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COUNSEL

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met and granted Otarola's application for suspension of deportation.

In the face of clear statutory language and this court's precedent holding that the stop-time provision of IIRIRA was not effective until April 1, 1997, the Immigration and Naturalization Service ("INS") prosecuted this appeal on the sole ground that the stop-time rule applied to Otarola on October 25, 1996, and thus he had not met the seven-year residency requirement. The appeal was meritless and yet pursued by the INS. The BIA heard the appeal after April 1, 1997, applied IIRIRA's stop-time rule, and denied Otarola's petition for suspension of deportation. Had the INS not pursued a completely meritless appeal of the IJ's decision, the IJ's order granting suspension of deportation would have been final. We conclude that the BIA's reversal of the IJ's decision applying the correct effective date of IIRIRA would contravene Congressional intent in providing a six-month delay before IIRIRA took effect. Accordingly, we grant the petition for review and remand the case to the BIA with instructions to affirm the IJ's decision.

entered the United States without inspection on or about February 22, 1989. On December 4, 1995, the INS served Otarola with an order to show cause ("OSC"), which charged that he was subject to deportation pursuant to § 241(a)(1)(B) of the "INA"), codified at 8
a)(1)(B).

admitted the allegations of fact in the OSC, conceded his eligibility for deportation, and requested leave to apply for suspension of deportation. On October 25, 1996, Otarola

suspension of deportation by satisfying the three pre-IIRIRA statutory requirements.**2** In her ruling, the IJ rejected the INS's argument that IIRIRA's stop-time rule applied to Otarola on October 25, 1996.**3** The IJ entered an order granting Otarola's application for suspension of deportation.

On November 20, 1996, the INS appealed the IJ's decision on the sole ground that the stop-time rule was applicable on October 25, 1996 and that therefore the IJ lacked"statutory authority to consider [Otarola's] request" because the stop-time rule rendered Otarola "statutorily [in]eligible for relief from deportation." Treating the stop-time rule as if it were effective on October 25, 1996, the INS contended that Otarola fell three months shy of seven years of continuous presence and thus could not establish threshold eligibility for suspension of deportation.

On June 16, 1997, the INS filed a short memorandum which reiterated its argumentas a mrinitial br re, la "realief
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[2] Similarly, in Castillo-Perez v. INS, 212 F.3d 518, 522 (9th Cir. 2000), the BIA found that the alien had established a prima facie case of ineffective assistance of counsel; never-

Id. (emphasis added).

In this case, the shoe is on the other foot. While the aliens in Rios-Pineda filed frivolous appeals in order to accrue the requisite seven years of presence, the INS in the present case maintained an appeal with no legal merit apparently thinking that the BIA would apply the stop-time rule after April 1, 1997. If it is improper for aliens to file frivolous appeals simply to secure the passage of time, then it is improper for the INS to engage in similar tactics. Allowing the INS to appeal a correct IJ decision on a frivolous, non-discretionary procedural ground in order to avail itself of the stop-time rule the re- -1ural6clyea Congpreisioralainsent to

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for the BIA to reverse the IJ's decision, because she had applied the correct law.

IV.

The dissent argues that this case is controlled by Ram v. INS, 243 F.3d 510 (9th Cir. 2001). That case differs significantly from this case13.8 TD -0.164 TwVu signifi-

V.

Petition GRANTED. Because the BIA denied Otarola's

On September 30, 1996, IIRIRA was signed into law. Sec-

physical presence stops accruing upon service of an order to show cause or a notice to appear.

Section 309(a), set forth in the notes to 8 U.S.C.§ 1101, articulates the effective date of IIRIRA. Section 309(c), entitled "Transition for certain aliens," begins by establishing the general rule of IIRIRA's applicability to "transitional aliens": "Subject to the succeeding provisions of this subsection," the amendments do not apply to aliens in exclusion or deportation who were in proceedings before IIRIRA's effective date. However, the statute does not stop there.

Section 309(c)(5)(A), a "succeeding provision of . . . subsection" 309(c), states:

> In general -- Subject to subparagraphs (B) and (C),[**1**] paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [section 1229b(d) of this title] (relating to continuous residence or physical presence) shall apply to orders to show cause . . . issued before, on, or after the date of the enactment of this Act . . . .

(Emphasis added.) The clear intent of Congress in enacting these statutes and subsequent amendments is that, after April 17, 1997, the stop-time rule in § 240A(d)(1) applies to aliens whose orders to show cause "issued before" that effective date.

C. The majority fails to apply the controlling case.

This case is controlled by Ram. There, we held that the BIA must apply IIRIRA's stop-time rules to transitional-rule aliens like Petitioner:

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Because the legislative history of NACARA resolves any ambiguity in the plain language of IIRIRA section 309(c)(5)(A), we conclude that there is only one reasonable interpretation of this statute.

requirements may apply retroactively to trigger cutoff dates based on notices to appear issued prior to April 1, 1997," id. Of course, the date when the INS filed its memorandum in this case, reiterating its legal position -- June 16, 1997 -- already was after the effective date of April 1, 1997.

When we decided Astrero

APPENDIX

Date	Event
February 23, 1989	Otarola enters the United States

December 30, 1996 Astrero