Title 8 —Aliens and Nationality
Chapter I —Department of Homeland Security
Subchapter B —Immigration Regulations

PART 240—VOLUNTARY DEPARTURE, SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL

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Source: 62 FR 10367, Mar. 6, 1997, unless otherwise noted.

Subpart A—Removal Proceedings [Reserved]

Subpart B—Cancellation of Removal

§ 240.21 Suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect before April 1, 1997) and cancellation of removal and adjustment of status under section 240A(b) of the Act for certain nonpermanent residents.

(a) *Applicability of annual cap on suspension of deportation or cancellation of removal.*

(1) As used in this section, the term *cap* means the numerical limitation of 4,000 grants of suspension of deportation or cancellation of removal in any fiscal year (except fiscal year 1998, which has a limitation of 8,000 grants) pursuant to section 240A(e) of the Act.

(2) The provisions of this section apply to grants of suspension of deportation pursuant to section 244(a) of the Act (as in effect before April 1, 1997) or cancellation of removal pursuant to section 240A(b) of the Act that are subject to a numerical limitation in section 240A(e) of the Act for any fiscal year. This section does not apply to grants of suspension of deportation or cancellation of removal to aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended by section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), or aliens in deportation proceedings prior to April 1, 1997, who apply for suspension of deportation pursuant to section 244(a)(3) of the Act (as in effect prior to April 1, 1997). The Immigration Court and the Board shall no longer issue conditional grants of suspension of deportation or cancellation of removal as provided in 8 CFR 240.21 (as in effect prior to September 30, 1998).

(b) *Conditional grants of suspension of deportation or cancellation of removal in fiscal year 1998 cases* —

(1) ***Conversion to grants.*** Except with respect to cases described in paragraphs (b)(2) and (b)(3) of this section, EOIR shall grant suspension of deportation or cancellation of removal without condition prior to October 1, 1998, to the first 8,000 aliens given conditional grants of suspension of deportation or cancellation of removal (as determined by the date of the immigration judge's order or, if the order was appealed to the Board, the date such order was entered by the Board.)

(2) ***Treatment of certain nationals of Nicaragua and Cuba who received conditional grants of suspension of deportation or cancellation of removal on or before September 30, 1998*** —

(i) ***NACARA adjustment request.*** An application for suspension of deportation or cancellation of removal filed by a national of Nicaragua or Cuba that was granted on a conditional basis on or before September 30, 1998, shall be deemed to be a request for adjustment of status pursuant to section 202 of NACARA ("NACARA adjustment") for the period starting September 30, 1998 and ending December 31, 1998. The Service shall provide the applicant with notice of the date,

time, and place at which the applicant must appear before a Service officer to perfect the request for NACARA adjustment. Such notice shall include an attestation form, Attestation of Alien and Memorandum of Creation of Record of Lawful Permanent Residence, Form I-895, regarding the applicant's eligibility for NACARA adjustment.

(ii) ***Submission of documentation.*** To perfect the request for NACARA adjustment, the applicant must appear before a Service officer on the date scheduled with the following documentation:

(A) The order granting suspension of deportation or cancellation of removal on a conditional basis issued on or before September 30, 1998;

(B) A completed, but unsigned Form I-895, which the applicant shall be required to sign and to attest to the veracity of the information contained therein in the presence of a Service officer;

(C) Any applicable applications for waiver of inadmissibility; and

(D) Two "ADIT-style" photographs; meeting the specifications in the instructions attached to Form I-895.

(iii) ***Waiver of documentation and fees.*** The provisions of § 245.13(e) and (f) of this chapter relating to documentary requirements for NACARA adjustment are waived with respect to an alien seeking to perfect a request for adjustment of status pursuant to paragraph (b)(2) of this section. In addition, the fees for the NACARA adjustment and for any applications for waivers of inadmissibility submitted in conjunction with perfecting a request for NACARA adjustment shall be waived.

(iv) ***NACARA adjustment determination.*** In determining an applicant's eligibility for NACARA adjustment under the provisions of paragraph (b)(2) of this section, unless the Service officer before whom the applicant appears is not satisfied that the applicant is admissible to the United States in accordance with section 202(a)(1)(B) of NACARA, and has continuously resided in the United States from December 1, 1995, through the date of appearance before the Service officer (not counting an absence or absences from the United States totaling 180 days or less or any absences that occurred pursuant to advance authorization for parole (Form I-512 issued by the Service)), the Service officer shall accept an alien's attestation of admissibility and/or continuous physical presence as sufficient evidence that the applicant has met the admissibility and/or continuous physical presence requirement for NACARA adjustment. If the Service officer grants NACARA adjustment, then the Service officer shall create a record of lawful permanent residence and the prior order granting suspension of deportation or cancellation of removal on a conditional basis shall be automatically vacated and the deportation or removal proceedings shall be automatically terminated. The Service officer (whose decision in this regard is not subject to appeal) shall not adjust the applicant to lawful permanent resident status pursuant to section 202 of NACARA if:

(A) The Service officer is not satisfied that the applicant is eligible for NACARA adjustment and so indicates on the attestation form; or

(B) The applicant indicates on the attestation form that he or she does not wish to receive NACARA adjustment.

(v) ***Automatic conversion.*** If the Service officer does not adjust the applicant to lawful permanent resident status pursuant to section 202 of NACARA, the applicant's conditional grant of suspension of deportation or cancellation of removal shall be automatically converted to a grant of suspension of deportation or cancellation of removal. Upon such a conversion, the Service shall create a record of lawful permanent residence based upon the grant of suspension of deportation or cancellation of removal.

(vi) ***Failure to appear.*** An alien who fails to appear to perfect his or her request for NACARA adjustment shall have his or her conditional grant of suspension of deportation or cancellation of removal automatically converted by the Immigration Court or the Board to a grant of suspension of deportation or cancellation of removal effective December 31, 1998.

(3) ***Conditional grants not converted in fiscal year 1998.*** The provisions of paragraphs (b)(1) and (b)(2) of this section for granting relief shall not apply with respect to:

(i) Any case in which a conditional grant of suspension of deportation or cancellation of removal is pending on appeal before the Board as of September 30, 1998 or, if the right to appeal to the Board has not been waived, the time for an appeal has not expired. After the Board issues its decision or the time for appeal has expired, the conditional grant shall be converted to a grant when a grant is available.

(ii) Any other conditional grant not described in paragraphs (b)(1), (b)(2) or (b)(3)(i) of this section, which was not converted to a grant in fiscal year 1998. Such a conditional grant shall be converted to a grant when a grant is available.

(4) ***Motion to reopen.*** The Service may file a motion to reopen within 90 days after the alien is issued a grant of suspension of deportation or cancellation of removal pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, if after the issuance of a conditional grant by the Immigration Court or the Board the applicant committed an act that would have rendered him or her ineligible for suspension of deportation or cancellation or removal at the time of the conversion.

(5) ***Travel for aliens conditionally granted suspension of deportation or cancellation of removal.*** If the Immigration Court or the Board granted suspension of deportation or cancellation of removal on a conditional basis or, if the conditional grant by the Immigration Court was appealed to the Board and the Board issued such a conditional grant, the alien shall retain the conditional grant of suspension of deportation or cancellation of removal upon return to the United States following a temporary absence abroad and be permitted to resume completion of his or her case, provided that:

(i) The alien departed on or before September 30, 1998 with or without a grant of advance parole from the District Director; or

(ii) The alien, prior to his or her departure from the United States after September 30, 1998, obtained a grant of advance parole from the District Director in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter and complied with the terms and conditions of the advance parole.

(c) ***Grants of suspension of deportation or cancellation of removal in fiscal years subsequent to fiscal year 1998.*** On and after October 1, 1998, the Immigration Court and the Board may grant applications for suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect prior to April 1, 1997) or cancellation of removal and adjustment of status under section 240A(b) of the Act that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the

annual numerical limitation has been reached in that fiscal year. The awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§ 3.1(d)(3) and 3.39 of this chapter.

(1) ***Applicability of the annual cap.*** When grants are no longer available in a fiscal year, further decisions to grant or deny such relief shall be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year. Immigration judges and the Board may deny without reserving decision or may pretermit those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. The basis of such denial or pretermission may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the Act, a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases.

(2) ***Aliens applying for additional forms of relief.*** Whether or not the cap has been reached, the Immigration Court or the Board shall adjudicate concurrently all other forms of relief for which the alien has applied. Applications for suspension of deportation or cancellation of removal shall be denied in the exercise of discretion if the alien is granted asylum or adjustment of status, including pursuant to section 202 of NACARA, while the suspension of deportation or cancellation of removal application is pending. Where an appeal of a decision granting asylum or adjustment is sustained by the Board, a decision to deny as a matter of discretion an application for suspension of deportation or cancellation of removal on this basis shall be reconsidered.

[63 FR 52138, Sept. 30, 1998, as amended at 66 FR 6446, Jan. 22, 2001]

Subpart C—Voluntary Departure

§ 240.25 Voluntary departure—authority of the Service.

(a) ***Authorized officers.*** The authority contained in section 240B(a) of the Act to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Director for Enforcement and Removal Operations, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

(b) ***Conditions.*** The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity. A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.

(c) ***Decision.*** The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

(d) ***Application.*** Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service counsel. If the Service agrees to voluntary departure after proceedings have commenced, it may either:

(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or

(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with § 240.26.

(e) ***Appeals.*** An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien's right to apply to the immigration judge for voluntary departure in accordance with § 240.26 or for relief from removal under any provision of law.

(f) ***Revocation.*** If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without advance notice by any officer authorized to grant voluntary departure under § 240.25(a). Such revocation shall be communicated in writing, citing the statutory basis for revocation. No appeal shall lie from revocation.

[62 FR 10367, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002; 81 FR 62355, Sept. 9, 2016]

Subpart D—Exclusion of Aliens (for Proceedings Commenced Prior to April 1, 1997) [Reserved]

Subpart E—Proceedings To Determine Deportability of Aliens in the United States: Hearing and Appeal (for Proceedings Commenced Prior to April 1, 1997) [Reserved]

Subpart F—Suspension of Deportation and Voluntary Departure (for Proceedings Commenced Prior to April 1, 1997) [Reserved]

Subpart G—Civil Penalties for Failure To Depart [Reserved]

Subpart H—Applications for Suspension of Deportation or Special Rule Cancellation of Removal Under Section 203 of Pub. L. 105-100

Source: 64 FR 27876, May 21, 1999, unless otherwise noted.

§ 240.60 Definitions.

As used in this subpart the term:

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

ABC class member refers to:

(1) Any Guatemalan national who first entered the United States on or before October 1, 1990; and

(2) Any Salvadoran national who first entered the United States on or before September 19, 1990.

Asylum application pending adjudication by the Service means any asylum application for which the Service has not served the applicant with a final decision or which has not been referred to the Immigration Court.

Filed an application for asylum means the proper filing of a principal asylum application or filing a derivative asylum application by being properly included as a dependent spouse or child in an asylum application pursuant to the regulations and procedures in effect at the time of filing the principal or derivative asylum application.

IIRIRA means the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Pub. L. 104-208 (110 Stat. 3009-625).

NACARA means the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted as title II of Pub. L. 105-100 (111 Stat. 2160, 2193), as amended by the Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-139 (111 Stat. 2644).

Registered ABC class member means an ABC class member who:

(1) In the case of an *ABC* class member who is a national of El Salvador, properly submitted an ABC registration form to the Service on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991; or

(2) In the case of an *ABC* class member who is a national of Guatemala, properly submitted an *ABC* registration form to the Service on or before December 31, 1991.

§ 240.61 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart H applies to the following aliens:

(1) A registered *ABC* class member who has not been apprehended at the time of entry after December 19, 1990;

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service.

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia;

(4) An alien who is the spouse or child of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section;

(5) An alien who is:

(i) The unmarried son or unmarried daughter of an individual described in paragraph (a)(1), (a)(2), or (a)(3) of this section and is 21 years of age or older at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (a)(1), (a)(2), or (a)(3) of this section; and

(ii) Entered the United States on or before October 1, 1990.

(b) This subpart H does not apply to any alien who has been convicted at any time of an aggravated felony, as defined in section 101(a)(43) of the Act.

§ 240.62 Jurisdiction.

(a) ***Office of International Affairs.*** Except as provided in paragraph (b) of this section, the Office of International Affairs shall have initial jurisdiction to grant or refer to the Immigration Court or Board an application for suspension of deportation or special rule cancellation of removal filed by an alien described in § 240.61, provided:

(1) In the case of a national of El Salvador described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 31, 1996 (with an administrative grace period extending to February 16, 1996), or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(2) In the case of a national of Guatemala described in § 240.61(a)(1), the alien filed a complete asylum application on or before January 3, 1995, or otherwise met the asylum application filing deadline pursuant to the *ABC* settlement agreement, and the application is still pending adjudication by the Service;

(3) In the case of an individual described in § 240.61(a)(2) or (3), the individual's asylum application is pending adjudication by the Service;

(4) In the case of an individual described in § 240.61(a)(4) or (5), the individual's parent or spouse has an application pending with the Service under this subpart H or has been granted relief by the Service under this subpart.

(b) ***Immigration Court.*** The Immigration Court shall have exclusive jurisdiction over an application for suspension of deportation or special rule cancellation of removal filed pursuant to section 309(f)(1)(A) or (B) of IIRIRA, as amended by NACARA, by an alien who has been served Form I-221, Order to Show Cause, or Form I-862, Notice to Appear, after a copy of the charging document has been filed with the Immigration Court, unless the alien is covered by one of the following exceptions:

(1) ***Certain ABC class members.***

(i) The alien is a registered *ABC* class member for whom proceedings before the Immigration Court or the Board have been administratively closed or continued (including those aliens who had final orders of deportation or removal who have filed and been granted a motion to reopen as required under 8 CFR 3.43);

(ii) The alien is eligible for benefits of the *ABC* settlement agreement and has not had a *de novo* asylum adjudication pursuant to the settlement agreement; and

(iii) The alien has not moved for and been granted a motion to recalendar proceedings before the Immigration Court or the Board to request suspension of deportation.

(2) ***Spouses, children, unmarried sons, and unmarried daughters.***

(i) The alien is described in § 240.61(a) (4) or (5);

(ii) The alien's spouse or parent is described in § 240.61(a)(1), (a)(2), or (a)(3) and has a Form I-881 pending with the Service; and

(iii) The alien's proceedings before the Immigration Court have been administratively closed, or the alien's proceedings before the Board have been continued, to permit the alien to file an application for suspension of deportation or special rule cancellation of removal with the Service.

§ 240.63 Application process.

(a) ***Form and fees.*** Except as provided in paragraph (b) of this section, the application must be made on the form prescribed by USCIS for this program and filed in accordance with the instructions for that form. An applicant who submitted to EOIR a completed, Application for Suspension of Deportation, before the effective date of the form prescribed by USCIS may apply with USCIS by submitting the completed Application for Suspension of Deportation attached to a completed first page of the application. Each application must be filed with the required fees as provided in 8 CFR 106.2.

(b) ***Applications filed with EOIR.*** If jurisdiction rests with the Immigration Court under § 260.62(b), the application must be made on the Form I-881, if filed subsequent to June 21, 1999. The application form, along with any supporting documents, must be filed with the Immigration Court and served on the Service's district counsel in accordance with the instructions on or accompanying the form. Applications for suspension of deportation or special rule cancellation of removal filed prior to June 21, 1999 shall be filed on Form EOIR-40.

(c) ***Applications filed with the Service.*** If jurisdiction rests with the Service under § 240.62(a), the Form I-881 and supporting documents must be filed in accordance with the instructions on or accompanying the form.

(d) ***Conditions and consequences of filing.*** Applications filed under this section shall be filed under the following conditions and shall have the following consequences:

(1) The information provided in the application may be used as a basis for the initiation of removal proceedings, or to satisfy any burden of proof in exclusion, deportation, or removal proceedings;

(2) The applicant and anyone other than a spouse, parent, son, or daughter of the applicant who assists the applicant in preparing the application must sign the application under penalty of perjury. The applicant's signature establishes a presumption that the applicant is aware of the contents of the application. A person other than a relative specified in this paragraph who assists the applicant in preparing the application also must provide his or her full mailing address;

(3) An application that does not include a response to each of the questions contained in the application, is unsigned, or is unaccompanied by the required materials specified in the instructions to the application is incomplete and shall be returned by mail to the applicant within 30 days of receipt of the application by the Service; and

(4) Knowing placement of false information on the application may subject the person supplying that information to criminal penalties under title 18 of the United States Code and to civil penalties under section 274C of the Act.

[64 FR 27876, May 21, 1999, as amended at 74 FR 26939, June 5, 2009; 85 FR 46926, Aug. 3, 2020; 89 FR 6398, Jan. 31, 2024]

§ 240.64 Eligibility—general.

(a) ***Burden and standard of proof.*** The burden of proof is on the applicant to establish by a preponderance of the evidence that he or she is eligible for suspension of deportation or special rule cancellation of removal and that discretion should be exercised to grant relief.

(b) ***Calculation of continuous physical presence and certain breaks in presence.*** For purposes of calculating continuous physical presence under this section, section 309(c)(5)(A) of IIRIRA and section 240A(d)(1) of the Act shall not apply to persons described in § 240.61. For purposes of this subpart H, a single absence of 90 days or less or absences which in the aggregate total no more than 180 days shall be considered brief.

(1) For applications for suspension of deportation made under former section 244 of the Act, as in effect prior to April 1, 1997, the burden of proof is on the applicant to establish that any breaks in continuous physical presence were brief, casual, and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States. For purposes of evaluating whether an absence is brief, single absences in excess of 90 days, or absences that total more than 180 days in the aggregate will be evaluated on a case-by-case basis. An applicant must establish that any absence from the United States was casual and innocent and did not meaningfully interrupt the period of continuous physical presence.

(2) For applications for special rule cancellation of removal made under section 309(f)(1) of IIRIRA, as amended by NACARA, the applicant shall be considered to have failed to maintain continuous physical presence in the United States if he or she has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days. The applicant must establish that any period of absence less than 90 days was casual and innocent and did not meaningfully interrupt the period of continuous physical presence in the United States.

(3) For all applications made under this subpart, a period of continuous physical presence is terminated whenever an alien is removed from the United States under an order issued pursuant to any provision of the Act or the alien has voluntarily departed under the threat of deportation or when the departure is made for purposes of committing an unlawful act.

(4) The requirements of continuous physical presence in the United States under this subpart shall not apply to an alien who:

(i) Has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(ii) At the time of the alien's enlistment or induction, was in the United States.

(c) ***Factors relevant to extreme hardship.*** Except as described in paragraph (d) of this section, extreme hardship shall be determined as set forth in § 240.58.

(d) ***Rebuttable presumption of extreme hardship for certain classes of aliens*** —

(1) ***Presumption of extreme hardship.*** An applicant described in paragraphs (a)(1) or (a)(2) of § 240.61 who has submitted a completed Form I-881 or Form EOIR-40 to either the Service or the Immigration Court, in accordance with § 240.63, shall be presumed to have established that deportation or removal from the United States would result in extreme hardship to the applicant or to his or her spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) ***Rebuttal of presumption.*** A presumption of extreme hardship as described in paragraph (d)(1) of this section shall be rebutted if the evidence in the record establishes that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States. In making such a determination, the adjudicator shall consider relevant factors, including those listed in § 240.58.

(3) ***Burden of proof.*** In those cases where a presumption of extreme hardship applies, the burden of proof shall be on the Service to establish that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States.

(4) ***Effect of rebuttal.***

(i) A determination that it is more likely than not that neither the applicant nor a qualified relative would suffer extreme hardship if the applicant were deported or removed from the United States shall be grounds for referral to the Immigration Court or dismissal of an application submitted initially to the Service. The applicant is entitled to a *de novo* adjudication and will again be considered to have a presumption of extreme hardship before the Immigration Court.

(ii) If the Immigration Court determines that extreme hardship will not result from deportation or removal from the United States, the application will be denied.

[64 FR 27876, May 21, 1999; 64 FR 33386, June 23, 1999]

§ 240.65 Eligibility for suspension of deportation.

(a) ***Applicable statutory provisions.*** To establish eligibility for suspension of deportation under this section, the applicant must be an individual described in § 240.61; must establish that he or she is eligible under former section 244 of the Act, as in effect prior to April 1, 1997; must not be subject to any bars to eligibility in former section 242B(e) of the Act, as in effect prior to April 1, 1997, or any other provisions of law; and must not have been convicted of an aggravated felony or be an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997 (relating to Nazi persecution and genocide).

(b) ***General rule.*** To establish eligibility for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except the provisions specified in paragraph (c) of this section, and must establish:

(1) The alien has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date the application was filed;

(2) During all of such period the alien was and is a person of good moral character; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) ***Aliens deportable on criminal or certain other grounds.*** To establish eligibility for suspension of deportation under former section 244(a)(2) of the Act, as in effect prior to April 1, 1997, an alien who is deportable under former section 241(a) (2), (3), or (4) of the Act, as in effect prior to April 1, 1997 (relating to criminal activity, document fraud, failure to register, and security threats), must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for deportation;

(2) The alien has been and is a person of good moral character during all of such period; and

(3) The alien's deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien, or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(d) ***Battered spouses and children.*** To establish eligibility for suspension of deportation under former section 244(a)(3) of the Act, as in effect prior to April 1, 1997, an alien must be deportable under any law of the United States, except under former section 241(a)(1)(G) of the Act, as in effect prior to April 1, 1997 (relating to marriage fraud), and except under the provisions specified in paragraph (c) of this section, and must establish that:

(1) The alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date the application was filed;

(2) The alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and

(3) During all of such time in the United States the alien was and is a person of good moral character; and

(4) The alien's deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or the alien's parent or child.

§ 240.66 Eligibility for special rule cancellation of removal.

(a) ***Applicable statutory provisions.*** To establish eligibility for special rule cancellation of removal, the applicant must show he or she is eligible under section 309(f)(1) of IIRIRA, as amended by section 203 of NACARA. The applicant must be described in § 240.61, must be inadmissible or deportable, must not be subject to any bars to eligibility in sections 240(b)(7), 240A(c), or 240B(d) of the Act, or any other provisions of law, and must not have been convicted of an aggravated felony or be an alien described in section 241(b)(3)(B)(I) of the Act (relating to persecution of others).

(b) ***General rule.*** To establish eligibility for special rule cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, the alien must establish that:

(1) The alien is not inadmissible under section 212(a)(2) or (3) or deportable under section 237(a)(2), (3) or (4) of the Act (relating to criminal activity, document fraud, failure to register, and security threats);

(2) The alien has been physically present in the United States for a continuous period of 7 years immediately preceding the date the application was filed;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in extreme hardship to the alien, or to the alien's spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence.

(c) ***Aliens inadmissible or deportable on criminal or certain other grounds.*** To establish eligibility for special rule cancellation of removal under section 309(f)(1)(B) of IIRIRA, as amended by section 203 of NACARA, the alien must be described in § 240.61 and establish that:

(1) The alien is inadmissible under section 212(a)(2) of the Act (relating to criminal activity), or deportable under paragraphs (a)(2) (other than section 237(a)(2)(A)(iii), relating to aggravated felony convictions), or (a)(3) of section 237 of the Act (relating to criminal activity, document fraud, and failure to register);

(2) The alien has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status constituting a ground for removal;

(3) The alien has been a person of good moral character during the required period of continuous physical presence; and

(4) The alien's removal from the United States would result in exceptional and extremely unusual hardship to the alien or to the alien's spouse, parent, or child, who is a United States citizen or an alien lawfully admitted for permanent residence.

§ 240.67 Procedure for interview before an asylum officer.

(a) ***Fingerprinting requirements.*** USCIS will notify each applicant 14 years of age or older to appear for an interview only after the applicant has complied with fingerprinting requirements pursuant to 8 CFR 103.16, and USCIS has received a definitive response from the FBI that a full criminal background check has been completed. A definitive response that a full criminal background check on an applicant has been completed includes:

(1) Confirmation from the FBI that an applicant does not have an administrative or criminal record;

(2) Confirmation from the FBI that an applicant has an administrative or a criminal record; or

(3) Confirmation from the FBI that two properly prepared fingerprint cards (Form FD-258) have been determined unclassifiable for the purpose of conducting a criminal background check and have been rejected.

(b) ***Interview.***

(1) The asylum officer shall conduct the interview in a non-adversarial manner and, except at the request of the applicant, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on the applicant's eligibility for suspension of deportation or special rule cancellation of removal. If the applicant has an asylum application pending with the Service, the asylum officer may also elicit information relating to the application for asylum in accordance with § 208.9 of this chapter. At the time of the interview, the applicant must provide complete information regarding the applicant's identity, including name, date and place of birth, and nationality, and may be required to register this identity electronically or through any other means designated by the Attorney General.

(2) The applicant may have counsel or a representative present, may present witnesses, and may submit affidavits of witnesses and other evidence.

(3) An applicant unable to proceed with the interview in English must provide, at no expense to the Service, a competent interpreter fluent in both English and a language in which the applicant is fluent. The interpreter must be at least 18 years of age. The following individuals may not serve as

the applicant's interpreter: the applicant's attorney or representative of record; a witness testifying on the applicant's behalf; or, if the applicant also has an asylum application pending with the Service, a representative or employee of the applicant's country of nationality, or, if stateless, country of last habitual residence. Failure without good cause to comply with this paragraph may be considered a failure to appear for the interview for purposes of § 240.68.

(4) The asylum officer shall have authority to administer oaths, verify the identity of the applicant (including through the use of electronic means), verify the identity of any interpreter, present and receive evidence, and question the applicant and any witnesses.

(5) Upon completion of the interview, the applicant or the applicant's representative shall have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in the officer's discretion, limit the length of such statement or comment and may require its submission in writing. Upon completion of the interview, and except as otherwise provided by the asylum officer, the applicant shall be informed of the requirement to appear in person to receive and to acknowledge receipt of the decision and any other accompanying material at a time and place designated by the asylum officer.

(6) The asylum officer shall consider evidence submitted by the applicant with the application, as well as any evidence submitted by the applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview, during which the applicant may submit additional evidence.

[64 FR 27876, May 21, 1999, as amended at 76 FR 53791, Aug. 29, 2011]

§ 240.68 Failure to appear at an interview before an asylum officer or failure to follow requirements for fingerprinting.

(a) Failure to appear for a scheduled interview without prior authorization may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer. A written request to reschedule will be granted if it is an initial request and is received by the Asylum Office at least 2 days before the scheduled interview date. All other requests to reschedule the interview, including those submitted after the interview date, will be granted only if the applicant has a reasonable excuse for not appearing, and the excuse was received by the Asylum Office in writing within a reasonable time after the scheduled interview date.

(b) Failure to comply with fingerprint processing requirements without reasonable excuse may result in dismissal of the application or waiver of the right to an adjudication by an asylum officer.

(c) Failure to appear shall be excused if the notice of the interview or fingerprint appointment was not mailed to the applicant's current address and such address had been provided to the Office of International Affairs by the applicant prior to the date of mailing in accordance with section 265 of the Act and Service regulations, unless the asylum officer determines that the applicant received reasonable notice of the interview or fingerprinting appointment.

§ 240.69 Reliance on information compiled by other sources.

In determining whether an applicant is eligible for suspension of deportation or special rule cancellation of removal, the asylum officer may rely on material described in § 208.12 of this chapter. Nothing in this subpart shall be construed to entitle the applicant to conduct discovery directed toward records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State.

§ 240.70 Decision by the Service.

(a) ***Service of decision.*** Unless the asylum officer has granted the application for suspension of deportation or special rule cancellation of removal at the time of the interview or as otherwise provided by an Asylum Office, the applicant will be required to return to the Asylum Office to receive service of the decision on the applicant's application. If the applicant does not speak English fluently, the applicant shall bring an interpreter when returning to the office to receive service of the decision.

(b) ***Grant of suspension of deportation.*** An asylum officer may grant suspension of deportation to an applicant eligible to apply for this relief with the Service who qualifies for suspension of deportation under former section 244(a)(1) of the Act, as in effect prior to April 1, 1997, who is not an alien described in former section 241(a)(4)(D) of the Act, as in effect prior to April 1, 1997, and who admits deportability under any law of the United States, excluding former section 241(a)(2), (3), or (4) of the Act, as in effect prior to April 1, 1997. If the Service has made a preliminary decision to grant the applicant suspension of deportation under this subpart, the applicant shall be notified of that decision and will be asked to sign an admission of deportability or inadmissibility. The applicant must sign the admission before the Service may grant the relief sought. If suspension of deportation is granted, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that suspension of deportation is granted.

(c) ***Grant of cancellation of removal.*** An asylum officer may grant cancellation of removal to an applicant who is eligible to apply for this relief with the Service, and who qualifies for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by section 203 of NACARA, and who admits deportability under section 237(a), excluding paragraphs (2), (3), and (4), of the Act, or inadmissibility under section 212(a), excluding paragraphs (2) or (3), of the Act. If the Service has made a preliminary decision to grant the applicant cancellation of removal under this subpart, the applicant shall be notified of that decision and asked to sign an admission of deportability or inadmissibility. The applicant must sign the concession before the Service may grant the relief sought. If the Service grants cancellation of removal, the Service shall adjust the status of the alien to lawful permanent resident, effective as of the date that cancellation of removal is granted.

(d) ***Referral of the application.*** Except as provided in paragraphs (e) and (f) of this section, and unless the applicant is granted asylum or is in lawful immigrant or non-immigrant status, an asylum officer shall refer the application for suspension of deportation or special rule cancellation of removal to the Immigration Court for adjudication in deportation or removal proceedings, and will provide the applicant with written notice of the statutory or regulatory basis for the referral, if:

(1) The applicant is not clearly eligible for suspension of deportation under former section 244(a)(1) of the Act as in effect prior to April 1, 1997, or for cancellation of removal under section 309(f)(1)(A) of IIRIRA, as amended by NACARA;

(2) The applicant does not appear to merit relief as a matter of discretion;

(3) The applicant appears to be eligible for suspension of deportation or special rule cancellation of removal under this subpart, but does not admit deportability or inadmissibility; or

(4) The applicant failed to appear for a scheduled interview with an asylum officer or failed to comply with fingerprinting processing requirements and such failure was not excused by the Service, unless the application is dismissed.

(e) ***Dismissal of the application.*** An asylum officer shall dismiss without prejudice an application for suspension of deportation or special rule cancellation of removal submitted by an applicant who has been granted asylum, or who is in lawful immigrant or non-immigrant status. An asylum officer may also dismiss an application for failure to appear, pursuant to § 240.68. The asylum officer will provide the applicant written notice of the statutory or regulatory basis for the dismissal.

(f) ***Special provisions for certain ABC class members whose proceedings before EOIR were administratively closed or continued.*** The following provisions shall apply with respect to an *ABC* class member who was in proceedings before the Immigration Court or the Board, and those proceedings were closed or continued pursuant to the *ABC* settlement agreement:

(1) ***Suspension of deportation or asylum granted.*** If an asylum officer grants asylum or suspension of deportation, the previous proceedings before the Immigration Court or Board shall be terminated as a matter of law on the date relief is granted.

(2) ***Asylum denied and application for suspension of deportation not approved.*** If an asylum officer denies asylum and does not grant the applicant suspension of deportation, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation. In the case where jurisdiction rests with the Board, an application for suspension of deportation that is referred to the Board will be remanded to the Immigration Court for adjudication.

(g) ***Special provisions for dependents whose proceedings before EOIR were administratively closed or continued.*** If an asylum officer grants suspension of deportation or special rule cancellation of removal to an applicant described in § 240.61(a)(4) or (a)(5), whose proceedings before EOIR were administratively closed or continued, those proceedings shall terminate as of the date the relief is granted. If suspension of deportation or special rule cancellation of removal is not granted, the Service shall move to recalendar proceedings before the Immigration Court or resume proceedings before the Board, whichever is appropriate. The Service shall refer to the Immigration Court or the Board the application for suspension of deportation or special rule cancellation of removal. In the case where jurisdiction rests with the Board, an application for suspension of deportation or special rule cancellation of removal that is referred to the Board will be remanded to the Immigration Court for adjudication.

(h) ***Special provisions for applicants who depart the United States and return under a grant of advance parole while in deportation proceedings.*** Notwithstanding paragraphs (f) and (g) of this section, for purposes of adjudicating an application for suspension of deportation or special rule cancellation of removal under this subpart, if an applicant departs and returns to the United States pursuant to a grant of advance parole while in deportation proceedings, including deportation proceedings administratively closed or continued pursuant to the *ABC* settlement agreement, the deportation proceedings will be considered terminated as of the date of applicant's departure from the United States. A decision on the NACARA application shall be issued in accordance with paragraph (a), and paragraphs (c) through (e) of this section.