 and change of status under section 248, the aiien shaii be

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considered as being in, and maintaining, lawful status as a nonimmigrant.

(2) LkLi;.SIYC H?blCOI'- except ;is clne~scs:>c:r ici iy proidc3, rn s sccto- s.,'lil cmst :.re :i>eexc.5 .r 3.tr :r, iflr c
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'(h) LIMITATION ON CONSIDER4TION IN THE SENATE OF LEGISLATION ADJUSTING STATUS-

'(1) IN GENERAL- Except as provided in paragraph (2). ~tshall not be in order in the Senate to consider any bill,

resolution, or amendment that--

' (A) provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving

temporary protected status under this section, or

'(B) has the effect of amending this subsection or limiting the application of this subsection

'(2) SUPERMAJORITY REQUIRED- Paragraph (1) may be waived or suspended in the Senate only by the affirmative vote
of three-fifths of the Members auiy chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate
duly chosen and sworn shaii be required in the Senate to sustain an appeal of the ruling of the Chair on a point of order
raised under paragraph (1).

(3) RULES- Paragraphs (1) and (2) are enacted-.
'(A) as an exercise of the rulemaking power of the Senate and as such they are deemed a part of the rules of the :
Senate, but applicabie oniy with respect to the matters described in paragraph (1) and supersede other ruies of the
Senate oniy to the extent that such paragraphs are inconsistent therewith; and

'(0)with full recognitton of the const~tutlonal rlght of the Senate to change such rules at any time, in the same

manner as in the case of any other rule of the Senate

(I) ANNUAL REPORT AND REVIEW-
'(1) ANNUAL REPORT- Not iater than March 1of each year (beginning with 1992). the Attorney General, after

consultation with the appropriate agencies of the Government, shaii submit a report to the Committees on the Judiciary of

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;EC. 303. SPECIAL TEMPORARY PROTECTED STATUS FOR SALVADORANS.

(a) DESIGNATION-
(1) IN GENERAL- El Salvador is hereby designated under section 244A(b) of the Immigration and Nationality Ad, subject
to the provisions of this section.
(2) PERIOD OF DESIGNATION- Such 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 lanuary 1, 1991.
(b) ALIENS ELIGIBLE-
(1) IN GENERAL- In applying section 244A of the Immigration and Nationality Act pursuant to the designation undetthis
section, subject to section 244A(c)(3) of such Act, an aiien who is a national of El Salvador meets the requirement3Wf"C~
section 244A(c)(l) of such Act oniy if--
(A) the aiien has been continuously physically present in the United States since September 19, 1990;
(€5) the alien is admissible as an immigrant, except as otherwise provided under section 244A(c)(Z)(A) of such Act,

and is not ineligible for temporary protected status under section 244A(c)(Z)(B) of such Act; and

(C) in a manner which the Attorney General shail establish, the aiien registers for temporary protected status under
this section during the registration period beginning lanuary 1, 1991, and ending June 30, 1991.
(2) REGISTRATION FEE- The Attorney General shall require Payment of a reasonable fee as a condition of registering an
alien under paragraph (i)(C) (inciuding providing an alien with an 'employment authorized' endcrsement or other
appropriate work permit under this section). The amount of the fee shall be sufficient to cover the costs of administration
of this Section. Notwithstanding section 3302 of title 31, United States Code, all such registration fees collected shail be
credited to the appropriation to be used in carrying out this section.
(c) APPLICATION OF CERTAIN PROVISIONS-
(1) IN GENERAL- Except as provided in this subsection, the provisions of section 244A of the Immigration and Nationality
Act (inciuding subsection (h) thereof) shall apply to El Salvador (and aliens provided temporary protected status) under
this section in the same manner as they apply to a foreign state designated (and aliens provided temporary protected
status) under such section.
(2) PROVISIONS NOT APPLICABLE- Subsections (b)(l), (b)(2), (b)(3), (c)(l), (c)(4), (d)(3), and (i) of such section 244A
shall not apply under this section.
(3) 6-MONTH PERIOD OF REGISTRATION AND WORK AUTHDRIZATION- Notwithstanding section 244A(a)(i) of the
imii?igraiion and Nationality Act, the work authorization provided under this section shall be effective for penods of 6
months. in applying section 244A(c)(3)(C) of such Act under this section, 'semiannually, at the end of each 6-month
period' shail be substituted for 'annually, at the end of each 12-month period' and, notwithstanding section 244A(d)(2)
of such Act, the period of validity of docvmentation under this section shall be 6 months.
(4) REENTRY PERMITTED AFTER DEPARTURE FOR EMERGENCY CIRCUMSTANCES- In applying section 244A(f)(3) of the
Immigration and Nationality Act under this section, the Attorney General shall provide for advance parole in the case of
an aiien pmvided special temporary protected status under this section if the alien establishes to the satisfaction of the
Attorney General ttbt emergency and extenuating circumstances beyond the control of the alien requires the aiien to
depart for a brief, temporary trip abmad.

(d) ENFORCEMENT OF REQUIREMENT TO DEPART AT TIME OF TERMINATION OF DESIGNATION-
(1)SHOW CAUSE ORDER AT TIME OF FINAL REGISTRATION- At the registration occurring under this section closest to
the date of termination of the designation of El Salvador under subsection (a). the Immiaration and Naturalization Semire
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2428 of the Immigration and Nationality Ad (inserted by section 545(a) of this Act) and certain discretionary forms of

refief are no longer avaiiabie to the aiien pursuant to such section.

TITLE IV--NATURALIZATION

EC. 401. ADMINISTRATIVE NATURALIZATION.

(a) NATURAUZATION AUTHORIV- Section 310 (8 U.S.C. 1421) is amended to read as follows:
NATURALIZATION AUTHORITY

'SEC. 310. (a) ALITHORITY IN ATORNEY GENERAL- The sole authority to naturalize persons as citizens of the United States is
conferred upon the Attorney General.

'(b) ADMINISTRATION OF OATHS- An applicant for naturalization may choose to have the oath of aliegiance under section
337(a) administered by the Attorney General or by any District Court of the United States for any State or by any court of
record in any State having a seal, a clerk, and jurisdiction in actions in law or equiw, or law and equity, in which the amount in
controversy is uniimited. The jurisdiction of all courts in this subsection specified to administer the oath of aiiegiance shall
extend only to penons resident within the respective jurisdiction of such courts.

'(c) JUDICIAL REVIEW- A person whose application for naturalization under this title is denied, after a hearing before an
immigration officer under section 336(a), may seek review of such denia! before the United States district court for the district
in which such peEnn ?%ides in accordance with chapter 7 of title 5, United States Code. Such review shali be de novo, and the
court shail make its own flndings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de
novo on the appiication.

'(d) SOLE PROCEDURE- A person may only be naturalized as a citizen of the United States in the manner and under the
conditions prescribed in this titie and not otherwise.'.

(b) FILING OF APPLICATIONS- Section 334(a) (8 U.S.C. 1445!a)) is amended by adding at the end the following new
sentence: 'In the case of an applicant subject to a requirement of continuous residence under section 316(a) or 319(a), the
appiication for naturalization may be fiied up to 3 months before the date the applicant wouid first otherwise meet such
continuous residence requirement.'.
(c)NOTIFICATION- Section 335(b) 18 U.S.C. 1446(b)) isamended by adding at the end the foliowing new sentence: 'Any
such employee shali, at the examination, inform the petitioner of the remedies available to the petitioner under section 336.'.
402. SUBSTITUTING 3 MONTHS RESIDENCE IN INS DISTRICT OR STATE FOR 6 MONTHS RESIDENCE IN A STATE.
Section 316(a)(l) (8 U.S.C. 1427(a)(1)) is amended by Lnking 'and who has resided within the State in which the petitioner
iled the petition for at ieast six months' and inserting 'and who has resided within the State or within the district of the
iervice in the United States in which the applicant fiied the appiication for at least three months'.

SEC. 403. WAIVER OF ENGUSH LANGUAGE REQUIREMENT FOR NATURALIZATION.

ection 312(1) (8 U.S.C. 1423(1)) is amended by striking 'is over fifty years of age and has been living in the United States

1r periods totaiing at ieast twenty years subsequent to a lawfui admission for permanent residence' and inserting 'either (A)

aver 50 years of age and has been living in the United States for periods totaiing at least 20 years subsequent to a lawful
jmission for permanent residence, or (8) is over 55 years of age and has been living in the United States for periods totaiing
:ieast 15 years subsequent to a lawful admission for permanent residence'.

SEC. 404. TREATMENT OF SERVICE IN ARMED FORCES OF A FOREIGN COUNTRY.

:ction 315 (8 U.S.C. 1425) is amended--

(1) in subsection (a), by inserting 'but subject to subsection (c)' after 'section 405(b)', and
(2)by adding at the end the following new subsection:
:) An aiien shall not be ineligibie for citizenship under this section or othemise because of an exemption from training or
vice in the Armed Forces of the United States pursuant to the exercise of rights under a treaty, if before the time of the
?rcise of such rights the aiien served in the Armed Forces of a foreign country of which the alien was a national.'.

105. NATURALIZATION OF NATIVES OF THE PHILIPPINES THROUGH CERTAIN ACTIVE-DUTY SERVICE DURING
WORLD WAR 11.
WAIVER OF CERTAIN REQUIREMENTS- (1) Clauses (1) and (2) of section 329(a) of the immigration and Nationality Act (8

.C. 1440(a)) shaii not appry to the naturalization of any person-.

(A) who was born in the Phiiippines and who was residing in the Phiiippines before the service described in subparagraph
(8);
(8) who served honorably--
(i) in an active-duty status under the command of the United States Armed Forces in the Far East, or
(ii) within the Philippine Army, the Philippine Scouts, or recognized guerrilia units,
at any time during the period beginning September 1, 1939, and ending December 31, 1946;

(c) who is otheiwise eligible for naturaiizatio
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H.R.2332 --To amend the Immigration Act of1990 to extend for 4 months the application (Enrolled B!ll [Final as
Passed Both House and Senate] -ENR)

One Hundred Second Congress of the United States of America

AT THE FIRST SESSION
Begun and heid at the City of Washington an Thursday, the third day of lanuan/, one thousand nine hundred and ninety-one
A" Act
To amend the Imm~gratlon Act of 1990 to extend for 4 months the appl~cation deadline for speoai temporary protected status for Salvadorans

Be lt enacted by the Senate and House of Representabves of :he United States of Amenca rn Congress assembled,

SECTION 1.4-MONTH EXTENSION OF APPLICATION DEADLINE FOR SPECIAL TEMPORARY PROTECTED
STATUS FOR SALVADORANS.

Section 303(b)(l)(C) of the Immigration Act of 1990 is amended by striking 'June 30, 1991' and inserting 'October 31, 1991'.
Speaker of the House of Representatives
Vice President of the United States and
President of the Senate.

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H.R. 2332, TO EXTEND SALVADORAN IMMIGRATION STATUS DEADUNE --HON. NANCY PELOSI (Extension of
Remarks -June 25, 1991)
!Page EZ3641

...

HON. NANCY PELOSI

in the House of Representatives

TUESDAY, JUNE 25, 1991

.
Ms. PELOSI. Mr. Speaker, 1 rise today in support of H.R. 2332, a bill to extend the deadiine for Salvadoran immigrants to
apply for temporary protec~UTF3TIg¶ to Uctooer31;-rSYI.

;ast year in the immigration bill, we established a temporary protected status [TPS] irnmigmtion category to protect aii$&,
the United States whose iives would be endangered if they returned to homelands plagued to armed conflict, natural disaster

.
Unfoitunateiy, the Immigration and Naturalization Sewice [INS] moved agonizingiy slowly in developing and publishing
reguiations on how to apply for TPS. Probiems with fees set at unreasonably high levels by the INS further siowed the
application process. The final regulations were not estabiished until last month, and the deadline for Salvadorans to apply is
June 30, 1991, iess than a week away.

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arc jXSl;fkC. i'Jcn2ssCE TPS 'or

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When we passed the TPS pmgram with a series of application deadlines, we beiieved that the INS would and could impiement
the pmgram rapidly enough to make the deadlines realistic. This has not been the case. Now that the final regulations have

:
been released, we shouid extend the application deadline in order for the program to be given a chance to succeed. Iurge my
coiieagues to support H.R. 2332 to extend for 4 more months.

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