U.S. Department of Justice
Immigration and Naturalization Service

HQASY 120/12.11

425 I Street NW
Washington, DC 20536

FEB 22 2001

MEMORANDUM FOR ASYLUM OFFICE DIRECTORS
DEPUTY DIRECTORS
SUPERVISORY ASYLUM OFFICERS
QUALITY ASSURANCE/TRAINING OFFICERS
ASYLUM OFFICERS

FROM: Joseph E. Langlois
Director, Asylum Division

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries.

This memorandum supercedes the memorandum dated January 16, 2001, that covers the same subject. Please remove the January 16, 2001, memorandum from your files and replace it with this one. The January 16, 2001, memorandum instructed Asylum Offices that section 241(a)(5) would preclude an applicant granted NACARA 203 relief from also being granted asylum, if otherwise eligible. This memorandum revises that guidance. It clarifies that an asylum applicant who has been granted lawful permanent resident status is not barred by section 241(a)(5) from seeking and, if eligible, receiving, a grant of asylum.

On December 21, 2000, President Clinton signed into law an amendment to the Legal Immigration Family Equity Act (the "LIFE Act")[1], which provides that an individual who is otherwise eligible for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act (INA) (reinstatement)[2].

The NACARA Procedures Manual currently instructs Asylum Offices to not schedule any interviews for NACARA or ABC cases in which it appears that the individual may be subject to

[1] (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). (Pages H12299-H12300.) The amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

[2] Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."

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reinstatement, pending further guidance on the issue. (See section V.D.2.) It further instructs that, in those cases where the reinstatement issue is not apparent until the time of the interview, asylum officers should suspend the interview and take no further action at this time.

In light of the recent legislative action that specifically provides that an individual who is otherwise eligible for relief shall not be barred from applying for NACARA 203 relief by operation of section 241(a)(5) of the INA, you may now process NACARA 203 applications of individuals who reentered the United States illegally after having received final orders of removal, exclusion, or deportation. Such NACARA applications should be adjudicated without regard to section 241(a)(5). If the applicant appears eligible for relief under NACARA 203, the application should be granted. If the applicant is not found eligible for relief under NACARA, the application should be referred to the immigration judge, unless the applicant has a pending ABC asylum application (see below).

Section V.D.2 of the NACARA Procedures Manual is revised as follows:

2. Individuals who depart the U.S. while under a final order and reenter the U.S. illegally (reinstatement of prior orders)

If an individual is removed or departs from the U.S. after the issuance of a final order, the order is generally considered to have been executed and is no longer outstanding. An exception may apply if the individual received advance parole while in temporary protected status.[3] If an individual returns to the United States illegally after having been removed from the United States, or departed voluntarily while under an order of removal, deportation or exclusion, the individual may be subject to reinstatement of the prior order. 8 CFR § 241.8. Pursuant to section 241(a)(5) of the INA, once the previous order is reinstated, the individual is not eligible to apply for relief under the INA. However, the Legal Immigration Family Equity Act of 2000 (LIFE), as amended, specifically provides that an individual who is otherwise eligible for relief under NACARA shall not be barred from applying for such relief by operation of section 241(a)(5). This means that a NACARA applicant who was deported, excluded or removed from the United States, or otherwise left the United States while under a final order, and subsequently reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible.

a. ABC asylum application pending

The INS has not yet determined whether an ABC-registered class member's eligibility for benefits under the settlement agreement is affected by the applicability of the reinstatement provision. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has

[3] An individual with an outstanding final order who 1) is given authorization to travel abroad **while in temporary protected status** and 2) returns in accordance with this authorization may not have executed the final order by his or her departure from the U.S. See, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Sec. 304.

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been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if NACARA relief has been granted, the asylum application of any ABC-eligible applicant who otherwise would have been subject to reinstatement may be adjudicated if the applicant wishes to proceed with the asylum application. If the applicant is not eligible for relief under NACARA, place both the NACARA application and the asylum application on hold. Further guidance on adjudicating asylum applications of ABC- eligible applicants who are not granted NACARA relief will be provided shortly.

b. Non-ABC asylum application pending

A non-ABC asylum application (for example, an application filed by an ABC class member on or before April 1, 1990, who did not register for benefits or by a Former Soviet Bloc national (FSB) applicant whose asylum application filed on or before December 31, 1991 is still pending), is affected by the reinstatement provisions. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if the applicant has been granted NACARA relief, the asylum application may be adjudicated if the applicant wishes to go forward with the application. If NACARA relief has not been granted the pending non-ABC asylum application should be administratively closed in RAPS under "C4" as being under the jurisdiction of the immigration judge.[4] Notice should be given to the applicant with the referral letter informing him or her that the asylum application has been closed because the applicant appears to be subject to section 241(a)(5) of the INA. See Appendix BC.

If the applicant has a derivative asylum application pending and is not eligible for ABC benefits or NACARA relief, the dependent should be removed from the principal in RAPS, and the Asylum Office should give notice to both the principal asylum applicant and the dependent of the action taken. See Appendix BD. Note that, if the principal on the asylum application is granted NACARA relief and withdraws the asylum application, the dependent will no longer have a pending derivative asylum application and therefore no notice regarding possible application of section 241(a)(5) is necessary.

Please remove from the NACARA Procedures Manual APPENDIX AZ(3) - NACARA Dismissal Letter - Applicant Subject to Reinstatement, which should no longer be used.

If you have any questions regarding this guidance, please contact Wenona Paul (202-305-9742).

[4] Although technically the asylum application would not be under the jurisdiction of the IJ, we do not yet have a code in RAPS to indicate that the person is precluded from seeking asylum based on section 241(a)(5) of the INA.

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APPENDIX BC – Notice of Dismissal or Referral of Asylum Application Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev.2/21/01)

A Number
Date:

ADDRESS

Dear M :

This letter refers to your application for asylum, Form I-589. Our records indicate that on _____, you were **[deported, excluded or removed]** from the United States **[or, you left the United States while under a final order of deportation, exclusion or removal]**. You then reentered the United States illegally on _____.

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Individuals granted lawful permanent resident status under Section 203 of NACARA ("NACARA 203 relief") are no longer subject to reinstatement under 241(a)(5) of the INA. However, individuals who have not been granted NACARA 203 relief and who therefore are still subject to Section 241(a)(5) of the INA are not permitted to apply for asylum. Because you reentered the United States illegally after having been ordered deported, excluded or removed, and you have not been granted NACARA 203 relief, you are not permitted to apply for asylum in the United States.

The INS has determined that you are not eligible for an INS grant of relief under section 203 of NACARA (see attached letter). However, the INS is not reinstating your prior order of deportation, exclusion or removal, because you may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your NACARA application is being referred to an Immigration Judge for a determination. Your asylum application has been dismissed because you are not eligible to apply for asylum as a result of your illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, you may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

DIRECTOR NAME
Asylum Office Director

cc: **Name of Representative**

APPENDIX BD – LOSS OF DERIVATIVE STATUS Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev. 2/21/01)

A Number
Date:

ADDRESS

Dear M :

This letter refers to your inclusion of **[name of dependent]** as a dependent in your application for asylum, Form I-589. Our records indicate that on _____, **[name of dependent]** was **[deported, excluded, or removed]** from the United States **[or, left the United States while under a final order of deportation, exclusion, or removal]**. He/she then reentered the United States illegally on _____.

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Because your dependent reentered the United States illegally after having been ordered deported, excluded, or removed, he/she is not permitted to apply for asylum in the United States and therefore cannot be included in your asylum application. However, individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are still permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Although, the law permits the Immigration and Naturalization Service (INS) to consider your dependent's application for relief under section 203 of NACARA, it prohibits the INS from including your dependent in your application for asylum.

The INS has determined that your dependent is not eligible for an INS grant of relief under section 203 of NACARA. However, the INS is not reinstating the prior order of deportation or removal against your dependent because he/she may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your dependent's NACARA application is being referred to an Immigration Judge for a determination. In addition, your dependent has been removed from your asylum application because it appears he/she is not eligible to apply for asylum or be included in an asylum application as a result of his/her illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, your dependent may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

DIRECTOR NAME
Asylum Office Director

cc: **[Name of Dependent]**
[Name of Representative]

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