

NOTES

A LONG ROAD TO RESIDENCY: THE LEGAL HISTORY OF SALVADORAN & GUATEMALAN IMMIGRATION TO THE UNITED STATES WITH A FOCUS ON NACARA

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INTRODUCTION

Over the last three decades, civil war and natural disaster have forced millions of Salvadorans and Guatemalans to leave Central America in search of a better life in the United States.¹ During the same period, the U.S. government has been reluctant to provide them with lawful residence.² The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)³ is the most recent major development in immigration law to address Salvadorans and Guatemalans currently living in the U.S. Although NACARA is a positive development for Salvadorans and Guatemalans in the U.S. seeking hardship relief,⁴ the statute has two notable flaws.

First, NACARA merely gives Salvadorans and Guatemalans the opportunity to apply for suspension of deportation or cancellation of removal.⁵ A successful claim for suspension of deportation or cancellation of removal requires the favorable discretion of the

¹ See Palma Torissi, *Salvadorans' Remittances as Unique Consequences: The Place for Salvadorans' Remittances in the Determination of the Extreme Hardship Requirement of the Nicaraguan Adjustment and Central American Relief Act*, 9 *TOURO INT'L L. REV.* 87, 89 (2001) (stating that by the end of 1992, one in six Salvadorans had fled to the United States to escape civil war); Susan Coutin, *The Odyssey of Salvadoran Asylum Seekers*, NORTH AMERICAN CONGRESS ON LATIN AMERICA REPORT ON THE AMERICAS, May 1, 2004, at 38 (noting that more than one million Salvadorans fled to the United States from 1980 to 1992 during El Salvador's civil war); Lewis Dolinsky, *Notes From Here and There: Guatemalan Campaign Goes North*, S.F. *CHRON.*, Feb. 19, 1999, at A12 (stating that one million Guatemalans are presumed to reside in Chicago, Miami, San Francisco, and Los Angeles).

² See, e.g., Symposium, *Law, Religion, and Identity: The Oppressed, the Suspect, and the Citizen*, 26 *LAW & SOC. INQUIRY* 63 (2001) (describing the Salvadoran and Guatemalan attempt to gain asylum in the United States as a two-decade long struggle).

³ Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, Tit. II, Div. A (1997) [hereinafter NACARA].

⁴ See Torissi, *supra* note 1, at 89 (noting that under NACARA, approximately 200,000 Salvadorans and 50,000 Guatemalans are able to seek hardship relief).

⁵ See NACARA, *supra* note 3, at § 203(a)(1).

Attorney General, which can be difficult to obtain.⁶ By contrast, NACARA grants similarly situated immigrants from Cuba and Nicaragua the opportunity to become lawful permanent residents independent of the Attorney General's favorable discretion.⁷ Neither NACARA nor the Congressional Record explains why immigrants from El Salvador and Guatemala must face a greater challenge in their quest for American residency than Cubans or Nicaraguans.⁸

NACARA's second shortcoming is its arbitrary deadlines. Salvadorans and Guatemalans who arrived in the U.S. after 1990 are not eligible for relief as principals.⁹ Salvadoran nationals only qualify as principals if they first entered the U.S. on or before September 19, 1990.¹⁰ Similarly, Guatemalan nationals only qualify as principals if they first entered the U.S. on or before October 1, 1990.¹¹ These deadlines bear little relation to Central America's recent social and political history.¹² Civil war did not officially end until 1992 in El Salvador¹³ and 1996 in Guatemala.¹⁴

The following pages provide a legal history of the struggle immigrants from El Salvador and Guatemala have faced in attempting to gain lawful residence in the United States, with a focus on

⁶ *See id.* (stating that the Attorney General "may" adjust the status of Salvadorans and Guatemalans eligible for relief under NACARA).

⁷ *See id.* at § 202(a)(1) (stating that the Attorney General "shall" adjust the status of Cubans and Nicaraguans eligible for relief under NACARA); *See also* Patrick E. Caldwell, *NACARA: Minotaur or Midas?*, 53 SMU L. REV. 1559, 1573 (2000) ("NACARA begins with an address to Cubans and Nicaraguans, which are treated far differently from other Central Americans. Cubans and Nicaraguans can apply for adjustment of status (to lawful permanent resident (LPR)) regardless of whether they [have] overstayed a voluntary departure, [are] ordered deported, or [are] still in processing. This is as close to a free pass as the INS ever gets.")

⁸ *See* Lourdes A. Rodriguez, *Understanding the Nicaraguan Adjustment and Central American Relief Act*, 5 ILSA J. INT'L & COMP. L. 501, 509 (1999).

⁹ *See* NACARA, *supra* note 3, at § 203(a)(1). "Principals" may apply for NACARA relief independently, as distinguished from "dependents", who must be the child or spouse of a principal in order to qualify. Dependents may be granted NACARA relief at the same time as a principal, regardless of when the dependent entered the United States. *Id.*

¹⁰ *See id.*

¹¹ *Id.*

¹² *See* Coutin, *supra* note 1, at 38 (noting that NACARA does not address the situation of Salvadoran immigrants who escaped very poor conditions during the postwar era).

¹³ In January 1992, after prolonged negotiations, signed peace accords ended the civil war in El Salvador. U.S. Department of State, *Background Note: El Salvador*, <http://www.state.gov/r/pa/ei/bgn/2033.htm> (last visited March 8, 2005).

¹⁴ In December 1996, peace accords were finally signed, ending the 36-year internal conflict in Guatemala. U.S. Department of State, *Background Note: Guatemala*, <http://www.state.gov/r/pa/ei/bgn/2045.htm> (last visited March 8, 2005).

NACARA. The analysis shows that NACARA, despite its drawbacks, is an overall positive step for Salvadoran and Guatemalan immigrants in the United States. To place NACARA in its appropriate legal context, the analysis begins with a discussion of important legislation and cases that pre-date NACARA.

I. LEGISLATION AND CASES THAT PREDATE NACARA

A. *The Immigration and Nationality Act of 1952*

The Immigration and Nationality Act of 1952 (INA)¹⁵ was the first statute to collect and codify the various laws governing immigration and naturalization in the United States. Notably, INA afforded aliens the opportunity to avoid deportation once they could establish a clear probability of persecution on account of race, religion, nationality, political opinion or membership in a particular social group upon return to their homeland.¹⁶ Since 1952, INA has been modified countless times.¹⁷

B. *The Refugee Act of 1980*

Nearly thirty years after the enactment of INA, the Refugee Act of 1980¹⁸ provided the first permanent procedure for the admission and effective resettlement of refugees in the United States. The Refugee Act defines a refugee as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .¹⁹

The Refugee Act was initially praised as extremely important humanitarian legislation.²⁰ However, two of its provisions gave the

¹⁵ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA].

¹⁶ 8 U.S.C. § 1253(h) (1996).

¹⁷ See, e.g., 8 U.S.C. § 1101 (2005).

¹⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42) (1980)).

¹⁹ See *id.* at § 1101(a)(42)(A).

²⁰ See, e.g., 126 CONG. REC. 1522 (1980) (statement of Rep. Rodino) (“[The Refugee Act] is one of the most important pieces of humanitarian legislation ever enacted by a United States Congress.”).

United States a great deal of flexibility in choosing whom to accept as refugees. First, the Refugee Act allowed foreign policy to be considered in determining which immigrant groups qualified as refugees for admission purposes.²¹ Second, the Attorney General was granted broad discretion in defining “persecution” when evaluating the status of refugees as a group.²²

From 1980 to 1992, application of the Refugee Act was highly impacted by United States foreign policy, and Salvadorans and Guatemalans both suffered as a result.²³ In 1981, only one Salvadoran was granted asylum, sparking harsh disapproval from the United Nations High Commissioner for Refugees (UNHCR).²⁴ The UNHCR report concluded that the United States was failing to fulfill its obligations by not providing Salvadorans with an appropriate opportunity for asylum.²⁵ The UNHCR contacted the Reagan Administration twice in 1981 to request that the U.S. improve its policy regarding undocumented Salvadorans.²⁶ Despite international disapproval, the following year no Salvadorans were granted asylum by the United States.²⁷ From 1984 to 1988, the Immigration and Naturalization Service (INS) approved a mere 2.5% of Salvadoran asylum applications.²⁸ The percentage of Guatemalan asylum seekers granted approval from 1982 to 1990 was also

²¹ See, e.g., INA § 207(e)(6) (codified at 8 U.S.C. § 1157(e)(6)).

²² See INA § 243(h) (*repealed* by Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

²³ See Symposium, *Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101, 105 (1986) (stating that the focus of American refugee policy during the Cold War discriminated against Hispanics from El Salvador and Indians from Guatemala in particular); see also Coutin, *supra* note 1, at 38:

Because the U.S. government was providing the Salvadoran government with military and economic aid, it was reluctant to recognize Salvadoran emigres as victims of human rights abuses and as deserving of political asylum. According to the U.S. Committee for Refugees, 97% of Salvadorans who applied for political asylum between 1983 and 1986 were rejected, while applicants from Iran, Romania, Czechoslovakia, Afghanistan, Poland and Hungary – all ruled by non-friendly regimes – were approved at rates ranging from 32% to 60%.

²⁴ H.R. REP. NO. 1142, Part 1, 98th Cong., 2d Sess. 5 (1984).

²⁵ See *id.*

²⁶ *Id.* 1981 marked the first time the UNHCR had ever informed the United States Government that it was not fulfilling its obligations to refugees as was required by international law. *Id.* at 6.

²⁷ IMMIGRATION & NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE [hereinafter STATISTICAL YEARBOOK]: 1982, at 30.

²⁸ See STATISTICAL YEARBOOK: 1988, at 90.

extraordinarily low.²⁹ In 1982, four Guatemalans received asylum.³⁰ The number of Guatemalans granted asylum increased to eleven in 1985, and then fell back to seven by 1987.³¹

As the cases below demonstrate, a narrow interpretation of “persecution” allowed for the low admission rates of Salvadoran and Guatemalan immigrants even after the passage of the Refugee Act.

1. INS v. Elias-Zacarias

*INS v. Elias-Zacarias*³² exemplifies the difficulty Guatemalan immigrants have had in proving “persecution on account of a political opinion”³³ to Immigration Judges, the Board of Immigration Appeals (BIA), and the United States Supreme Court.

Jairo Jonathan Elias-Zacarias was a young Guatemalan who sought refuge in the United States after avoiding conscription into a notorious Communist guerilla movement in Guatemala.³⁴ He applied for asylum on the ground that he feared persecution by the guerilla movement if forced to return to his homeland.³⁵ Strong evidence supported his fear that the guerillas posed a threat to his life.³⁶ Around the same time Elias-Zacarias left Guatemala, the guerillas maintained a strong presence and were committing human rights atrocities, causing most rural Guatemalans to fear for

²⁹ See STATISTICAL YEARBOOK: 1990, at 106 (citing that only 65 Guatemalans were granted asylum in 1990); STATISTICAL YEARBOOK: 1989, at 59 (citing that 102 Guatemalans received asylum in 1989); STATISTICAL YEARBOOK: 1987, at 57 (citing that seven Guatemalans received asylum in 1987); STATISTICAL YEARBOOK: 1985, at 74 (citing that eleven Guatemalans obtained asylum in 1985); STATISTICAL YEARBOOK: 1982, at 30 (citing that four Guatemalans received asylum in 1982).

³⁰ See STATISTICAL YEARBOOK: 1982, at 30.

³¹ See STATISTICAL YEARBOOK: 1985, at 74; STATISTICAL YEARBOOK: 1987, at 57.

³² *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

³³ Refugee Act of 1980 (codified at 8 U.S.C. § 1101(a)(42)(1980)) defines a refugee as: any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that country because of *persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion* (emphasis added).

³⁴ See *id.* at 479.

³⁵ See *id.*

³⁶ See *id.* at 479-480; see also DAVID STOLL, RIGOBERTA MENCHU AND THE STORY OF ALL POOR GUATEMALANS 9-11 (1999) (making it clear that most rural Guatemalans saw both the guerillas and the government military as threats to their existence).

their lives.³⁷ Nevertheless, the Immigration Judge denied Elias-Zacaria's request for asylum and the BIA dismissed Elias-Zacaria's appeal on procedural grounds.³⁸ The Ninth Circuit Court of Appeals reversed the prior rulings, holding that forced acts of conscription by a guerilla group constituted persecution on account of a political opinion.³⁹ Eventually the case reached the Supreme Court.⁴⁰

Justice Scalia, in reversing the Ninth Circuit, stated that to constitute a "political opinion," the opinion must be explicitly held by the victim, not the oppressor, and that the oppressor must single out and target the victim on account of that opinion.⁴¹ The majority also held that the decision to forgo political involvement is not necessarily a political opinion because such a decision may involve non-ideological motives.⁴² In conclusion, the majority found that even if Elias-Zacarias held a political opinion, he was required to show that his persecutors' motives were to persecute him because statutory language made motive critical.⁴³

In response to the majority, Justice Stevens delivered a heated dissent in which he warned against construing "political opinion" in a manner that limits the benefits of our immigration laws to those who stick to one political extreme or another.⁴⁴ Furthermore, in addressing the majority's refusal to recognize Elias-Zacaria's case as one of persecution, Stevens pointed out that, "[G]uerillas do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are only concerned with an act that constitutes an overt manifestation of a political opinion."⁴⁵ In Stevens's view, persecution due to that overt manifestation was persecution on account of a political opinion.⁴⁶ Regardless of Stevens's strong dissent, Elias-Zacarias was denied asylum in the United States.

³⁷ See *Elias-Zacarias*, 502 U.S., at 479-480; Stoll, *supra* note 36, at 9.

³⁸ See *Elias-Zacarias*, 502 U.S., at 480.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 482-83.

⁴² *Id.* at 482.

⁴³ See *Elias-Zacarias*, 502 U.S. at 483.

⁴⁴ *Id.* at 487 (Stevens, J., dissenting).

⁴⁵ *Id.* at 489 (Stevens, J., dissenting).

⁴⁶ *Id.*

2. INS v. Canas-Segovia

The Supreme Court was forced to consider the meaning of “persecution” once again in *INS v. Canas-Segovia*.⁴⁷ This time the issue was “persecution on account of religion,” rather than “political opinion” as in *Elias-Zacarias*.⁴⁸

The Canas-Segovia brothers, both Jehovah’s Witnesses, left El Salvador at the ages of 16 and 17, respectively, so as to avoid conscription into the government military.⁴⁹ The INS rejected the brothers’ claims for asylum on the ground that conscientious objection was not a predicate for religious persecution under the Refugee Act.⁵⁰ The BIA affirmed the Immigration Judge’s decision and explained that the Salvadoran government’s conscription policy did not qualify as persecution because it did not specifically target Jehovah’s Witnesses.⁵¹ The fact that members of religious groups throughout El Salvador were victims of intense persecution for refusing to join a side in the civil war did not sway the INS or BIA.⁵² However, the Ninth Circuit reversed the BIA and ruled in favor of the brothers, pointing out that UN guidelines did not require a demonstration of the persecutor’s motives under the Refugee Act.⁵³

Two years later, the Supreme Court heard the case and decided to remand it to the Ninth Circuit, stating that the holding in *Elias-Zacarias*⁵⁴ necessitated a determination of the persecutor’s motives in *Canas-Segovia*.⁵⁵ On remand, the Ninth Circuit found the evidence sufficient to prove that the Salvadoran military in-

⁴⁷ *INS v. Canas-Segovia*, 902 F.2d 717 (9th Cir. 1990), *judgment vacated by*, 502 U.S. 1086 (1992), *remanded to* 970 F. 2d 599 (9th Cir. 1992).

⁴⁸ *See id.* There are several ways to establish refugee status, including proof of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* Refugee Act, *supra* note 33.

⁴⁹ *See Canas-Segovia*, 902 F.2d at 717. At the time of trial, El Salvador had a policy of mandatory military service for all males between the ages of 18 and 30. Conscientious objectors, on religious grounds or otherwise, were not exempted from military service. The legal penalties for resisting conscription ranged from six months to 15 years imprisonment. Fear of mandatory military service caused the brothers to flee El Salvador at the respective ages of 16 and 17. *Id.*

⁵⁰ *Id.* at 720-721.

⁵¹ *Id.* at 721.

⁵² *Id.* at 726-727.

⁵³ *Canas-Segovia*, 902 F.2d at 726-727.

⁵⁴ *INS v. Elias Zacarias*, 502 U.S. 478 (1992).

⁵⁵ *INS v. Canas-Segovia*, 502 U.S. 1086 (1992) (remanding *Canas-Segovia* to the 9th Circuit for further consideration in light of *INS v. Elias-Zacaria*).

tended to persecute the brothers based on their religious beliefs.⁵⁶ Although the Canas-Segovia brothers eventually gained legal refuge in the United States, the extensive procedural history of the case, as well as the initial rulings by the INS and BIA, make clear that the Refugee Act of 1980 was far from a guarantee of protection to Salvadorans seeking refuge in the United States.

C. *Specific Developments in Immigration Law during the Early 1990's*

The thick stream of migrants from Central America to the U.S. was steady throughout the 1980s.⁵⁷ In 1987, Attorney General Edwin Meese promulgated the Nicaraguan Review Program⁵⁸ specifically to protect Nicaraguans from deportation. Although there were ten times as many Salvadorans as Nicaraguans fleeing to the United States during the 1980s,⁵⁹ the first legislative measure to grant specific protection to Salvadorans was Salvadoran Temporary Protected Status⁶⁰ in 1990. Guatemalans did not receive comparable protection until the *American Baptist Churches*⁶¹ settlement in 1991.

1. *Salvadoran Temporary Protected Status*

Salvadoran Temporary Protected Status (TPS)⁶² was the product of a decade-long battle to provide legal protection for Salvadoran immigrants residing in the United States.⁶³ In 1983, Representative Joe Moakley and eighty-seven colleagues urged the

⁵⁶ *INS v. Canas-Segovia*, 970 F.2d 599 (9th Cir. 1992).

⁵⁷ DEPARTMENT OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS [hereinafter IMMIGRATION STATISTICS]: 2003, at 14 (showing that from 1971-1980, 134,640 immigrant aliens from Central America were admitted; from 1981-1990, 468,088 immigrant aliens from Central America were admitted; from 1991-2000, 526,915 immigrant aliens from Central America were admitted).

⁵⁸ Discontinuation of the Nicaraguan Review Process, 60 Fed. Reg. 31,167 (June 13, 1995).

⁵⁹ See Central American Studies and Temporary Relief Act of 1987, H.R. Res. 230, 100th Cong. (1987) (estimating that there were 500,000 to 750,000 Salvadorans in the United States in 1985); *Tefel v. Reno*, 972 F. Supp. 623, 626 n.4 (S.D. Fla. 1997) (estimating that 53,000 Nicaraguans were protected by the Nicaraguan review program).

⁶⁰ Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978 (1990).

⁶¹ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

⁶² See Immigration Act of 1990, *supra* note 60.

⁶³ See, e.g., Ari Weitzhandler, Comment, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249, 261 (1993) (stating that Congress expressed interest in providing protective measures for Salvadorans throughout the 1980's).

Attorney General and Secretary of State to create Extended Voluntary Departure (EVD)⁶⁴ for Salvadorans. In 1984 and 1985, Congress specifically requested that more EVD be granted to immigrants from El Salvador.⁶⁵ Several years later, Congress unsuccessfully fought for the enactment of the Central American Studies and Temporary Relief Act.⁶⁶ Finally, in 1990, Salvadorans qualified to receive TPS.⁶⁷

Under TPS, Salvadorans who had been “continuously physically present in the United States since September 19, 1990”⁶⁸ were entitled to a work permit, renewable every six months.⁶⁹ The Salvadoran TPS program lasted until 1992⁷⁰ and evolved into a Deferred Enforced Departure⁷¹ program that expired completely in 1996.⁷² While Salvadoran TPS provided relief to approximately one hundred and fifty thousand Salvadoran immigrants,⁷³ the relatively low turnout brought to light the general mistrust for the INS within the Salvadoran community.⁷⁴ This lack of faith in the INS is

⁶⁴ Extended Voluntary Departure is a blanket form of relief from deportation that is granted to a group of nationals currently present in the United States from a specified country. See Pamela M. Martin, Note, *Temporary Protected Status and the Legacy of Santos-Gomez*, 25 GEO. WASH. J. INT'L. L. & ECON. 227, 230 (1992).

⁶⁵ See Pub. L. No. 98-164, § 1012, 97 Stat. 1062 (1983).

⁶⁶ The Central American Studies and Temporary Relief Act of 1987 proposed that Salvadorans and Nicaraguans be suspended from deportation and removal until a full investigation was conducted into the conditions in Nicaragua and El Salvador at the time of arrival of the individual in question. H.R. 230, 100th Cong. (1987).

⁶⁷ See Immigration Act of 1990, *supra* note 60.

⁶⁸ See *id.* at § 303(b)(1)(A) (1990).

⁶⁹ See *id.* at § 303(c)(3).

⁷⁰ Extension of Application Deadline for Special Temporary Protected Status for Salvadorans, Pub. L. No. 102-65, 105 Stat. 322 (1991).

⁷¹ Further Extension of Work Authorization for Salvadorans Under Deferred Enforced Departure, 61 Fed. Reg. 3053 (1996).

⁷² See *id.*

⁷³ See Extension of Deferral of Enforced Departure for Nationals of El Salvador, 58 Fed. Reg. 32,157 (1993) (supplementary information):

On June 26, 1992, the Commissioner of the Immigration and Naturalization Service announced in the Federal Register (57 Fed. Reg. 28700-28701) that deportation of nationals of El Salvador who had registered for TPS, and who had re-registered for the second period, would not be enforced before June 30, 1993, because El Salvador could not then accommodate the repatriation of the approximately 150,000 people who had been granted TPS.

⁷⁴ Although Salvadoran Temporary Protected Status provided relief to approximately 150,000 Salvadorans, there were likely over 1,000,000 Salvadorans living in the United States by the time the program expired. See Coutin, *supra* note 1, at 38 (noting that more than one million Salvadorans fled to the United States from 1980 to 1992 during El Salvador's civil war).

closely tied to two cases: *Orantes-Hernandez v. Smith*⁷⁵ and *Nunez v. Boldin*.⁷⁶

a. *Orantes-Hernandez v. Smith*

In *Orantes-Hernandez*, Judge Kenyon issued an injunction to prevent the INS from depriving detained Salvadorans their due process rights.⁷⁷ Detainees were prevented from contacting and communicating with counsel and outsiders, coerced into signing voluntary departure agreements, arbitrarily put in solitary confinement for long periods of time, and physically abused and threatened by INS employees.⁷⁸ After the preliminary injunction was issued, the INS continued to violate the detainees' due process rights, thereby prompting the issuance of a permanent injunction in *Orantes-Hernandez v. Meese*, six years later.⁷⁹

b. *Nunez v. Boldin*

Similar to *Orantes-Hernandez*, in *Nunez* the INS was charged with confiscating the telephone numbers and addresses of attorneys, friends, and relatives of Salvadoran and Guatemalan detainees, thus preventing them from seeking outside assistance after being apprehended.⁸⁰ In the final judgment, Judge Vela decided to issue a preliminary injunction against the INS for failing to give Salvadorans and Guatemalans notice of their right to apply for political asylum in the United States prior to deportation.⁸¹

The general lack of respect for Salvadoran and Guatemalan aliens within the INS, as officially recognized in *Orantes-Hernandez* and *Nunez*, explains why many immigrants from these nations have been hesitant to take advantage of certain protection programs offered by the U.S. government.

2. *American Baptist Churches Settlement*

Whereas Salvadoran immigrants' need for protection was officially recognized by legislation in 1990,⁸² Guatemalans did not re-

⁷⁵ *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

⁷⁶ *Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982).

⁷⁷ See *Orantes-Hernandez*, 541 F. Supp., at 386.

⁷⁸ See *id.* at 359-60.

⁷⁹ See *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd* by *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

⁸⁰ See *Nunez*, 537 F. Supp., at 580 n.1.

⁸¹ *Id.* at 587.

⁸² See Immigration Act of 1990, *supra* note 60.

ceive similar protection until the *American Baptist Churches* settlement (ABC)⁸³ in 1991. The ABC program was the result of three lawsuits brought by religious organizations, Central American advocacy groups, and undocumented Salvadoran and Guatemalan refugees against Attorneys General Edwin Meese and Richard Thornburgh.⁸⁴

In the first action, the religious organizations claimed that the defendants breached the churches' First Amendment right to freely associate and practice their beliefs by selectively prosecuting them for providing sanctuary to Central American refugees.⁸⁵ In the second action, the Salvadoran and Guatemalan plaintiffs alleged that the defendants' discriminatory application of immigration laws violated their Equal Protection as guaranteed by the Fifth Amendment.⁸⁶ The immigrants also claimed that the defendants had recklessly endangered their lives by knowingly and willfully sending them back to countries where they were subject to wrongful death, assault, battery, and intentional infliction of emotional distress.⁸⁷ In the third action, the refugee plaintiffs requested and were granted class certification.⁸⁸

The ABC settlement entitled all Salvadorans who had resided in the United States as of September 19, 1990, and all Guatemalans residing in the U.S. since October 1, 1990, to de novo asylum adjudication.⁸⁹ In recognition of the injustice created by certain provisions in the Refugee Act of 1980, the ABC settlement agreement stated that foreign policy considerations would no longer play a role in evaluating a refugee's fear of persecution.⁹⁰ Furthermore, the agreement stated that the standard used to determine an appli-

⁸³ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

⁸⁴ *American Baptist Churches v. Meese I*, 666 F. Supp. 1358 (N.D. Cal. 1987); *American Baptist Churches v. Meese II*, 712 F. Supp. 756 (N.D. Cal. 1989); *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

⁸⁵ In *American Baptist Churches v. Meese I*, Judge Peckham allowed the religious organizations to proceed with their First Amendment claims but stated that they lacked standing to assert the rights of Salvadoran and Guatemalan refugees to remain in the United States. However, he also granted the plaintiffs thirty days to amend their complaint in order to establish standing by association. See *American Baptist Churches v. Meese I*, 666 F. Supp. at 1366-69.

⁸⁶ See *American Baptist Churches v. Meese II*, 712 F. Supp., at 759.

⁸⁷ See *id.*

⁸⁸ See *American Baptist Churches v. Thornburgh*, 760 F. Supp., at 799.

⁸⁹ See *id.*

⁹⁰ *Id.*

cant's fear of persecution must be the same for all refugee groups, including Salvadorans and Guatemalans.⁹¹

Numerous Salvadoran and Guatemalan immigrants benefited from the ABC settlement.⁹² However, there were major drawbacks to the settlement. Many eligible for ABC benefits experienced long delays in obtaining an initial hearing.⁹³ Additionally, ABC's strict class limitations and deadlines excluded many immigrants who faced the same hardships as those included in the ABC class.⁹⁴ The arbitrary deadlines set in ABC continue to be an issue for those seeking relief under NACARA.⁹⁵

D. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

Five years after the ABC settlement, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁹⁶ which is still in force. IIRIRA reflects a dramatic increase in the government's effort to battle illegal immigration and takes a harsh stance against undocumented aliens living in the United States.⁹⁷ Consequently, the passage of IIRIRA was a major setback for Salvadorans and Guatemalans seeking to remain in the United States.

⁹¹ *Id.*

⁹² See Robert M. Cannon, Comment, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement*, 5 ADMIN. L.J. 713, 714 (1991) (citing that 650,000 Guatemalans and Salvadorans had their status changed as a result of the ABC settlement).

⁹³ See 145 CONG. REC. 10,944 (daily ed. Sept. 15, 1999) (statement of Sen. Durbin).

⁹⁴ See Coutin, *supra* note 1, at 38 ("The same conditions that make ABC class members reluctant to return to El Salvador also fuel continued emigration.").

⁹⁵ NACARA uses the same deadlines that were created by the ABC settlement. See Coutin, *supra* note 1, at 38 (further noting that NACARA does not address the situation of Salvadoran immigrants who escaped very poor conditions during the postwar era).

⁹⁶ Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in sections of 8 U.S.C. § 1101) [hereinafter IIRIRA].

⁹⁷ See Evangeline G. Abriel, Symposium, *Immigration Reform Laws: Redefining Who Belongs: Article: Ending the Welcome: Changes in the United States' Treatment of Undocumented Aliens (1986 to 1996)*, 1 RUTGERS RACE & L. REV. 1, 2 (1998) ("IIRIRA's backlash is particularly striking when compared with the prior legislative effort to control illegal immigration. . . . In just ten years our treatment of undocumented aliens has become considerably harsher.").

Around the same time Congress enacted IIRIRA, the political climate in Central America began to stabilize.⁹⁸ By 1996, peace accords had been reached in El Salvador and Guatemala, making it extremely difficult for Salvadorans and Guatemalans to establish grounds for political asylum.⁹⁹ Instead, the most available form of relief for Salvadoran and Guatemalan immigrants since the mid-1990s has been cancellation of removal, called suspension of deportation prior to IIRIRA.¹⁰⁰ Whereas asylum claims focus on the conditions in immigrants' home countries, an application for cancellation of removal considers the degree to which an immigrant has succeeded in establishing a new life in America.¹⁰¹

Under IIRIRA, all undocumented aliens applying for cancellation of removal are required to prove ten years of continuous physical presence in the United States.¹⁰² Prior to IIRIRA, an alien seeking cancellation of removal was only required to show seven years of continuous presence.¹⁰³ Another significant change in policy due to IIRIRA is that an alien may no longer use personal hardship to establish eligibility for cancellation of removal.¹⁰⁴ An alien must now demonstrate that his or her removal would cause hardship to a United States citizen or permanent resident spouse, parent, or child.¹⁰⁵ Furthermore, IIRIRA increases the level of hardship required to obtain cancellation of removal from "extreme"¹⁰⁶ to "exceptional and extremely unusual."¹⁰⁷ IIRIRA also instituted a limit of 4,000 total cancellations of removal per year.¹⁰⁸

The enactment of IIRIRA coupled with the fact that the INS attempted to apply IIRIRA retroactively to old claims for suspen-

⁹⁸ See U.S. Department of State, *supra* note 13 (stating that in January 1992, after prolonged negotiations, signed peace accords ended the civil war in El Salvador); U.S. Department of State, *supra* note 14 (stating that in December 1996, peace accords were finally signed, ending the 36-year internal conflict in Guatemala).

⁹⁹ See Coutin, *supra* note 1, at 38 (explaining that peace accords caused surprise dilemmas for Salvadorans immigrants).

¹⁰⁰ See IIRIRA, *supra* note 96.

¹⁰¹ INA, *supra* note 15, distinguishes between two kinds of relief: 1) straight asylum (INA §§ 208(a) and 101(a)(42)); and 2) cancellation of removal (INA § 241(b)(3)).

¹⁰² 8 U.S.C. § 1229(b)(1)(A).

¹⁰³ 8 U.S.C. § 1254(a)(2).

¹⁰⁴ 8 U.S.C. § 1229(b)(1)(D).

¹⁰⁵ *Id.*

¹⁰⁶ 8 U.S.C. 1254(a)(2).

¹⁰⁷ 8 U.S.C. 1229(b)(1)(D).

¹⁰⁸ INA, *supra* note 15, at § 240A(e).

sion of deportation led to a major class action suit¹⁰⁹ and new legislation¹¹⁰ aimed at resolving some of IIRIRA's harsher provisions.

1. *Tefel v. Reno*

*Tefel v. Reno*¹¹¹ was a class-action suit brought by several thousand Nicaraguan nationals who sought to enjoin the INS from applying the new cancellation of removal standards under IIRIRA to outstanding claims for suspension of deportation.¹¹² The plaintiffs argued that retroactive enforcement of IIRIRA was a violation of Fifth Amendment Due Process rights.¹¹³ The INS asserted that the newly enacted provisions of IIRIRA could be enforced retroactively, claiming that an order to show cause, which may be traced to a date prior to the passage of IIRIRA, is identical to a notice to appear.¹¹⁴

After evaluating the legislative history of IIRIRA, Judge King determined that the INS had made an erroneous assumption in equating an order to show cause with a notice to appear and granted a preliminary injunction against retroactive enforcement of IIRIRA.¹¹⁵ Judge King cited the economic damage¹¹⁶ and the human consequences of family separation that would result from the mass deportation of Nicaraguans as influential in his decision against the INS.¹¹⁷

The issues addressed in *Tefel* were not unique to the Nicaraguan plaintiffs.¹¹⁸ The application of IIRIRA posed the threat of mass deportation in similarly situated immigrant communities

¹⁰⁹ *Tefel v. Reno*, 972 F. Supp. 623 (S.D. Fla. 1997).

¹¹⁰ NACARA, *supra* note 3.

¹¹¹ *Tefel*, 972 F. Supp. 623.

¹¹² *See id.* at 626.

¹¹³ *See id.* at 626-27.

¹¹⁴ *See id.* at 634-35.

¹¹⁵ *Id.*

¹¹⁶ *See Tefel*, 972 F. Supp at 649-650. Florida State Representative Jorge Rodriguez Chomat stated that Nicaraguans had such a strong economic presence in the community of Sweetwater that "the city would have to stop existing if a substantial number of the Nicaraguan community was deported." *Id.* at 649-50. Jose Antonio Ojeda, Assistant Count Manager for Dade County, estimated a \$1 billion loss in revenue to Dade County if Nicaraguans were deported. *Id.* at 649.

¹¹⁷ Robert Arguello, an advocate for immigrant rights, described children who refused to attend school because they feared their parents would be deported as soon as they left the house. *See id.* at 649.

¹¹⁸ *See* Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 236 n.224 (estimating that the potential number of class members nationwide in *Tefel* was as high as 500,000).

throughout the United States, including Salvadoran and Guatemalan neighborhoods.¹¹⁹ Soon after *Tefel*, Congress officially recognized the danger of applying IIRIRA to specific groups of undocumented aliens when it enacted the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).¹²⁰

II. NACARA

A. General Function

Various political groups sympathetic to the plight of undocumented aliens under IIRIRA petitioned Congress to enact reform.¹²¹ As a result, Congress passed NACARA in 1997 to provide extra relief to select immigrant groups and to protect long-time residents from deportation.¹²² NACARA uses separate provisions to address two statutorily distinct groups of aliens.¹²³

The first provision applies to Cubans and Nicaraguans and the second applies to Salvadorans, Guatemalans, and Eastern Europeans.¹²⁴ The first provision provides more favorable relief than the second provision.¹²⁵ Neither NACARA nor the Congressional Record explains why immigrants from El Salvador, Guatemala, and Eastern Europe are treated differently than Cubans and Nicaraguans.¹²⁶ Some feel the inequity is the result of partisan politics.¹²⁷ Others claim Cuban and Nicaraguan immigrants are favored

¹¹⁹ See 143 CONG. REC. S10,185, 10,192, 10,203, H10,676 (1997).

¹²⁰ NACARA, *supra* note 3.

¹²¹ See Coutin, *supra* note 1, at 38:

In 1997, Central American advocates launched a new campaign to win legal permanent residency for ABC class members. Salvadoran and Guatemalan authorities concerned with the destabilizing effects that would result from deportations also lobbied for a remedy. Several months into the campaign, Salvadorans and Guatemalans joined forces with Nicaraguans who had fled the Sandinista government and were also victims of IIRIRA. This alliance made possible the passage of the Nicaraguan and Central American Relief Act.

¹²² See *id.*

¹²³ NACARA, *supra* note 3, at §§ 202, 203.

¹²⁴ *Id.*

¹²⁵ See Caldwell, *supra* note 7, at 1573 (“NACARA begins with an address to Cubans and Nicaraguans, which are treated far differently from other Central Americans. Cubans and Nicaraguans can apply for adjustment of status (to lawful permanent resident (LPR)) regardless of whether they [have] overstayed a voluntary departure, [are] ordered deported, or [are] still in processing. This is as close to a free pass as the INS ever gets.”)

¹²⁶ See Rodriguez, *supra* note 8, at 509.

¹²⁷ See, e.g., Rodriguez, *supra* note 8, at 509 (quoting Sen. Kennedy on the lack of uniformity in NACARA and the mistreatment of Salvadorans and Guatemalans) (“This legislation is a frank admission by the Senate that last year’s immigration law treated these

because they fled Communist governments opposed by the United States.¹²⁸

B. *NACARA § 202: Cubans and Nicaraguans*

Section 202 of NACARA allows undocumented Cuban and Nicaraguan aliens to adjust their status to lawful permanent resident.¹²⁹ This provision of NACARA is as close to a free pass for American residence as the INS grants.¹³⁰ The requisite showings for adjusted status under § 202 are lenient. The alien must have applied for permanent residence prior to April 1, 2000, must be “otherwise eligible” to receive an immigrant visa, and must be “otherwise admissible” for permanent residence.¹³¹ The adjustment to lawful permanent resident is not necessarily hindered by the alien’s status prior to the adjustment.¹³² In other words, a Cuban who has previously been ordered deported may be granted permanent residence in the United States.¹³³ Pursuant to § 202, Cubans and Nicaraguans seeking permanent residence need only complete the application for adjustment of status.¹³⁴ They are not required to file any other documentation or petitions.¹³⁵

There remain some minor limitations on Cubans and Nicaraguans who apply for adjusted status under NACARA. Section 202 only applies to aliens who have been continuously present in the United States since December 1, 1995.¹³⁶ However, the same

families unfairly, and that something must be done to correct it. But instead of correcting the injustice for all refugees, Republicans now pick and choose among their favorite Latino groups. . .”).

¹²⁸ See, e.g., Coutin, *supra* note 1, at 38 (stating that the differential treatment of Nicaraguans compared with Salvadorans and Guatemalans is likely due to the fact that Nicaraguans fled a government the United States opposed, whereas Salvadorans and Guatemalans fled governments that the U.S. supported).

¹²⁹ NACARA, *supra* note 3, at § 202(h).

¹³⁰ See Caldwell, *supra* note 7, at 1573.

¹³¹ NACARA, *supra* note 3, at § 202(a)(1)(A). The terms “otherwise eligible” and “otherwise admissible” under § 202 refer to the broad grounds for exclusion and deportation common to all immigration actions. Eligibility for an immigrant visa clears the alien of the exclusionary grounds while eligibility for permanent residence clears the alien of deportation grounds. Security grounds, health risks, drug-related crimes, and acts of moral turpitude are examples of common grounds for exclusion that also bar § 202 applicants. See *id.* at § 202(c).

¹³² *Id.* at § 202(a)(2).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ NACARA, *supra* note 3, at § 202(b)(1).

provision goes on to state that the alien may have left the U.S. after December 1, 1995, as long as the aggregate time abroad does not exceed 180 days.¹³⁷

Benefits unique to Cubans and Nicaraguans under NACARA include the allowance of derivative claims for adjustment of status by eligible spouses and children¹³⁸ and the ability to secure work authorization.¹³⁹ One very important difference between § 202 and the section that applies to Salvadorans and Guatemalans is that § 202 mandates that all prima facie applicants for lawful permanent residence be accepted regardless of opinions held by the Attorney General.¹⁴⁰ Under NACARA, Salvadorans and Guatemalans are subject to the Attorney General's discretion.¹⁴¹

C. NACARA § 203: Salvadorans and Guatemalans

In addition to providing relief to Eastern Europeans, § 203 covers five specific groups of Salvadorans and Guatemalans.¹⁴² One group is composed of Salvadoran nationals who first entered the United States on or before September 19, 1990 and who registered for benefits under the ABC settlement on or before October 31, 1991.¹⁴³ A second group is made up of Guatemalan nationals who first entered the United States on or before October 1, 1990 and registered for ABC benefits on or before December 31, 1991.¹⁴⁴ Another group includes Salvadorans and Guatemalans who filed an application for political asylum with the INS on or before April 1, 1990.¹⁴⁵ Spouses and children of Salvadorans and Guatemalans granted NACARA suspension of deportation or special cancellation of removal are also eligible.¹⁴⁶ Finally, unmarried sons and daughters of the above classes are eligible, so long as the unmarried son or daughter entered the United States on or before

¹³⁷ *Id.*

¹³⁸ *Id.* at § 202(d)(1)(B).

¹³⁹ *Id.* at § 202(c).

¹⁴⁰ *Id.* at § 202(a)(1).

¹⁴¹ NACARA, *supra* note 3, at § 203(a)(1).

¹⁴² *Id.*

¹⁴³ IIRIRA, *supra* note 96, at § 309(c)(5)(C)(i)(I)(aa), amended by NACARA § 203(a)(1).

¹⁴⁴ *Id.* at § 309(c)(5)(C)(i)(I)(bb), amended by NACARA § 203(a)(1).

¹⁴⁵ *Id.* at § 309(c)(5)(C)(i)(II), amended by NACARA § 203(a)(1).

¹⁴⁶ *Id.* at § 309(c)(5)(C)(i)(III), amended by NACARA § 203(a)(1).

October 1, 1990 and the legal relationship existed at the time that the parent was granted the benefit.¹⁴⁷

Unlike Cubans and Nicaraguans, the undocumented aliens addressed in § 203 are not given the immediate opportunity to become lawful permanent residents.¹⁴⁸ Instead, § 203 provides Salvadorans and Guatemalans relief in the form of suspension of deportation or cancellation of removal, if specific requirements are met.¹⁴⁹

1. *Suspension of Deportation and Cancellation of Removal*

Suspension of deportation and cancellation of removal are forms of discretionary relief that allow an alien subject to deportation or removal to remain in the United States.¹⁵⁰ IIRIRA replaced the previous suspension of deportation procedures with the cancellation of removal provisions.¹⁵¹ As a result, NACARA makes suspension of deportation available to aliens who have been placed in deportation proceedings through the issuance of an order to show cause prior to April 1, 1997, and cancellation of removal is available to those who have been placed in removal proceedings through the issuance of a notice to appear after April 1, 1997.¹⁵² Under NACARA, Salvadorans and Guatemalans eligible for cancellation of removal, rather than suspension of deportation, are provided with a special form of cancellation of removal.¹⁵³ Special cancellation of removal is nearly identical to suspension of deportation and more lenient than standard cancellation of removal under IIRIRA.¹⁵⁴ A successful NACARA claim for suspension of deportation or cancellation of removal permits aliens to adjust their status to lawful permanent resident.¹⁵⁵ Such claims, however, are predicated on multiple conditions.¹⁵⁶

¹⁴⁷ *Id.* at § 309(c)(5)(C)(i)(IV), amended by NACARA § 203(a)(1).

¹⁴⁸ NACARA, *supra* note 3, at § 203(a)(1) (stating that the Attorney General “may” adjust the status of aliens eligible for relief under NACARA § 203).

¹⁴⁹ *Id.* The requirements are discussed immediately *infra*, in Part III-(C)(1) (“Suspension of Deportation and Cancellation of Removal”).

¹⁵⁰ See INA, *supra* note 15, at §§ 238-242.

¹⁵¹ See IIRIRA, *supra* note 96.

¹⁵² See INA, *supra* note 15, at §§ 238-242.

¹⁵³ NACARA, *supra* note 3, at § 203(b).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at § 204(b).

¹⁵⁶ *Id.* at § 203(a).

First, the alien must not be inadmissible or deportable under criminal or security grounds.¹⁵⁷ Such grounds of inadmissibility and deportability are: (1) convictions for two crimes involving moral turpitude;¹⁵⁸ (2) two or more convictions with aggregate sentences of five years or more;¹⁵⁹ (3) a drug trafficking offense or a conviction for being a drug addict or abuser;¹⁶⁰ (4) a conviction for a crime relating to prostitution;¹⁶¹ (5) deportability as an aggravated felon;¹⁶² (6) a conviction for a firearms offense;¹⁶³ (7) deportability or inadmissibility as a terrorist;¹⁶⁴ and (8) deportability for a domestic violence conviction or for falsification of United States citizenship to obtain benefits in this country, as stipulated in the INA.¹⁶⁵

If the alien is not barred relief by the above criminal or security grounds, he or she must establish: (1) continuous physical presence in the United States for seven years;¹⁶⁶ (2) good moral character;¹⁶⁷ (3) extreme hardship to himself or herself or to a spouse, child, or parent who is a United States citizen or lawful permanent resident;¹⁶⁸ and (4) a case worthy of favorable discretion.¹⁶⁹ Because NACARA's extreme hardship standard has generated substantial debate, it warrants further discussion.¹⁷⁰

¹⁵⁷ *Id.*

¹⁵⁸ INA, *supra* note 15, at §§ 212(a)(2)(A)(I), 237(a)(2)(A).

¹⁵⁹ *Id.* at § 212(a)(2)(B).

¹⁶⁰ *Id.* at § 212(a)(2)(C).

¹⁶¹ *Id.* at § 212(a)(2)(D).

¹⁶² *Id.* at § 212(a)(2)(A)(iii).

¹⁶³ INA, *supra* note 15, at § 237(a)(2)(C).

¹⁶⁴ *Id.* at § 212(a)(3).

¹⁶⁵ *Id.* at § 237(a)(2)(E)(I)(ii).

¹⁶⁶ IIRIRA, *supra* note 96, at § 309(f)(1)(A)(ii), *amended by* NACARA § 203(b).

¹⁶⁷ *Id.* at § 309(f)(1)(A)(iii), *amended by* NACARA § 203(b).

¹⁶⁸ *Id.* at § 309(f)(1)(A)(iv), *amended by* NACARA § 203(b).

¹⁶⁹ *Id.* at § 309(f)(1), *amended by* NACARA § 203(b).

¹⁷⁰ *See, e.g.,* Torrisi, *supra* note 1 (arguing generally that NACARA's extreme hardship should be interpreted more broadly so as to allow for increased relief for Salvadorans); Caldwell, *supra* note 7, at 1591 (stating that many Guatemalans and Salvadorans living in the United States may find it difficult to satisfy NACARA's extreme hardship requirement); LINTON JOAQUIN & MARK SILVERMAN, NACARA FOR GUATEMALANS, SALVADORANS, AND FORMER SOVIET BLOCK NATIONALS 16 (2004) (noting that the Department of Justice received over 400 comments regarding NACARA's extreme hardship standard).

D. NACARA's Extreme Hardship Standard

In order to obtain relief under NACARA, aliens must establish that removal would result in "extreme hardship" to the alien or the alien's spouse, parent, or child who is a U.S. citizen or lawful permanent resident.¹⁷¹ Based on statutory language alone, NACARA uses a more lenient standard than IIRIRA, which requires that a claimant prove "exceptional and extremely unusual hardship" in order to obtain cancellation of removal.¹⁷² However, because the Attorney General is afforded a great deal of discretion in interpreting what constitutes extreme hardship, it was initially unclear whether NACARA's hardship standard would differ from the IIRIRA standard in practice.¹⁷³ The ambiguity was of particular concern to Salvadorans and Guatemalans, many of whom fail to meet IIRIRA's hardship standard.¹⁷⁴

The factors relevant to the determination of hardship have been consistent for several decades.¹⁷⁵ These factors fall under two major headings: economic hardship and emotional hardship.¹⁷⁶ Immigration judges have generally held that a showing of economic detriment alone is not enough to establish extreme hardship in a claim for cancellation of removal,¹⁷⁷ unless the economic detriment is unusually severe.¹⁷⁸ Similarly, a mere showing of emotional hardship is not sufficient to demonstrate extreme hardship.¹⁷⁹ Therefore, aliens must generally prove that they, or a statutory relative, will suffer economic and emotional hardship as a result of the principal's removal in order to remain in the United States. A further analysis of the factors relevant to a hardship determination

¹⁷¹ IIRIRA, *supra* note 96, at § 309(f)(1)(A)(iv), *amended by* NACARA § 203(b).

¹⁷² 8 U.S.C. § 1229(b)(1)(D).

¹⁷³ *See* Torrisi, *supra* note 1, at 90 (questioning whether the Attorney General will choose to interpret NACARA's hardship standard in accordance with Congress' statement of legislative intent or the IIRIRA standard).

¹⁷⁴ *See* Caldwell, *supra* note 7, at 1591.

¹⁷⁵ *See* Torrisi, *supra* note 1, at 97 ("There has been a remarkable degree of consistency in BIA decisions of the past several decades listing the factors to be considered as relevant to the determination of the extreme hardship requirement.").

¹⁷⁶ *See id.* at 98.

¹⁷⁷ *See id.*

¹⁷⁸ *See* Palafax v. INS, 1997 U.S. App. Lexis 10662 at 10 (stating that an alien can demonstrate extreme hardship through evidence of uncommonly severe economic detriment).

¹⁷⁹ *See* Hassan v. INS, 927 F.2d 465, 468 (1991) ("[T]he claim of emotional hardship. . . is not conclusive of extreme hardship, and is not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission.").

under IIRIRA demonstrates the difficulty of establishing a hardship claim.

1. *Economic Hardship*

Factors relevant to a finding of economic hardship include: (1) poor economic conditions in the alien's homeland; (2) a significant decrease in standard of living as a result of removal; (3) loss of employment due to removal; (4) financial hardship to the alien's family as a result of removal; and (5) inability to find employment in one's area of specialization following removal.¹⁸⁰ The above factors, alone, do not constitute extreme hardship because almost every alien in the United States experiences a similar form of hardship.¹⁸¹ However, on rare occasions an alien may demonstrate extreme hardship by proving the absolute inability to find employment outside the United States, also known as unusually severe economic detriment.¹⁸² Relevant factors supporting a claim of unusually severe economic detriment are old age, severe illness, and extreme lack of education.¹⁸³ Unless an alien has strong evidence that removal will result in unusually severe economic detriment, he or she must establish a form of hardship in addition to financial woes to satisfy the extreme hardship standard.¹⁸⁴

2. *Emotional Hardship*

Emotional hardship combined with economic hardship is the usual route to a finding of extreme hardship.¹⁸⁵ The most common form of emotional hardship associated with removal is family separation.¹⁸⁶ Other factors used to evaluate emotional hardship in-

¹⁸⁰ See Torrisi, *supra* note 1, at 99.

¹⁸¹ See *id.*

¹⁸² See *id.* at 100.

¹⁸³ See *Urban v. INS*, 123 F.3d 644, 649 (7th Cir. 1997).

¹⁸⁴ *Id.*, at 648.

¹⁸⁵ See Torrisi, *supra* note 1, at 101 ("Emotional or psychological hardship to the alien himself is recognized as a personal hardship which can combine with economic hardship to lead to a finding of extreme hardship."); *Mejia-Carillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981) (holding that emotional hardship resulting from deportation must be considered in the extreme hardship determination).

¹⁸⁶ See, e.g., *Mejia-Carillo*, 656 F.2d at 520 (the court reversed a BIA decision for failing to consider family separation in a case in which children and a mother would be forced to return to Mexico while the father remained in the United States); *Ravancho v. INS*, 658 F.2d 169 (3d Cir. 1981) (the court reversed a BIA decision for failure to consider family separation in conjunction with all other relevant information).

clude the difficulty of adjusting to a foreign culture¹⁸⁷ and the psychological impact of failure to provide for one's family.¹⁸⁸ It is important to note, however, that several courts have found that emotional hardship resulting from removal is counterbalanced by the reunification of loved ones in an alien's home country, thus rendering the emotional hardship suffered obsolete.¹⁸⁹

The difficulty of establishing a claim for hardship, especially with regard to the "exceptional and extremely unusual" standard used by IIRIRA,¹⁹⁰ caused understandable concern in Salvadoran and Guatemalan communities.¹⁹¹ This concern, coupled with the fact that NACARA exempts Cubans and Nicaraguans from proving hardship on any level, caused a great deal of frustration amongst Salvadorans and Guatemalans.¹⁹² As a result, in 1999, the Department of Justice created a rebuttable presumption of extreme hardship for Salvadorans and Guatemalans who were otherwise eligible for NACARA relief, discussed in greater detail below.¹⁹³

III. POST-NACARA DEVELOPMENTS

A. *Reactions to NACARA*

The unequal treatment of Salvadorans and Guatemalans under NACARA, compared with that of Cubans and Nicaraguans, resulted in heavy criticism.¹⁹⁴ Representatives from districts with large Central American populations have pointed out that § 203 fails to protect numerous long-time residents from deportation,

¹⁸⁷ See *Ramos v. INS*, 695 F.2d 181 (5th Cir. 1983)(the court reprimanded the BIA for failing to consider the impact of moving the alien's children to a country where they did not speak the language or understand the culture).

¹⁸⁸ See *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995)(the court required the BIA to consider the psychological damage an alien would suffer from deportation after the alien had demonstrated that providing for her family was her mission in life).

¹⁸⁹ See, e.g., *Regalado v. INS*, 1997 U.S. App. Lexis 15473 at 5 (the court denied an alien's claim for suspension of deportation, in part, because he would be rejoining elderly parents and two siblings in Guatemala).

¹⁹⁰ 8 U.S.C. 1229(b)(1)(D).

¹⁹¹ See *Caldwell*, *supra* note 7, at 1591.

¹⁹² See *Joaquin*, *supra* note 170, at 16.

¹⁹³ 8 C.F.R. § 240.64 (1999). Discussed in greater detail below, at section IV(D) ("Rebuttable Presumption of Extreme Hardship"), *infra*.

¹⁹⁴ See, e.g., *Rodriguez*, *supra* note 8, at 509 (quoting Sen. Kennedy on the lack of uniformity in NACARA and the mistreatment of Salvadorans and Guatemalans)("This legislation is a frank admission by the Senate that last year's immigration law treated these families unfairly, and that something must be done to correct it.").

one of the primary motives behind the bill's promulgation.¹⁹⁵ Some feel the relief available to Salvadorans and Guatemalans under NACARA is a form of punishment in that filing a claim under § 203 is more likely to lead to deportation or removal than lawful permanent residence.¹⁹⁶ Furthermore, because § 203 of NACARA requires an immigration official's favorable discretion, it fails to ensure that many Salvadorans and Guatemalans who have established families, bought property, and started new lives in the United States will not be removed.¹⁹⁷ Many have continued to argue that the deportation of numerous Salvadorans and Guatemalans would hurt the United States economy and destroy the financial structure of El Salvador and Guatemala.¹⁹⁸ Consequently, members of both the House and Senate attempted to amend NACARA almost as soon as it was passed.¹⁹⁹

B. *Equal Justice for Immigrants Act*

Representatives Gutierrez, Becerra, Meek, Hinojosa, Rodriguez, Roybal-Allard, Sanchez, and Waters proposed the Equal Justice for Immigrants Act (EJIA)²⁰⁰ the day after NACARA became law. The proposed Act entitled Salvadorans and Guatemalans who were eligible for NACARA relief to apply for lawful permanent residence so long as they filed their claim before April 1, 2000,²⁰¹ and regardless of whether the INS had acted on their previous claims.²⁰² EJIA would have also allowed the spouses of eligible applicants to apply for lawful permanent residence.²⁰³ Unlike NACARA, EJIA provided that decisions made regarding qualified petitioners' rights to permanent residency were subject to review.²⁰⁴ Furthermore, EJIA proposed to amend NACARA to allow for administrative and judicial review of decisions made pursuant to NA-

¹⁹⁵ See, e.g., 143 CONG. REC. H10, 676 (1997).

¹⁹⁶ *Id.* at H10,680-681.

¹⁹⁷ See 145 CONG. REC. S10,944 (1999)(testimony of Sen. Durbin).

¹⁹⁸ See 143 CONG. REC. H10,676 (1997); 143 CONG. REC. S10,196 (1997); 143 CONG. REC. S10,257 (1997); 145 CONG. REC. S10,944 (1999).

¹⁹⁹ See H.R. 3054, 105th Cong. (1997). NACARA was passed on November 19, 1997 and the first draft of the Equal Justice for Immigrants Act came out on November 20, 1997. See *id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at § 2(a)(1)(A).

²⁰² *Id.* at § 2(a)(2)(C).

²⁰³ *Id.* at § 2(d).

²⁰⁴ H.R. 3054 at § 2(f).

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CARA.²⁰⁵ EJIA was referred to the Committee on the Judiciary, but the bill was never passed.²⁰⁶

C. *Family, Work, and Immigrant Integration Amendments of 2000*

The Family, Work, and Immigrant Integration Amendments of 2000 (FWIIA)²⁰⁷ represents a more recent approach to increasing legal protection for Salvadoran and Guatemalan aliens. FWIIA proposed to amend § 202 of NACARA to include Salvadorans, Guatemalans, Hondurans, and Haitians, and to change the deadline for application for lawful permanent residency to April 1, 2003.²⁰⁸ The amendments also sought to apply § 202 of NACARA to outstanding Salvadoran and Guatemalan claims for suspension of deportation and cancellation of removal made pursuant to § 203.²⁰⁹ Under FWIIA, eligible applicants would have been able to petition for their spouses, children, stepchildren, and unmarried sons and daughters living abroad to obtain a visa to join them in the United States.²¹⁰ Moreover, FWIIA addressed the needs of orphaned aliens under the age of eighteen by allowing for adjustment of status provided they had resided in the United States for five years, faced potential abuse if removed to their home country, and were ineligible for political asylum.²¹¹ FWIIA was read twice and referred to the judiciary, but has not been passed.²¹²

D. *Rebuttable Presumption of Extreme Hardship*

In 1999, the Department of Justice responded favorably to NACARA's critics by creating a rebuttable presumption of extreme hardship for § 203 applicants.²¹³ The presumption applies to all Salvadorans and Guatemalans eligible for relief as principals under NACARA.²¹⁴ The Department of Homeland Security (DHS) has the burden of proof to rebut the presumption.²¹⁵ In

²⁰⁵ *Id.* at § 3(a)(1).

²⁰⁶ *See* H.R. 3054.

²⁰⁷ S. 2668, 106th Cong. (2000).

²⁰⁸ *Id.* at § 102.

²⁰⁹ *Id.* at § 103.

²¹⁰ *Id.* at § 105.

²¹¹ *Id.* at § 803.

²¹² *See* S. 2668, 106th Cong. (2000).

²¹³ 8 C.F.R. § 240.64.

²¹⁴ *Id.* at § 240.64(d)(1).

²¹⁵ *Id.* at § 240.64(d)(3).

seeking to overcome the hardship presumption, the DHS must prove that it is more likely than not that neither the applicant nor a qualifying relative would suffer extreme hardship.²¹⁶ Even if an asylum officer determines that the presumption is rebuttable, the NACARA applicant retains the presumption of extreme hardship in Immigration Court.²¹⁷ The regulation's supplementary information details the limited circumstances in which the presumption may be rebutted:

Adjudicators will evaluate an application on the basis of whether, given the presumption, the application contains evidence of factors associated with extreme hardship (as set forth in [8 CFR] §240.58). Generally, the presumption will be overcome only under two circumstances. First, the presumption might be overcome in those cases where there is no evidence of factors associated with extreme hardship (for example, an applicant who has no family in the United States, no work history, and no ties to the community). Second, evidence contained in the record could significantly undermine the basic assumptions on which the presumption is based. For example, if an individual has acquired significant resources or property in his or her home country, the individual and his or her qualified family members may be able to return without experiencing extreme hardship, in the absence of other hardship factors in the case (such as serious medical treatment for which there is no treatment in the home country).²¹⁸

The rebuttable presumption of extreme hardship allowed additional judges to adjudicate NACARA claims and indicated the government's general desire to streamline the application process.²¹⁹ Nevertheless, many Salvadorans and Guatemalans continued to experience delays in application processing even after the presumption of extreme hardship was instituted in 1999.²²⁰ Such

²¹⁶ *Id.*

²¹⁷ *Id.* at § 240.64(d)(4).

²¹⁸ Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 64 Fed. Reg. 27,856, 27,866 (May 21, 1999).

²¹⁹ See Coutin, *supra* note 1, at 38:

Asylum officials, who normally only hear asylum claims, were granted authority to adjudicate NACARA suspension cases, thus streamlining the application process . . . [M]ost significantly, the regulations explicitly presumed that ABC class members would suffer hardship if deported, though immigration officials retained the right to rebut this presumption in particular cases.

²²⁰ See *id.* (stating that by the end of 2003, only 87,516 of 131,688 Salvadoran and Guatemalan claims for NACARA relief had been adjudicated).

delays can be devastating for immigrants, who must often remain in the United States awaiting a final ruling, in order to have their status adjusted.²²¹ For example, Irma Martinez, a Salvadoran immigrant, was unable to visit her dying mother in El Salvador because she was awaiting a final judgment on her NACARA claim.²²² Another Salvadoran and long-time U.S. resident, Javier Lopez, recounted that his children in El Salvador would often call him, anxiously awaiting the outcome of his NACARA case and the opportunity to join him America: "I'd call them by phone and they'd say to me, 'When are you going to get your papers?' And I'd tell them, 'I'm waiting. I don't know, but any day they will arrive.'"²²³

Whereas some NACARA-eligible Salvadorans and Guatemalans are upset with delays in processing, immigrants who remain ineligible for NACARA benefits face a far worse situation.

IV. THE CURRENT SITUATION

A. Overview

While it appears that a majority of Salvadorans and Guatemalans who arrived in the United States before 1990 will eventually obtain lawful residence under NACARA, there are many who arrived after 1990 that remain ineligible for NACARA relief.²²⁴ Salvadoran nationals only qualify as principals under NACARA if they first entered the U.S. on or before September 19, 1990.²²⁵ Similarly, Guatemalan nationals only qualify as principals if they first entered the United States on or before October 1, 1990.²²⁶ These arbitrary deadlines ignore Central America's recent social and political history.²²⁷

²²¹ See Coutin, *supra* note 1.

²²² See *id.*

²²³ *Id.*

²²⁴ See IMMIGRATION & NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES [hereinafter UNAUTHORIZED IMMIGRANT POPULATION]: 1990 to 2000, at 9 (estimating that as of 2000, 189,000 Salvadorans and 144,000 Guatemalans are living illegally in the United States and showing that behind Mexicans, Salvadorans and Guatemalans represent the most numerous illegal immigrant populations in the United States); Coutin, *supra* note 1, at 38 (stating that Salvadoran officials estimate that 25% of Salvadorans now live in the United States).

²²⁵ See NACARA, *supra* note 3, at § 203(a)(1).

²²⁶ *Id.*

²²⁷ See Coutin, *supra* note 1, at 38 (noting that NACARA does not address the situation of Salvadoran immigrants who escaped very poor conditions during the postwar era.).

Civil war did not officially end until 1992 in El Salvador²²⁸ and 1996 in Guatemala.²²⁹ As recently as 2001, high crime rates and serious public corruption problems have caused the Guatemalan government a great deal of concern.²³⁰ Violent harassment and intimidation by unknown assailants of human rights activists, judicial workers, and journalists led the government to attempt a national dialogue aimed at resolving these problems.²³¹ This dialogue has not come to fruition.²³² Although political violence has diminished since the end of the civil war in El Salvador, criminal violence continues to wreak havoc there as well.²³³

Many Salvadorans and Guatemalans who arrived in the U.S. after 1990 have established families in America and continue to be a major source of economic growth for their home countries.²³⁴ The fact that they are ineligible for lawful residence under NA-CARA damages family life and has negative economic implications.

B. *Family Ties*

The removal of Salvadoran and Guatemalan immigrants who arrived in the United States after 1990 often leads to family separation. As Steven Camarota, Director of Research at the Center for Immigration Studies in Washington, notes, "Once you let the person stay in the United States, it becomes extremely difficult in our society to make them go. How are you going to keep them from falling in love, getting married and having U.S.-born children?"²³⁵ Many Salvadorans and Guatemalans who remain ineligible for lawful permanent residence started new lives in the United States over

²²⁸ In January 1992, after prolonged negotiations, signed peace accords ended the civil war in El Salvador. U.S. Department of State, *Background Note: El Salvador*, <http://www.state.gov/r/pa/ei/bgn/2033.htm> (last visited March 8, 2005).

²²⁹ In December 1996, peace accords were finally signed, ending the 36-year internal conflict in Guatemala. U.S. Department of State, *Background Note: Guatemala*, <http://www.state.gov/r/pa/ei/bgn/2045.htm> (last visited March 8, 2005).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ See Coutin, *supra* note 1.

²³⁴ See American Immigration Law Foundation, *The Role of Remittances in the World's Economy*, http://www.aif.org/ipc/policy_reports_2003_pr002_remittances.asp (last visited March 10, 2005); Guatemala News Update, *infra* note 243.

²³⁵ Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1.

ten years ago. In that time, it is likely that many have married and had American-born children.

Keeping families together has often been an important consideration in granting lawful permanent residence. In *Ravancho v. INS*,²³⁶ the court reversed a BIA decision, which ordered the deportation of a Philippine couple, for failure to consider family separation in conjunction with all other relevant information, in particular the effect on a minor child with close relatives in the U.S. In *Mejia-Carillo v. INS*,²³⁷ the court reversed a BIA decision on similar grounds for failure to consider non-economic factors such as family separation in a case in which the dependant children were lawful permanent residents living with their mother and would be forced to follow her back to Mexico while their lawful permanent resident father remained in the United States.

Psychological hardship also plays a role in a successful claim for lawful residence. In *Batoon v. INS*,²³⁸ the court specifically endorsed the use of medical affidavits that demonstrate the likely psychological impact of deportation in determining hardship. Family separation can cause psychological damage to children and parents, since either parent or child is often a U.S citizen or lawful permanent resident. The story of Virginia Feliz, an eight-year old American citizen, is currently having such problems.²³⁹ Two months after her mother was deported to Honduras, doctors at the Child and Adolescent Mental Health Program of Bronx-Lebanon Hospital Center found that she had a major depressive disorder.²⁴⁰ Although she now takes antidepressant drugs and sees a therapist, she still has frequent nightmares and continues to get into fights at school.²⁴¹ The case of Virginia Feliz demonstrates how removal can have an extremely negative psychological impact on U.S. citizens. In addition to the emotional hardship created by family separation, removal of Salvadorans and Guatemalans has negative economic implications.

²³⁶ *Ravancho v. INS*, 658 F.2d 169 (3rd Cir. 1981).

²³⁷ *Mejia-Carillo v. INS*, 656 F.2d 520 (9th Cir. 1981).

²³⁸ *Batoon v. INS*, 707 F.2d 399 (9th Cir. 1983).

²³⁹ See Bernstein, *supra* note 235.

²⁴⁰ *Id.*

²⁴¹ *Id.*

C. Financial Dependence

Money earned by Salvadorans and Guatemalans currently living in the United States is often sent back to El Salvador and Guatemala.²⁴² This money is generally referred to as remittance. Remittances provide a major source of income for both Guatemala²⁴³ and El Salvador.²⁴⁴ The repatriation of hundreds of thousands of Salvadorans and Guatemalans currently living in the United States would greatly disrupt the economy and society in El Salvador and Guatemala.²⁴⁵ By 1998, remittances to El Salvador had already exceeded the total value of all exports and remain a substantial source of income.²⁴⁶ Remittances are estimated to account for over one billion dollars of income for Guatemala in 2005.²⁴⁷

The disappearance of remittances would also magnify the problems in El Salvador and Guatemala created by reductions in U.S. foreign aid.²⁴⁸ According to a report by economist Dilip Ratha in *Global Development Finance 2003*, remittances sent to developing countries reached \$72.3 billion in 2001 and generally exceeded government aid provided directly to developing countries.²⁴⁹ It has further been shown that remittances benefit the

²⁴² See Torrisi, *supra* note 1, at 128 (stating that the BIA is aware that remittances are sent by a large community of new and recent immigrants in the United States).

²⁴³ See Guatemala News Update, *Remittances Sent by Guatemalans Living Abroad*, <http://infoguat.guatemala.org/GNU%202003/Edition7-2003.htm#h1> (last visited Mar. 10, 2005) (estimating remittances sent to Guatemala in the following years in millions of U.S. dollars: 1) 1997: 183.5; 2) 1998: 224.8; 3) 1999: 211.4; 4) 2000: 260.2; 5) 2001: 327.1; 6) 2002: 645.7; 7) 2005: 1000.2).

²⁴⁴ See Coutin, *supra* note 1, at 38 (“According to El Salvador’s Central Reserve Bank, migrants abroad sent an estimated \$2.1 billion – 14% of the country’s gross domestic product – to their relatives in 2003.”).

²⁴⁵ See Torrisi, *supra* note 1, at 129 (stating that the Salvadoran government relies heavily on the constant influx of remittances from abroad).

²⁴⁶ See *id.* at 130 (“Remittances to El Salvador have exceeded the total value of exports by 20%.”).

²⁴⁷ See Guatemala News Update, *supra* note 243.

²⁴⁸ See *id.* (“[R]emittances are de facto taking the place of American foreign aid in stabilizing the government and social order of El Salvador.”); See Albion Monitor, *Small Federal Budget Cuts in Foreign Aid Mean Big Problems*, <http://www.monitor.net/monitor/10-9-95/foreignaid.html> (last visited Mar. 10, 2005) (stating that recent reduction in U.S aid has left many without clean water).

²⁴⁹ See American Immigration Law Foundation, *supra* note 234.

United States economy by taking the place of taxpayer dollars in the provision of foreign aid.²⁵⁰

At least one legal scholar, Palma Torrisi, has argued that the inability to send remittances should qualify, by itself, as a showing of extreme hardship because remittances represent emotional and economic investments.²⁵¹ Torrisi writes, "Denying cancellation of removal to Salvadorans who have been sending remittances to their families places in peril their fundamental way of expressing themselves and rises to the level of unique personal consequences."²⁵² Torrisi further explains that remittances account for over half of the income of receiving households in El Salvador and thus allow many Salvadorans to remain in their home country.²⁵³ It can be argued that remittances not only help sustain developing economies, such as those of El Salvador and Guatemala, but also discourage future immigration from El Salvador and Guatemala to the United States.

CONCLUSION

Social and political conditions in El Salvador and Guatemala should be primary factors in determining an appropriate cutoff date for heightened statutory relief. Peace accords provide a good starting point from which to investigate when a country has become relatively stable. In the case of El Salvador, peace was officially recognized in 1992.²⁵⁴ In Guatemala, peace accords were signed in 1996.²⁵⁵ Based on U.S. Department of State Reports, El

²⁵⁰ See, e.g., Torrisi, *supra* note 1, at 139 (stating that the U.S. economy benefits from remittances); American Immigration Law Foundation, *supra* note 234 (stating that remittances encourage reinvestment in the U.S. economy and provide U.S. taxpayers relief).

²⁵¹ See Torrisi, *supra* note 1.

²⁵² See *id.* at 138.

²⁵³ *Id.* at 130:

Studies on the impact of remittances on families in El Salvador show that "remittances account for 51 percent of the incomes of the receiving households." It has been indicated that remittances are to be credited with reducing the number of people living in poverty in El Salvador by 2.2%. Remittances can also be credited with reducing further illegal immigration from El Salvador to the United States. Remittances are recycled within the local economy in El Salvador and contribute to steady peoples' situations.

²⁵⁴ In January 1992, after prolonged negotiations, signed peace accords ended the civil war in El Salvador. U.S. Department of State, *Background Note: El Salvador*, <http://www.state.gov/r/pa/ei/bgn/2033.htm> (last visited Mar. 8, 2005).

²⁵⁵ In December 1996, peace accords were finally signed, ending the 36-year internal conflict in Guatemala. U.S. Department of State, *Background Note: Guatemala*, <http://www.state.gov/r/pa/ei/bgn/2045.htm> (last visited Mar. 8, 2005).

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Salvador and Guatemala both experienced periods of high crime and general instability even after war had ceased.²⁵⁶ Furthermore, repatriating immigrants that have already been in the U.S. for over ten years damages family life for many U.S. citizens and has negative economic implications. It follows that immigrants arriving from El Salvador and Guatemala during the mid 1990s have a strong argument for statutory relief in excess of what is provided under current U.S. immigration law.

On a positive note, some Salvadorans and Guatemalans have been fortunate enough to qualify for relief under NACARA.²⁵⁷ The institution of the rebuttable presumption of extreme hardship compensates for at least some of the grief initially caused by the extreme hardship requirement included in NACARA § 203.²⁵⁸

Despite its drawbacks, NACARA is an overall positive step for Salvadoran and Guatemalan immigrants in the United States. NACARA, and the legal history leading up to its promulgation, demonstrate that American immigration law is a constantly changing body that has increasingly favored Salvadoran and Guatemalan immigrants over the last three decades. Time will tell if this trend continues.

²⁵⁶ See *id.*; U.S. Department of State, *supra* note 254.

²⁵⁷ See Coutin, *supra* note 1 (stating that by the end of 2003, 87,516 NACARA claims for ABC members had been adjudicated).

²⁵⁸ 8 C.F.R. § 240.64 (1999).

