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# Like Alice in *Through the Looking Glass*: Grounds for Statutory Reformation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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## CASE NOTE

### LIKE ALICE IN *THROUGH THE LOOKING GLASS*<sup>1</sup>:

### GROUNDS FOR STATUTORY REFORMATION OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

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1. In *In re N-J-B*, the dissent, Board of Immigration (BIA) member Lory D. Rosenberg, commented that in *N-J-B* the benefit of the doubt was turned on its head: "Like Alice in *Through the Looking Glass*, what was the benefit of the doubt now has become the doubt that any alien should receive a benefit." *In re N-J-B*, Int. Dec. 3309 1, 38 (BIA Feb. 20, 1997).

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## I. INTRODUCTION

Much of the commentary on U.S. immigration issues has operated under the assumption that immigrants are enjoying greater protection under the current immigration laws. This assumption, however, is simply false. Historically, immigrants have been disenfranchised due to their limited legal rights. In 1980, District Court Judge James Lawrence King condemned the U.S. government's Haitian policy in *Haitian Refugee Center v. Civiletti*.<sup>2</sup> Eighteen years later, not much has changed. In 1997, Judge King faced a similar challenge in *Tefel v. Reno*.<sup>3</sup> On appeal, *Tefel* effectively led to the reformation of the Illegal

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2. *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla., 1980), modified *sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). For a vigorous critique of United States policy toward Haitians, see Cheryl Little, *United States Haitian Policy: A History Of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993).

3. *Tefel v. Reno*, 996 F. Supp. 1 (S.D. Fla. 1998).

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The reformation of the IIRIRA reflects the long-standing, invidious approach toward immigrants in this country.

In response to the Attorney General's vacatur of *In re N-J-B*, which is a decision that applied the IIRIRA retroactively to Nicaraguan immigrants, the Nicaraguan Adjustment and Central American Relief Act (NACARA) was passed.<sup>4</sup> On November 19, 1997, President William Jefferson Clinton signed NACARA as part of the District of Columbia Appropriations bill, which grants amnesty and residence to Nicaraguans and Cubans. NACARA rewrites IIRIRA to create an exception for certain qualifying aliens to apply for relief absent retroactive application.<sup>5</sup> However, NACARA treats other immigrants similarly situated, such as Haitians, Hondurans, Malaysians, and Iranians, among others, unequally because it excludes them from receiving the same relief under the Act.

In *In re N-J-B*, the Board of Immigration Appeals (BIA) determined that an alien is ineligible for suspension of

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4. The Board of Immigration Appeals in *In re N-J-B* (which stands for *Matter of Norma de Jesus Baldizon*) decided that the Immigration and Naturalization Service (INS) accurately interpreted § 309(c)(5) of IIRIRA and correctly applied the statute retroactively to Nicaraguans whose cases were in the pipeline. *In re N-J-B*, Int. Dec. 3309 (BIA Feb. 20, 1997); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(5), 110 Stat. 3009 (1996) [hereinafter IIRIRA]. Respondent's counsel never had an opportunity to argue the issue prior to the Board of Immigration Appeals' decision and only subsequently raised it as a cause of action in the complaint. Interview with Ira J. Kurzban, Kurzban Kurzban Weinger and Tetzeli, P.A. in Miami, Fla. (Nov. 11, 1997). On appeal, the United States District Court for the Southern District of Florida in *Tefel v. Reno* granted a preliminary injunction which prevented the deportation of thousands of Nicaraguans. *Tefel v. Reno*, 996 F. Supp. 1 (S.D. Fla. 1998).

5. Appellants' Motion For Second Extension of Time To Respond To Appellees' Motion To Dismiss Appeal As Moot at 4, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997) [hereinafter Appellants' Motion for Second Extension]. NACARA, § 203(a)(1), rewrites IIRIRA § 309(c)(5) to make it clear that former § 309(c)(5) will apply retroactively to the cases of aliens who have been issued orders to show cause before, on, or after IIRIRA's September 30, 1996 enactment date. *Id.* NACARA § 203(a)(1) creates an exception for certain qualifying Salvadorans, Guatemalans, and Eastern Europeans. *Id.* The exception allows these aliens to apply for either suspension of deportation or cancellation of removal without having their period of continuous physical presence cut off when placed in deportation proceedings. *Id.* NACARA § 202 provides an amnesty provision for Nicaraguans and Cubans. It allows Nicaraguans (and Cubans) an opportunity to bypass the suspension process altogether and apply directly for adjustment of status. *Id.* As such, under this provision, any Nicaraguan or Cuban who has been physically present in the United States since at least December 1, 1995, and who is otherwise admissible and applies prior to April 1, 2000, is eligible to have his status adjusted to that of an alien lawfully admitted for permanent residence. *Id.* at 5-6.

deportation relief even though she applied before IIRIRA.<sup>6</sup> The retroactive application of the statute effectively stripped the class members of equal treatment under the Act. Subsequently, the District Court issued a preliminary injunction preventing the class members from being deported. As a result, the Attorney General vacated the *In re N-J-B*.<sup>7</sup> decision and prompted Congress to institute legislative reform. Ironically, NACARA, the reform law, has raised the questions of preferential treatment of other immigrants similarly situated.<sup>8</sup> At the same time, NACARA did not address the jurisdictional challenges currently being leveled against the class members at the Court of Appeals for the Eleventh Circuit.

This Case Note examines the history of immigration law. It analyzes how *Tefel* led to the enactment of the historic legislation by analyzing the arguments which sparked these issues. This Case Note also addresses the jurisdictional challenge that is the subject of the government's appeal to the Court of Appeals for the Eleventh Circuit in *Tefel*. As such, the federal courts are faced with a fundamental question of first impression in *Tefel*. Under the newly-enacted IIRIRA, the question remains: did IIRIRA eliminate the District Courts' long-standing jurisdiction to challenge illegal immigration? This Comment seeks to examine the District Court's decision in *Tefel*

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6. The decision construed IIRIRA § 309(c)(5) so as to make a number of aliens, including class members, ineligible for the relief of suspension of deportation under § 244 of the Immigration and Nationality Act (INA). *In re N-J-B*, Int. Dec. 3309 (BIA Feb. 20, 1997); Immigration Nationality Act, Pub. L. No. 82-414, § 244, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101 *et seq.* (1994)) [hereinafter INA]. In effect, NACARA § 203(a)(1) reinstates and affirms the BIA's decision in *In re N-J-B*. It provides that for determining eligibility for suspension of deportation, the period of continuous physical presence is to be cut off for aliens who have been issued an order to show cause regardless of when the order was served. *In re N-J-B*, Int. Dec. 3309 (BIA Feb. 20, 1997). For an explanation of the exceptions provided under NACARA, see Appellants' Motion For Second Extension, *supra* note 5, at 3.

7. *Reno Vacates N-J-B Suspension Decision, Proposes Changes to 1996 Act*, 74 INTERPRETER RELEASES 1072 (July 14, 1997).

8. Despite these reforms, the new legislation does not address Haitians similarly situated to Nicaraguans, Cubans, Guatemalans, and Salvadorans. See Carol Rosenberg, Proyecto Daría Residencia a Hondureños [Project would grant residency to Hondurans], NUEVO HERALD, Jan. 30, 1998, at 3A. What appears disguised as a giant step towards ending the threat of immediate deportation for thousands of Central American immigrants, is actually a major setback for Haitians. The legislation provides lesser benefits for any other category of people included in the bill and completely excludes Haitian, Malaysian, Honduran and Iranian immigrants who are in the same situation. *Id.* Thus, imperative is the task of understanding the legal quagmire surrounding this complex issue.

in light of the new legislation, NACARA, and the pending appeal at the Court of Appeals for the Eleventh Circuit. Despite the prospects of new legislation to reform IIRIRA, the author argues that the impact of the legislation and the jurisdictional issue in *Tefel* remain in flux, thereby creating greater uncertainty that IIRIRA will be fairly applied.<sup>9</sup>

## II. HISTORY OF IMMIGRATION LAW

Suspension of deportation is a form of relief that was available in the past for immigration proceedings.<sup>10</sup> The Immigration and Nationality Act (INA) establishes the qualifications for suspension of deportation.<sup>11</sup> The INA permits the Attorney General to suspend deportation of an otherwise deportable alien who has been present in the United States for at least seven years, has good moral character, and whose deportation would result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States." This form of relief was eliminated for all persons placed in removal proceedings after April 1, 1997, by an immigration reform law passed September 1996, known as IIRIRA.<sup>12</sup>

This new immigration law sparked conflicting interpretations of various provisions affecting suspension of deportation cases.<sup>13</sup> Among the provisions at issue is Section 309(c)(5). This section raises the issue whether a person who is served with an Order to Show Cause (OSC) before she has been in the United States for seven years automatically has her physical presence cut off, thereby making her ineligible for relief from suspension. *Tefel* raised the other issue regarding whether

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9. Specifically, the prospects of NACARA remain speculative until the issue of unequal treatment for similarly situated immigrants is resolved at the Court of Appeals for the Eleventh Circuit. It has been suggested that if the Court of Appeals fails to recognize the constitutional rights of immigrants that the Supreme Court surely will. *Nicaraguans Get Help*, MIAMI HERALD, Feb. 11, 1997, at 14A. See *infra* Part III.A & C.

10. See generally INA § 244A.

11. The INA reads in pertinent part:

To be eligible for suspension of deportation, [an] alien must prove: (1) continuous physical presence in [the] United States for the immediately preceding 7 years, (2) good moral character, and (3) extreme hardship to himself or to his spouse, parent, or child, who is [a] United States citizen or lawful permanent resident. INA § 240A.

12. See generally IIRIRA.

13. See generally *In re N-J-B*, Int. Dec. 3309 (BIA Feb. 20, 1997).

Section 309(c)(5) of IIRIRA applied retroactively to individuals who were issued an OSC prior to the new law's enactment.

*A. Suspension of Deportation Not Bar Under IIRIRA*

IIRIRA significantly amended the INA<sup>14</sup> by replacing deportation and exclusion proceedings with removal proceedings.<sup>15</sup> Under IIRIRA, suspension of deportation was replaced with a new form of relief called "cancellation of removal." To obtain a cancellation of removal an applicant must satisfy additional and more stringent requirements than were previously required to gain suspension of deportation.<sup>16</sup> One of the new requirements is that the applicant must have been continuously "physically present" in the United States for at least ten years before applying for the relief.<sup>17</sup> INA Section 240 also provides that a person who enters the United States will be placed in removal proceedings by the issuance of an OSC. In contrast, suspension of deportation only requires physical presence for seven years.<sup>18</sup> Also, in order to obtain cancellation of removal, an applicant must prove exceptional and extremely unusual hardship to his family members who are either U.S. citizens or lawful permanent residents.<sup>19</sup> Under the suspension standard, the applicant is permitted to show extreme hardship to himself and to his resident family.<sup>20</sup>

The right to cancellation of removal is cut off if the immigrant attempting to accrue the ten years physical presence is served with a charging document now called a "notice to appear."<sup>21</sup> IIRIRA Section 240A(d)(1), reads in pertinent part:

(1) Termination of Continuous Period.—For purposes of this section, any period of continuous residence or continuous

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14. See generally IIRIRA. The amendments relevant to *Tefel* took effect on April 1, 1997. *Tefel v. Reno*, 996 F. Supp. 1 (S.D. Fla. 1998).

15. INA § 240A.

16. INA § 240A(b); see also Joint Explanatory Statement of the Committee of Conference on H.R. 2202, H.R. CONF. REP. No. 104-828, available in 104 CONG. REC. 10841, 10896 (daily ed. Sept. 24, 1996) and 1996 WL 563320 [hereinafter Joint Explanatory Statement].

17. INA § 240A(b).

18. INTRODUCING THE 1996 IMMIGRATION REFORM ACT 49 (R. Murphy ed.) (1996).

19. INA § 240A(b).

20. *Id.*

21. IIRIRA § 240A(d)(1).

physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 239(a) or when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4), whichever is earliest.<sup>22</sup>

This is a significant departure from prior immigration law on suspension of deportation, which was not interpreted to mean that the seven years needed for suspension could be cut off if the person was served with an OSC.<sup>23</sup> However, *In re N-J-B* reinterpreted IIRIRA Section 309(c)(5) to provide that it would apply retroactively to cut off the right to apply for suspension to anyone served with an OSC even if a person has acquired seven years presence in the United States.<sup>24</sup>

### B. *The New Transition Rules*

The "transition rule" of IIRIRA Section 309(c)(5) provides that most of the provisions of Subtitle A of Title III take effect on April 1, 1997.<sup>25</sup> However, Section 309 establishes four exceptions to the transition rule.<sup>26</sup> First, Section 303(b)(2) applies when the Attorney General notifies Congress of insufficient detention space for detainees and invokes the transition provisions.<sup>27</sup> Second, Section 306(c) deals with judicial review in certain cases.<sup>28</sup> Third, Sections 308(d)(2)(D) and 308(d)(5) address the issue of conforming amendments.<sup>29</sup> Fourth, there is an effective date transitional rule for aliens in deportation or exclusion proceedings on April 1, 1997.<sup>30</sup>

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22. *Id.*

23. Interview with Ira J. Kurzban, *supra* note 4.

24. *Id.*

25. IIRIRA § 309(c)(5) reads: "(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION. —Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act." IIRIRA § 309(c)(5).

26. *Summary of Section 309* (visited Oct. 24, 1997) <<http://www.fedpub.com/immigration/docs/Sec309.html>>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*



Despite these new changes in the law, deportation and exclusion proceedings that were pending before April 1, 1997, were not altered.<sup>31</sup> Therefore, suspension of deportation proceedings that were ongoing prior to April 1, 1997, and that the government did not elect to terminate and reinstitute as proceedings under the removal provisions<sup>32</sup> fall under the transition rule. Section 309(c)(1) provides:

**GENERAL RULE THAT NEW RULES DO NOT APPLY—**

Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date [April 1, 1997]—(A) the amendments made by this subtitle shall not apply, and (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.<sup>33</sup>

However, the transition rules permit the government to apply new procedures to pending cases in two situations.<sup>34</sup> First, the new procedures may be applied if an evidentiary hearing has not commenced as of April 1, 1997.<sup>35</sup> Second, the government may also terminate proceedings under the old law where no final administrative decision has been entered and reinitiated under the new law.<sup>36</sup> Moreover, Sections 309(c)(4) establishes transitional rules for judicial review of final orders of exclusion or deportation entered into "more than 30 days after" the enactment date of the Act which is April 1, 1997.<sup>37</sup>

In addition, Section 309(c)(5) provides a transitional rule for suspension of deportation cases.<sup>38</sup> It provides that the government's service of a charging document ends the period of continuous physical presence required for suspension of deportation or the new cancellation of removal for "notices" issued before, on or after September 30, 1996.<sup>39</sup> Thus, this section was meant to apply exclusively to notices to appear as opposed to orders to show cause. Specifically, IIRIRA Section

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31. IIRIRA § 309(c)(1).

32. IIRIRA § 240A(b).

33. IIRIRA § 309(c)(1).

34. See generally IIRIRA § 309(c)(2) and § 309(c)(3).

35. IIRIRA § 309(c)(2).

36. IIRIRA § 309(c)(3).

37. IIRIRA § 309(c)(4).

38. IIRIRA § 309(c)(5).

39. IIRIRA § 309(c)(4).

309(c)(5) states that it "shall apply to notices to appear issued before, on, or after the date of the enactment of this Act."<sup>40</sup>

### C. Legislative History

The legislative history of IIRIRA reveals that it was Congress' intent that only service of a notice to appear under Section 239(a) ends physical presence.<sup>41</sup> IIRIRA is the fruit of compromise between opposing legislative factions holding different views regarding the new immigration laws.

An analysis of IIRIRA's legislative history should begin with H.R. 2022, which was introduced into the House of Representatives as Section 309(c)(5).<sup>42</sup> It read: "the period of continuous physical presence under [section 244(a)] shall be deemed to have ended on the date the alien was served an *order to show cause* pursuant to section 242A of such Act (as in effect before such date of enactment)."<sup>43</sup>

Subsequently, the language of Section 309(c)(5) was amended to intentionally delete the language stating that service of an OSC ended physical presence.<sup>44</sup> The new amendment provides: "Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous ...physical presence) shall apply to notices to appear issued after the date of the enactment of this Act."<sup>45</sup>

While the amendment references Section 240A(d), which applies the special transitional rules to cancellation of removal and suspension of deportation, the original version of Section 309(c)(5) made no reference to Section 240A(d) regarding the issuance of an OSC.

Moreover, the House Judiciary Committee Report provides further confirmation of the amendment's intended effect upon Section 309(c)(5). The House's interpretation of Section 309(c)(5)

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40. IIRIRA § 309(c)(5) (emphasis added).

41. Plaintiffs' Memorandum of Law In Support Of Request For Preliminary Injunction at 26, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997) [hereinafter Plaintiffs' Memorandum].

42. Opening Brief of Petitioner at 33, *In re N-J-B-*, Int. Dec. 3309 (BIA Feb. 20, 1997) [hereinafter Opening Brief].

43. *Id.* (emphasis added).

44. Opening Brief, *supra* note 42, at 34.

45. *Id.* (citing H.R. 2022, § 309(c)(5)).

was that: "The rules under new section 240A(d)(1) and (2)...shall apply to any notice to appear (including an order to show cause under current section 242A) issued after the date of enactment of this Act."<sup>46</sup>

Thus, the final text of Section 309(c)(5) eliminated the originally proposed language. The original language required that service of an OSC would have ended physical presence and instead substituted the language that applies the Section 240A(d) special rules in all cases commenced prior to April 1, 1997. Specifically, physical presence can only be terminated by the special rules in specific situations explained by the Conference Committee's Explanatory Statement:

The period of continuous...physical presence ends when an alien is served a notice to appear under section 239(a) (for the commencement of removal proceedings under section 240), or when the alien is convicted of an offense that renders the alien deportable from the United States, whichever is earliest. A period of continuous physical presence is broken if the alien has departed from the United States for any period of 90 days, or for periods in the aggregate exceeding 180 days.<sup>47</sup>

In contrast, the government asserts that the Conference Committee:

Re-inserted language into [Section] 309(c)(5) that gave retroactive effect to the cut off date for suspension applications...this provision, which like the provision originally contained [in] H.R. 1915 applies the cut off period for calculation of physical presence retroactivity to all aliens served with an order to show cause prior to enactment of the Act ....<sup>48</sup>

However, the government's interpretation ignores the fact that the final statutory language is substantially different from that introduced in H.R. 1915 and 2202.<sup>49</sup>

In addition, the testimony of Peter Deutsch, a member of the U.S. House of Representatives from District 20 in the state of

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46. H.R. REP. No. 104-469(I) (1996), available in 1996 WL 168955.

47. Joint Explanatory Statement, *supra* note 16.

48. Plaintiffs' Memorandum, *supra* note 41, at 26.

49. *Id.*

Florida, challenges the government's analysis.<sup>50</sup> Congressman Deutsch testified that the government's interpretation of the contemplated legislation was erroneous.<sup>51</sup>

Therefore, the legislative history of the special rules clearly indicates that physical presence ends upon service of a "notice to appear under [S]ection 239(a)," commencing removal proceedings, not when an OSC commences deportation proceedings.

#### *D. In re N-J-B-*

##### 1. The Facts

In Nicaragua, petitioner, Norma de Jesus Baldizon, supported her four children by working as a schoolteacher for twenty years.<sup>52</sup> Baldizon was forced to teach Sandinista propaganda and ideology directly against her own political beliefs.<sup>53</sup> Her refusal to teach these subjects caused her and her family to suffer from harassment and scrutiny at the hand of the Sandinista government.<sup>54</sup>

Fearing for her life, Baldizon left Nicaragua and legally entered the United States with a tourist visa on April 5, 1987.<sup>55</sup> If deported to Nicaragua, she will not be able to receive the medical treatment she requires.<sup>56</sup> As a result of overstaying her visa, she was placed in deportation proceedings.<sup>57</sup>

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50. *Id.* at 26.

51. *Id.* at 27. Deutsch stated that:

Our feeling was that the interpretation by the Board was an incorrect interpretation. I'm someone who actually voted for the legislation, but I don't think really anyone contemplated that the legislation would have specifically changed the issue of suspension .... I don't think anyone who voted on this legislation contemplated the effect of the ruling .... If this was something that Congress wanted to occur we wouldn't be debating this issue now. It would have been expressed much more clearly in the legislation.

*Id.* at 27.

52. Opening Brief, *supra* note 42, at 6-7.

53. *Id.* at 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

Baldizon was issued an OSC on August 27, 1993.<sup>58</sup> She has been physically and continuously present in the United States since that date.<sup>59</sup> At a hearing held on April 1, 1994, the judge denied Baldizon's applications for asylum, withholding of deportation, suspension of deportation, and voluntary departure.<sup>60</sup> Instead, she was ordered deported from the United States.<sup>61</sup> Baldizon appealed to the Board of Immigration Appeals (BIA), which issued its 7-5 decision on February 20, 1997.<sup>62</sup> The Board determined that even though Baldizon had been in the United States for almost ten years at the time it heard her case, she was ineligible for suspension of deportation because she was served with an OSC.<sup>63</sup> Concurrently, Baldizon filed a protective notice of appeal in the Court of Appeals for the Eleventh Circuit on March 19, 1997.<sup>64</sup> On March 28, 1997, a verified class action complaint was filed in the United States District Court for the Southern District of Florida styled *Roberto Tefel, et al. v. Janet Reno, Attorney General, et al.*<sup>65</sup> On May 20, 1997, U.S. District Court Judge King entered a temporary restraining order against the government.<sup>66</sup> Subsequently, the government filed a motion to dismiss the lawsuit for lack of subject matter jurisdiction.<sup>67</sup> The district court issued a preliminary injunction in *Tefel* on June 24, 1997, and rejected the government's Motion to Dismiss for Lack of Jurisdiction.<sup>68</sup> The plaintiff class filed a Motion to Dismiss the government's appeal from the district court's preliminary injunction, on the ground that the appeal was moot.<sup>69</sup> Trial was set to commence at the Court of Appeals for the Eleventh Circuit on January 5, 1998, pending congressional

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58. Opening Brief, *supra* note 42, at 7.

59. *Id.*

60. *Id.*

61. See generally IIRIRA.

62. Opening Brief, *supra* note 42, at 7.

63. *Id.*

64. Respondent's Memorandum of Law In Support of Motion to Reconsider, *In re N-J-B*; Int. Dec. 3309 (BIA Feb. 20, 1997).

65. Opening Brief, *supra* note 42, at 4.

66. *TRO Granted in One Suspension Case, Motion to Dismiss Denied in Another*, 74 INTERPRETER RELEASES 825 (May 19, 1997) [hereinafter *TRO Granted*].

67. Supplement to Motion to Dismiss for Mootness at 6, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997) [hereinafter Supplement]. The motion contended that under INA § 242(g), which had been enacted as part of IIRIRA, the district court had no subject matter jurisdiction to consider the suit or to award plaintiffs any relief. See *Auguste v. Reno*, 118 F.3d 723 (11th Cir. 1997).

68. *Tefel v. Reno*, 996 F. Supp. 1, 2-3 (S.D. Fla. 1998).

69. *TRO Granted*, *supra* note 66, at 825.

action or inaction.<sup>70</sup> Following the Senate's passage of NACARA, the plaintiff class amended the original complaint to rename the class so as to add the Haitian immigrants to the class action.<sup>71</sup>

## 2. The Holding

The BIA in *In re N-J-B* determined that the government correctly interpreted the application of the new immigration laws to the class members.<sup>72</sup> The government argued that the transitional rule provides that an OSC served at any time to an alien in suspension of deportation proceedings interrupts continuous physical presence for purposes of that hearing;<sup>73</sup> thus, an OSC was equivalent to a notice to appear under the new law. The BIA held that under the transition rule, service of the OSC ends the period of continuous presence prior to the acquisition of the requisite seven years.<sup>74</sup> Therefore, according to the BIA, an alien is ineligible for suspension of deportation even though she applied before the enactment of IIRIRA in 1996.<sup>75</sup> This was a draconian decision that would have affected many Nicaraguans and other immigrants, except for the fact that *Tefel*, through the enactment of NACARA, effectively changed the immigration law.

## 3. A Criticism

There are three major points of criticism about the BIA majority's decision in *In re N-J-B*.<sup>76</sup> First, the BIA's interpretation ignores three important words: "notice to appear."<sup>77</sup> Pursuant to Section 240A(d)(1), an immigrant's physical presence is terminated "when the alien is served with a

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70. *Tefel*, No. 97-0805-CIV-KING at 65. However, appellants filed for an additional thirty day extension of time within which to file their response to the Motion to Dismiss for Mootness; see also Appellants' Motion For Second Extension, *supra* note 5, at 1.

71. Interview with Esther O. Cruz, Managing Attorney of Florida Immigrant Advocacy Center, in Miami, Fla. (July 16, 1997).

72. See generally *In re N-J-B*, Int. Dec. 3309 (BIA Feb. 20, 1997) (discussing the currently vacated decision which interpreted the new immigration law against respondents).

73. *Id.*

74. See *In re N-J-B*, Int. Dec. 3309 at 1 (BIA Feb. 20, 1997).

75. *Id.*

76. *Id.* at 28-39.

77. *Id.*

notice to appear under [Section] 239(a)," not an OSC. Second, the majority's holding also ignores the difference between the terms "Order to Show Cause" and "Notice to Appear."<sup>78</sup> Third, the majority further ignores the difference between "issuance" of a charging document and "service" of a charging document.<sup>79</sup> Fourth, the majority's decision implemented arbitrary distinctions and inconsistencies.<sup>80</sup> Therefore, the BIA majority's interpretation of the new sections of the INA, a purely administrative analysis, constituted statutory construction which only the judiciary has the final authority to reject.<sup>81</sup>

*a. Section 240A(d)(1)*

Five BIA members dissented in three separate dissenting opinions.<sup>82</sup> According to BIA Member Villageliu, one of the dissenters, the interruption of continuous physical presence applies to all cancellation of removal applications, regardless of how and when they were initiated, but does not apply to suspension of deportation cases remaining in deportation proceedings.<sup>83</sup> Moreover, Villageliu also considered the legislative history of the new law.<sup>84</sup> Initially, Congress included language applying the interruption of physical presence to deportation cases.<sup>85</sup> However, the language was subsequently deleted.<sup>86</sup> Villageliu clarified Congress' original intent:

[T]he interruption of continuous physical presence applies *only* when an alien is placed in removal proceedings and seeks cancellation of such removal under the new procedures. The language "notice to appear issued before, on, and after enactment" relied upon by the majority is merely a jurisdictional provision precluding jurisdictional challenges

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78. *Id.*

79. *Id.*

80. *Id.*

81. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide.").

82. *In re N-J-B-*, Int. Dec. 3309 at 36 (BIA Feb. 20, 1997).

83. *Id.*

84. *Id.* at 37.

85. See Plaintiffs' Memorandum, *supra* note 41, at 13.

86. *Id.*

when an alien is placed under the new removal procedures....<sup>87</sup>

Villageliu's analysis challenges the BIA majority's interpretation of Congress' intent by addressing the relevance of statutory interpretation consistent with the Act's purpose in its entirety.

*b. "Order to Show Cause" and "Notice to Appear"*

The BIA majority violated several basic principles of statutory interpretation.<sup>88</sup> In interpreting the phrase "notice to appear under 239(a)" as surplusage, the BIA majority violated the mandate that no statute may be read so as to render any word or phrase surplusage.<sup>89</sup> The BIA majority also violated the canon that the legislative purpose is expressed by the ordinary meaning of the words used when it refused to give the word "under" its ordinary meaning.<sup>90</sup> The BIA majority further violated the statutory canon that different words or phrases used in the same statute have different meanings when it failed to recognize that only notices to appear served under Section 239(a) interrupt physical presence.<sup>91</sup> It also ignored the distinction between the word "served" and the word "issued."<sup>92</sup> Finally, the BIA failed to construe ambiguities in favor of the alien.<sup>93</sup>

*c. "Issuance" and "Service" Distinguished*

The majority overlooks the fact that Section 309(c)(5) states that physical presence cut-off is triggered when a Notice to Appear under Section 239(a) is "issued," rather than "served." On the other hand, Section 240A(d)(1) uses the word "served" with a notice to appear under Section 239(a). That statute says

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87. *In re N-J-B-*, Int. Dec. 3309 at 29 (BIA Feb. 20, 1997) (emphasis added).

88. *Id.*

89. *Kungys v. United States*, 485 U.S. 759 (1988); *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955); *COIT Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989) (asserting that statutory sections must be construed harmoniously so as to give effect to each section).

90. *INS v. Phinpathya*, 464 U.S. 183 (1984); *Ardestani v. INS*, 520 U.S. 129, 135 (1991).

91. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

92. *In re N-J-B-*, Int. Dec. 3309 at 40 (BIA Feb. 20, 1997).

93. *Id.*



"issued" in Section 309(c)(5) and "served" in Section 240A(d)(1), indicating that Congress intended the transition rule to apply only to cases where the government had issued an OSC before September 30, 1996, but had not served it prior to that date.<sup>94</sup> Thus, this would give effect to the "before" language of Section 309(c)(5).

*d. Arbitrary Distinctions and Inconsistencies Criticized*

Class members also argued that the BIA decision is not entitled to deference because it contradicts the government's regulations and two of its own recent decisions.<sup>95</sup> The BIA decision was both contradictory and inconsistent in several regards. The BIA majority acknowledged that it was not until IIRIRA that the INA referred to notice to appear.<sup>96</sup> It also recognized that in the past deportation proceedings commenced with an OSC.<sup>97</sup> Nevertheless, in its holding the BIA equates both terms.

Furthermore, the BIA majority's holding and reasoning in this case differed substantially from the holding in two other recent BIA decisions.<sup>98</sup> In *In re Soriano*, the BIA stressed that "another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage."<sup>99</sup> Yet, this is exactly what the BIA did. Moreover, in *In re Fuentes*, the BIA followed canons of statutory construction that it disregarded in this decision.<sup>100</sup> As a result, the class members criticized the internal inconsistencies in the BIA's recent decisions, thereby discounting and challenging the majority's deference in the *In re N-J-B-* ruling.<sup>101</sup> The Court of Appeals for the Eleventh Circuit has, in recent cases, reversed the BIA because the Board drew arbitrary distinctions between two similarly situated groups of people.<sup>102</sup>

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94. Opening Brief, *supra* note 42, at 32.

95. *In re N-J-B-*, Int. Dec. 3309 (BIA Feb. 20, 1997).

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Soriano*, Int. Dec. 3289 (BIA June 2, 1996).

100. *In re N-J-B-*, Int. Dec. 3309 at 25 (BIA Feb. 20, 1997).

101. *Id.*

102. *Acosta-Montero v. INS*, 62 F.3d 1347, 1350 (11th Cir. 1995); *Yeung v. INS*, 61

The Attorney General also remains a staunch critic of the decision.<sup>103</sup> Her reaction to the decision was to certify the case to herself and subsequently vacate it.<sup>104</sup> Additionally, the Attorney General placed great emphasis on the law's possible ramifications if legislative proposals were not enacted. She stated that "[we] want to ensure that the 1996 immigration law will not have an unduly harsh effect on those individuals who have made vital contributions to their local communities here in the United States, while putting down deep roots in our nation and abiding by our laws."<sup>105</sup> Moreover, the Attorney General justified her actions by stating that she was, "[fulfilling] the promise by President Clinton to find a fair and reasonable solution for thousands of Central Americans and others whose cases were pending when Congress changed the standard for humanitarian relief from deportation..."<sup>106</sup>

### III. *TEFEL V. RENO*

The federal judge held in favor of the class members in *Tefel*.<sup>107</sup> The judge issued a temporary restraining order on May 14, 1997, barring the government from deporting thousands of individuals under Section 309(c)(5) of IIRIRA.<sup>108</sup> The government opposed the class members' request for a temporary restraining order and sought to dismiss the complaint on jurisdictional grounds from the outset.<sup>109</sup> First, the government argued that the District Court lacked jurisdiction to entertain

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F.3d 833 (11th Cir. 1995); see also *Batanic v. INS*, 12 F.3d 662, 666 (7th Cir. 1993) (citing *Pauley v. Bethenergy Mines*, 501 U.S. 680, 698 (1991) (asserting that as a general matter the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views); *U.S. Mosaic v. NLRB*, 935 F.2d 1249, 1255 n.7 (11th Cir. 1991) (finding that "agency inconsistency on a matter of statutory interpretation, if not well articulated, would almost epitomize arbitrary agency action.").

103. Department of Justice, Administration Proposes Fine-tuning for 1996 Immigration Law to Mitigate Harsh Effects of Applying New Rules to Pending Cases 2 (June 10, 1997) (press release) [hereinafter Press Release].

104. *Id.*

105. *Id.*

106. *Reno Vacates N-J-B- Suspension Decision, Proposes Changes to 1996 Act*, *supra* note 7.

107. *TRO Granted*, *supra* note 66, at 825.

108. *Id.*

109. Petitioners' Reply to Defendants' Memorandum in Opposition to Temporary Restraining Order and in Support of Defendants' Motion to Dismiss at 1, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997) [hereinafter Petitioners' Reply].

the suit because Section 242(g) of the INA bars the action.<sup>110</sup> Second, the government asserted that only the Court of Appeals for the Eleventh Circuit has jurisdiction to review final orders of deportation.<sup>111</sup> Third, in the alternative, the government argued that even if the Court had jurisdiction the class members failed to demonstrate that they were entitled to a temporary restraining order because they had not exhausted administrative remedies.<sup>112</sup> Presently, the jurisdictional issue is on appeal.<sup>113</sup>

### A. *The Government's Jurisdictional Challenge*

IIRIRA changed the procedure for seeking judicial review in the federal courts.<sup>114</sup> INA Section 242 currently contained within IIRIRA Section 306(a) repealed and replaced the old INA Section 106.<sup>115</sup> The old INA Section 106 applies to final orders of exclusion or deportation filed on or after the enactment of the IIRIRA.<sup>116</sup> Notably, under technical corrections, the new provisions do not affect those persons in proceedings *before* enactment of the IIRIRA.<sup>117</sup> However, the government challenges the interpretation of the judicial review section of the law.

The government's argument seeks to limit judicial review to the federal courts.<sup>118</sup> The government did not argue that the class members' claim cannot be reviewed at all by the federal courts. Instead, the government argued that exclusive judicial review in the Court of Appeals is adequate.<sup>119</sup> To make this argument the government relied upon the language of INA Section 242(g). This section provides for exclusive jurisdiction:

EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or

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110. *Id.*

111. *Id.*

112. *Id.*

113. Supplement, *supra* note 67, at 6.

114. IIRIRA § 306(a)(2) (former INA § 242 regarding deportation proceedings was amended and renumbered INA § 240 "Removal Proceedings").

115. *Id.*

116. IIRIRA § 306(c)(1).

117. INTRODUCING THE 1996 IMMIGRATION REFORM Act 121, *supra* note 18.

118. See Petitioners' Reply, *supra* note 109, at 29.

119. *Id.*

on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.<sup>120</sup>

The government read this section of the law broadly so as to virtually withdraw all jurisdiction from the federal courts. In fact, the government claims that decisions made by lower level officials constitute decisions of the Attorney General.<sup>121</sup> According to the court's interpretation, however, the plain statutory language only precludes judicial review of "the decision or action of the Attorney General."<sup>122</sup> Although the Attorney General may delegate her authority to lower level officials under INA 103(a)(4), (a)(6), and (c), she is not authorized to determine the extent of federal jurisdiction by delegation.<sup>123</sup> Otherwise, the court would be permitting the Executive Branch to determine the extent of federal jurisdiction, which is strictly prohibited under *Marbury v. Madison*.<sup>124</sup> Thus, the review of the decisions or actions of lower level government officials is not precluded. Therefore, the court accepted the class members' argument that INA 242(g) does not preclude judicial review in the district court because it only precludes review of direct decisions of the Attorney General.<sup>125</sup>

Moreover, the court determined that the government's interpretation of the statutes would lead to a complete abolition of judicial review for deportation cases commencing before April 1, 1997, and as a result, would raise serious constitutional issues.<sup>126</sup> INA Section 242 expressly prohibits judicial review of deportation orders "[e]xcept as provided in this section and notwithstanding any other provision of law."<sup>127</sup> The remainder of INA Section 242 does not apply to deportation proceedings initiated prior to April 1, 1997, which is the case here.<sup>128</sup> The class members were in deportation proceedings prior to April 1,

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120. INA § 242(g).

121. Petitioners' Reply, *supra* note 109, at 1.

122. *Id.*

123. *Id.* at 11.

124. *Id.* at 11.

125. *Id.*

126. *Id.* at 9.

127. *Id.* at 13 (emphasis added).

128. *Id.* at 13.

1997; thus, the cases would be governed by the pre-Section 242 statutory scheme.<sup>129</sup>

The government argues that the only exception to the purported total bar to judicial review under Section 242(g) is that set forth in former Section 106(a) of the INA.<sup>130</sup> The government unsuccessfully attempted to add the Section 106(a) exception to the language of INA Section 242.<sup>131</sup> According to the court's interpretation, INA Section 242(g) simply does not provide an exception for proceedings under INA Section 106 because Section 106 is repealed in the same section (IIRIRA 306(b)) that creates INA Section 242(g).<sup>132</sup> The court noted that INA Section 106 does apply as the pre-existing law for deportation review.<sup>133</sup> However, the court rejected the government's argument that INA Section 106 should be read to deny all district court review.<sup>134</sup>

Additionally, the District Court noted that the class members' estoppel and due process claims are matters that cannot be addressed by an Immigration Judge (IJ) or the BIA.<sup>135</sup> The government argued that the class members should pursue their constitutional and nonconstitutional claims exclusively in the Court of Appeals for the Eleventh Circuit upon receiving a final order of deportation.<sup>136</sup> The IJs would have no jurisdiction to hear these claims because a factual record could only be developed in the district court.<sup>137</sup> Thus, the District Court held that former Section 106(a) cannot be construed to prohibit the

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129. *Id.* The government argued that INA § 242(g) applies to deportation proceedings because of § 306(c)(1) of IIRIRA which reads that § 242(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation or removal proceedings under such Act." *Id.* However, the Court noted that this provision goes not to the application of INA § 242(g) but to its "Effective Date." *Id.* Moreover, once the language of § 242(g) is applied, the language limits it to removal proceedings. *Id.* Thus, the Court found that INA § 242(g) applies to proceedings that began as exclusion or deportation proceedings but were changed into removal proceedings under § 306(c)(3) of IIRIRA. *Id.*

130. INA § 106(a) (providing that under the provision, "the sole and exclusive procedure" to review "final orders of deportation" is in the court of appeals).

131. Order Denying Motion to Dismiss at 7, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 8.

136. *Id.* at 10.

137. *Id.*

district court from exercising its federal question jurisdiction.<sup>138</sup> The government subsequently appealed to the Court of Appeals for the Eleventh Circuit on jurisdictional grounds.<sup>139</sup> The class subsequently filed a motion to dismiss for mootness.<sup>140</sup> In the motion, the government agreed that the Attorney General's certification of the decision in *In re N-J-B-*, has had a profound effect on the status of *Tefel*.<sup>141</sup> Therefore, the government made the case for the mootness of its own appeal.

### *B. Jurisdiction Unresolved*

Despite the legislative reform of IIRIRA, the jurisdictional issue remains unresolved.<sup>142</sup> In fact, the class members filed a Supplement to Motion to Dismiss for Mootness with the Court of Appeals for the Eleventh Circuit in an effort to circumvent addressing the jurisdictional issue.<sup>143</sup> The precedent in the Eleventh Circuit indicates that the court is likely to favor the government's interpretation of INA Section 242(g) as posing a complete bar to jurisdiction for any other court.<sup>144</sup> This result may require remanding the case to the District Court with instruction to dissolve the injunction.<sup>145</sup>

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138. *Id.*

139. Supplement, *supra* note 67, at 1.

140. *Id.*

141. *Id.* In fact, the government stated that:

At present, the issues presented by the district court's decision are in flux. The Attorney General has not yet decided *N-J-B-* after certifying the case [*In re N-J-B-*] to herself, and it is not yet apparent when that decision will be rendered or what its outcome will be. Whether the decision ultimately affirms the BIA's decision in *N-J-B-* or reverses it, or affirms in part and reverses in part, the decision will significantly aid the government in identifying precisely for the Court what, if any, issues are appropriately presented for appellate consideration....

*Id.*

142. *Id.*

143. See Supplement to Motion to Dismiss for Mootness at 1, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997); Interview with Esther O. Cruz, Managing Attorney of Florida Immigrant Advocacy Center, in Miami, Fla. (Oct. 28, 1997).

144. *Auguste v. Reno*, 118 F.3d 723, 727 (11th Cir. 1997).

145. See *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267-68 (1936); *Auguste v. Reno*, 118 F.3d 723 (11th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210, 1213-14 (D.C. Cir. 1997); *Commodity Futures Trading Comm'n v. Board of Trade of Chicago*, 701 F.2d 653, 656, 658 (7th Cir. 1983); *Crowell v. Mader*, 444 U.S. 505 (1980).

The Eleventh Circuit has consistently held that it lacks jurisdiction to hear appeals pursuant to IIRIRA.<sup>146</sup> In *Auguste v. Reno*, the court held that judicial review could be precluded because "no judicial review is guaranteed by the Constitution" to aliens.<sup>147</sup> Thus, in order for the court to obtain jurisdiction, the suit must have been brought directly to the district court. Under this analysis, the court would hold that it did not have jurisdiction under IIRIRA to hear the claim, completely barring the class from asserting their constitutional claims.<sup>148</sup>

### C. Obtaining Preliminary Injunction

On June 24, 1997, U.S. District Judge King issued a preliminary injunction preventing the deportation of tens of thousands of individuals and preventing the government from enforcing the BIA's decision in *In re N-J-B*,<sup>149</sup> which ultimately impacts many immigrants throughout the nation.<sup>150</sup>

The Court's decision established that the class members met three of the four criteria required to obtain a preliminary injunction. The four criteria are as follows: (1) the substantial likelihood that they will prevail on the merits; (2) that a preliminary injunction is necessary to prevent irreparable harm; (3) that the threatened injury to the class members outweighs the threatened harm the preliminary injunction would inflict on

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146. *Auguste*, 118 F.3d at 727.

147. *Id.* at 727 (quoting *Carlson v. Landon*, 342 U.S. 524, 537 (1952)); see also *Boston-Bollers v. INS*, 106 F.3d 352, 355 (11th Cir. 1997).

148. One manner of circumventing the court's holding is to assert a habeas corpus argument. No court, including the Court of Appeals for the Eleventh Circuit, has precluded review in habeas. To do so, would raise a serious constitutional question. If the class members proceed on this basis, it is likely that the battle will be over the scope of habeas. However, cases like *Mbiya v. INS* suggest that review is only available in rare and unusual circumstances where there is a "fundamental miscarriage of justice." See *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga. 1996). As such, it is unlikely that such a challenge may even come to the forefront.

149. *Tefel v. Reno*, No. 97-0805-CIV-KING at 64 (S.D. Fla. June 24, 1997).

150. The class members in *In re N-J-B* consisted of:

All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's [Board of Immigration Appeals] decision to apply the transitional rule of Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.

See Plaintiffs Complaint at ¶ 55, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997).

the non-movant; and (4) that the preliminary injunction would serve the public interest.<sup>151</sup>

### 1. Likelihood of Prevailing

In contrast to a permanent injunction, a preliminary injunction does not require the strict test of "success" on the merits.<sup>152</sup> Thus, the class members were not required to present the same breadth of evidence that is required for obtaining a permanent injunction.<sup>153</sup> However, the government was prevented from obtaining full discovery at the preliminary injunction stage due to time constraints.<sup>154</sup>

### 2. Necessary to Prevent Irreparable Harm

The purpose of a preliminary injunction must always be to prevent irreparable injury.<sup>155</sup> In *Tefel*, the court held that the class members would suffer substantial irreparable harm if an injunction was not issued.<sup>156</sup> Although the government was given the opportunity to offer testimony of witnesses to rebut the claim of irreparable harm, the government declined to do so.<sup>157</sup> Instead, the government limited its challenge based on lack of irreparable harm to numerous assertions and arguments.<sup>158</sup> Thus, the court accepted the class members' un rebutted testimony and found that the class members met their burden of proof.<sup>159</sup>

This was a critical decision because without the preliminary injunction, many of the class members would certainly face deportation.<sup>160</sup> This fear was a substantial factor at trial resulting from the government's testimony, which indicated that

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151. *Tefel*, No. 97-0805-CIV-KING at 18 (citing *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981)).

152. *Tefel*, No. 97-0805-CIV-KING at 18 (citing *University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981)).

153. *Tefel*, No. 97-0805-CIV-KING at 18.

154. *Id.* at 14.

155. *Id.* at 60.

156. *Id.* at 64.

157. *Id.* at 59.

158. *Id.* at 59.

159. *Id.* at 59.

160. *Id.*



they intended to proceed with their deportation policy, and with executing any orders of deportation of class members with final orders of deportation.<sup>161</sup> Furthermore, many of the class members already have these orders of deportation; thus, they would be directly affected by the government's policy decisions.<sup>162</sup>

This fear of deportation affected class members in several ways.<sup>163</sup> Notably, many Nicaraguan families' fear of deportation resulted in parents not sending their children to school.<sup>164</sup> The Dade County School Board responded with a press release addressing the Nicaraguan community's concerns.<sup>165</sup> This response is indicative of the irreparable harm suffered by Nicaraguan families during the course of *Tefel*.

In addition, many witnesses testified as to the panic and fear of being deported expressed by Nicaraguan family members to their priests and other community leaders on a regular basis.<sup>166</sup> Some Nicaraguans did not publicize the deaths of their own family members in local newspapers or list their current

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161. *Id.*

162. *Id.* One example of irreparable harm involving Nicaraguans affected by the *N-J-B*-decision is the situation of a seventeen-year old girl who came to the United States when she was seven years old. She lives in the United States with her mother, a lawful permanent resident, and has no family in Nicaragua. She is an outstanding student at the top of her graduating class at the University of Miami/Knight Center School of Applied Technology. She has participated in extensive community involvement on behalf of low income, inner city youth and has been a peer counselor at Regis House. She is an active member of the Catholic Church. However, as a result of the *N-J-B*-decision, her plans to attend college and go to medical school may never be accomplished. Hence, the threat of physical removal from the United States is evidence of irreparable harm suffered by the Nicaraguans in this case. See Memorandum from Joan Friedland and Cheryl Little to the Staff at Florida Immigrant Advocacy Center, *Effect of N-J-B-Decision*, at 3-4 (June 1997) (on file with the *University of Miami Inter-American Law Review*).

163. *Tefel*, No. 97-0805-CIV-KING at 46-64.

164. Demetrio Perez, Jr., Vice Chair, Dade County School Board, Demetrio Perez, Jr. Asks School Board Colleagues For Solidarity With Nicaraguan Families (May 1, 1997) (press release).

165. *Id.* Mr. Demetrio Perez, Jr., stated:

We cannot remain indifferent ...when the emotional stability of our students is in danger. I think that we need to clarify - given the questions and concerns which we have been made aware of - that at this time there is no regulation in existence, which will remove Nicaraguan children from DCPS [Dade County Public Schools] classrooms. I hope this will serve to eliminate any doubts that many Nicaraguan families have expressed.

*Id.*

166. *Tefel*, No. 97-0805-CIV-KING at 60.

addresses in church registries for fear of being identified and deported by the government.<sup>167</sup>

Furthermore, many parents, fearing that the government would identify them, refused to bring their children to the hospital for medical attention.<sup>168</sup> Many of the witnesses that testified confirmed the fear and emotional hardship suffered by Nicaraguan families and especially their children.<sup>169</sup>

There are also many cases of children, who are citizens of the United States, but who have Nicaraguan parents.<sup>170</sup> For instance, one family, the Pettersons, have three children born in the United States.<sup>171</sup> Two of the daughters, who are seven and six years old, suffer from Argininemia, a rare form of cerebral palsy.<sup>172</sup> One of the daughters was born blind.<sup>173</sup> The father describes the other daughter at birth as, "just looked off into space...doesn't walk,...didn't talk,...didn't move."<sup>174</sup> The only form of treatment available for the younger child is found in the United States and Canada.<sup>175</sup> The oldest daughter is fed through a tube.<sup>176</sup> Also, both daughters receive treatment from an orthopedic physician because neither of them can walk.<sup>177</sup> Deportation of the father, the sole financial provider, would leave the children and mother homeless because they require the mother's complete attention and care.<sup>178</sup>

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167. *Id.* at 46-64.

168. *Id.* at 60. In reflecting on these matters, the Director of the Human and Labor Rights Institute at Florida International University, Haydee Marin, testified that for fear of deportation a family refused to bring their child to a hospital for medical attention. Subsequently, the child died. *Id.*

169. *Id.* For example, Maria Esperanza Vargas de Chavarria's daughter, who is now seventeen years old, suffers from San Fillipo Down Syndrome. *Id.* at 46. The disease will progress and eventually lead to her death. *Id.* at 46-47. The mother described the disease as resulting in the bones starting to "turn and twist and crumble up" and testified that her child will eventually stop speaking, understanding, moving, and walking. *Id.* The mother testified that if an injunction is not issued, it would be fatal for her child and would, in effect, be a "death sentence." *Id.* at 47.

170. *Id.* at 48.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 49.

Medical conditions of these types require close, periodic monitoring, which is impossible to provide to children in a country like Nicaragua. Even assuming, *arguendo*, that the children may stay in the United States, without the attention and assistance of their parents the children's chances of recovery are slim. It has been established through empirical evidence that factors in the social environment exert a major and potentially modifiable influence on the health of populations.<sup>179</sup>

Economically, the class members also suffered irreparable harm.<sup>180</sup> The government, at the time of the trial, had a policy that denied class members a work permit once their case was dismissed on the basis of *In re N-J-B*.<sup>181</sup> In *McNary v. Haitian Refugee Center, Inc.*, the Court stated that "[e]ven disregarding the risk of deportation, the impact of a denial of the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the application process."<sup>182</sup> Thus, the denial of work permit authorizations constituted economic hardship and irreparable harm to the class members.<sup>183</sup>

Dade County will also be affected. In fact, Judge King's opinion emphasized that "[a]n application of the law as presently interpreted in *N-J-B* would negatively affect Dade County, and particularly, the City of Sweetwater, economically as well as emotionally."<sup>184</sup> Moreover, one Dade County official testified that there would be an approximate \$1 billion loss in revenue to Dade County if class members were deported.<sup>185</sup>

However, the cornerstone of an "irreparable" injury for purposes of a preliminary injunction is the prerequisite that the injury cannot be undone through monetary remedies.<sup>186</sup> Certainly, the injuries suffered by the class members in this case cannot be undone by monetary relief. The class members are prevented from obtaining lawful permanent resident status.<sup>187</sup>

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179. Timothy G. Evans, Book Review, 1 HEALTH & HUM. RTS. 205 (1995).

180. *Tefel*, No. 97-0805-CIV-KING at 63.

181. *Id.*

182. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 491 (1991).

183. *Tefel*, No. 97-0805-CIV-KING at 63.

184. *Judge Issues Preliminary Injunction in Suspension of Deportation Case*, 74 INTERPRETER RELEASES 1029, 1032 (June 7, 1997).

185. *Id.* at 1032.

186. *Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864, 880 (S.D. Fla. 1988).

187. *Tefel*, No. 97-0805-CIV-KING at 60-61.

They are prevented from the right to accrue time toward citizenship, the ability to petition for family members, and to be free from government deportation proceedings.<sup>188</sup> These injuries bespeak irreparable harm.

### 3. Balancing Harm to Class Members Against Harm to Government

The court also considered the third prong of the test for obtaining a preliminary injunction—balancing the harm to class members against the harm to government.<sup>189</sup> The government asserted that "...the granting of a preliminary injunction would interfere with the federal government's ability to control the flow of immigration and...the ability of the Executive Office of Immigration Review to effectively process the cases within its jurisdiction."<sup>190</sup> Instead, the court found that the administrative inconvenience the government may sustain as a result of issuing a preliminary injunction did not outweigh the serious and substantial irreparable harm to the thousands of class members.<sup>191</sup>

### 4. Public Interest

The class members were easily able to meet the fourth prong's requirement that entering a preliminary injunction would serve the public interest.<sup>192</sup> State Representative Jorge Rodriguez Chomat, attorney and state representative for District 114 of the state of Florida, testified that the Nicaraguan community of Sweetwater is becoming increasingly concerned and worried about the effects of deportation on their community.<sup>193</sup> Chomat further testified that parents were fearful that they would be deported to Nicaragua and forced to abandon their United States citizen children.<sup>194</sup> The court found this

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 61-62.

193. *Id.* at 62.

194. *Id.*

testimony sufficient to prove that the preliminary injunction would serve the public interest.<sup>195</sup>

*D. Violation of Due Process and Equal Protection  
Rights Under the Fifth Amendment of the  
Constitution*

The *Tefel* class members claimed that they were deprived of their constitutional due process and equal protection rights under the Fifth Amendment of the Constitution.<sup>196</sup> Deportable aliens have long been recognized as having full due process rights.<sup>197</sup> The *Tefel* class members had a property interest in obtaining a hearing on their application.<sup>198</sup> The BIA majority's decision violated the class members' rights since they were deprived of their property interest without due process.<sup>199</sup>

It was argued that the BIA did not notify class members that the Board was considering applying the new statutes in Baldizon's case.<sup>200</sup> As a result, the BIA's failure to give class members' counsel the opportunity to address these issues before making its decision constitutes a denial of Baldizon's right to counsel.<sup>201</sup> The right to counsel is fundamental in immigration proceedings.<sup>202</sup> Thus, in *Tefel*, it was a violation of due process

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195. *Id.*

196. *Id.* at 26.

197. *Bridges v. Wixon*, 326 U.S. 135 (1945); *Ibrahim v. United States INS*, 821 F.2d 1547, 1550 (11th Cir. 1987).

198. *Logan v. Zimmerman Brush Co.*, 455 U.S. 425 (1982) (holding that where an individual was ordered deported on a misconstruction of the term "affiliation" as used in the statute and by reason of an unfair hearing of the question of his membership in the Communist Party, his detention under warrant is unlawful); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (standing for the proposition that notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund is a proceeding where individuals may be deprived of property rights and, hence, notice and hearing must measure up to the standards of due process); see also *Board of Regents v. Roth*, 408 U.S. 564 (1972) (stating that "when protected interests are implicated, the right to some kind of prior hearing is paramount."); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (indicating that prior to the termination of Social Security benefits, administrative procedures are required in order to protect property interests).

199. *Tefel*, No. 97-0805-CIV-KING at 5.

200. Interview with Ira J. Kurzban, *supra* note 4.

201. *Id.*

202. *Montilla v. INS*, 926 F.2d 162, 168 (2d Cir. 1991) (stating that violation of right to counsel does not require further showing of prejudice); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985) (asserting that due process guarantees right to counsel of choice); see also *Partible v. INS*, 600 F.2d 1094 (5th Cir. 1979).

not to permit counsel for the class members to address the issues.

Moreover, the distinctions drawn between the class members and others seeking suspension of deportation violate the equal protection guarantees of the due process clause of the Fifth Amendment of the Constitution.<sup>203</sup> Specifically, individuals who came forward to the government and who were placed in deportation proceedings before being present for seven years, who had their hearing after seven years and were granted suspension of deportation, are punished under the *In re N-J-B*-decision.<sup>204</sup> Conversely, immigrants who evaded the government for seven years are still eligible for suspension of deportation.<sup>205</sup>

The government argues that this distinction is constitutional; Congress has extraordinarily broad power to draw distinctions between aliens "that would be unacceptable if applied to citizens."<sup>206</sup> Therefore, Congress is said to make the same kinds of distinctions in NACARA that were made under *Fiallo*. As such, the Supreme Court has been deferential to the plenary power of Congress over political matters.

A comparison of the distinctions accorded in *Fiallo* and those under NACARA suggests distinctions among immigrants are constitutional.<sup>207</sup> The Supreme Court in *Fiallo* held it was constitutional under the INA for Congress to exclude preferential treatment as a parent to natural fathers (U.S. citizens) of illegitimate children.<sup>208</sup> The distinction between *Fiallo* and NACARA is immigration status. In his dissenting opinion, Justice Marshall, clearly distinguishes *Fiallo* from most other immigration cases in that *Fiallo* involved the rights of *citizens*.<sup>209</sup> However, it can be argued that NACARA involves the rights of

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203. *Tefel*, No. 97-0805-CIV-KING at 35-36.

204. *Id.*

205. *Id.*

206. See Defendants' Reply To Plaintiffs' Response To Defendants' Motion To Dissolve Injunction, Motion To Dismiss As Moot As To Certain Class Members, and Motion For Summary Judgment As To The Remaining Class at 8, *Tefel v. Reno*, No. 97-0805-CIV-KING (S.D. Fla. June 24, 1997) [hereinafter Defendants' Reply]; see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Mathews v. Diaz*, 426 U.S. 67, 80-82 (1976); *Boutilier v. INS*, 387 U.S. 118, 123 (1967).

207. For a complete summary of the distinctions and effect of NACARA, see Appellants' Motion For Second Extension, *supra* note 5, at 3.

208. *Fiallo v. Bell*, 430 U.S. 787 (1977).

209. *Id.* at 805.

immigrants. Thus, the Court may interpret NACARA in this light effectively limiting constitutional protection to immigrants alike.

In *Fiallo*, the court held that the statutory scheme should be upheld so long as it is based upon any "facially legitimate and bona fide reason."<sup>210</sup> The minimal standard of review instills in the government no obligation to produce evidence to sustain the rationality of a statutory classification.<sup>211</sup> Similarly, in the *Tefel* appeal, the government will argue that Congress, pursuant to NACARA, made a decision regarding which aliens would qualify for suspension of deportation.<sup>212</sup> Thus, NACARA is facially legitimate.<sup>213</sup> It further argues that the class members cannot succeed on a constitutional challenge to the stop-time provision of IIRIRA Section 309(c)(5)(A), as amended by NACARA Section 203(a)(1).

### *E. Policy Considerations*

The Attorney General announced her efforts to ameliorate the harsh effects caused by application of the new immigration laws to the class members.<sup>214</sup> The general rule that governs which law applies to individuals who are not citizens in removal proceedings is that anyone in proceedings before April 1, 1997, may be charged only under the old grounds of deportation or exclusion. In *In re N-J-B-*, the government interpreted the filing of an OSC as satisfying this requirement. However, the exception to the general rule is found in the power granted to the Attorney General under IIRIRA.<sup>215</sup> Under the new immigration regulations, the Attorney General retains the sole authority to terminate and reinstate proceedings.<sup>216</sup> The Attorney General announced her concern about ensuring a fair transition to the new tighter rules applicable to the relief from deportation known formerly as suspension of deportation.<sup>217</sup> As a result, the

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210. See Defendants' Reply, *supra* note 205, at 9.

211. 8 C.F.R. § 240.16 (1997); see also *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

212. Defendants' Reply, *supra* note 205, at 46.

213. *Fiallo v. Bell*, 430 U.S. at 795.

214. Press Release, *supra* note 103.

215. IIRIRA § 309(c)(3).

216. 8 C.F.R. § 240.16 (1997).

217. *Reno Vacates N-J-B- Suspension Decision, Proposes Changes to 1996 Act*, *supra* note 7, at 1073.

Attorney General vacated and is reviewing the decision of the BIA in *In re N-J-B*.<sup>218</sup>

In addition, the Attorney General announced that the Clinton Administration would be proposing amendments to the legislature. The amendments to the INA would allow those whose cases were already filed the opportunity to seek suspension under the standards that applied before the 1996 immigration reform law took effect, thereby eliminating unfair application of the new rules governing suspension-type relief to cases in proceedings before April 1, 1997.<sup>219</sup> These transitional cases would be exempted from the stop-time rule, which provides that the accrual of necessary time in the U.S. stops when a charging document is served.<sup>220</sup> Also, these transitional cases would be exempted from the new 4000 yearly cap on grants of suspension-type relief.<sup>221</sup>

Significantly, the Attorney General warned that if these legislative proposals were not enacted, the Administration would consider administrative options.<sup>222</sup> Among the administrative options mentioned is the Deferred Enforced Departure, which would protect from deportation nationals of El Salvador or Guatemala who would have been eligible for suspension but for the new rules.<sup>223</sup> Moreover, the press release announcing the Attorney General's decision to vacate *In re N-J-B* indicated that under the proposed legislation, the Immigration Reform Transition Act of 1997 will ensure that deserving requests for suspension, including those by certain battered spouses and children filed before April 1, will not be denied because of the 4000 case cap.<sup>224</sup>

In *Tefel*, the government appealed to the Court of Appeals for the Eleventh Circuit. The class members filed a Motion to Stay. However, both are pending until Attorney General Janet Reno makes a decision on *In re N-J-B* or until Congress takes action.<sup>225</sup> In the meantime, IJs made judgments on the issue at

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218. *Id.* at 1072.

219. *Id.* at 1072.

220. *Id.* at 1072.

221. *Id.* at 1072.

222. *Id.* at 1073.

223. *Id.* at 1073.

224. *Id.* at 1072.

225. Interview with Esther O. Cruz, *supra* note 71.



their discretion because the vacation is equivalent to having no precedent in the area.<sup>226</sup> As a result, the government may appeal any decision made by the IJs.<sup>227</sup>

Generally, immigration advocates responded positively to the Attorney General's actions.<sup>228</sup> According to Angela Kelly, Director of Policy for the National Immigration Forum in Washington, D.C., the proposals "will help to keep families together, promote stability in Central America, and restore a measure of fairness for those who almost had the rug pulled out from under them."<sup>229</sup>

There was some immediate progress as indicated by the Clinton administration's decision to consider the new proposals to the immigration reform laws. On July 29, 1997, three United States Senators, Connie Mack, Bob Graham, and Ted Kennedy, presented the proposed legislation to Congress.<sup>230</sup> According to Chris Hand, spokesperson for Graham, the project is the same as the proposal sent the week of July 22<sup>nd</sup> by President Bill Clinton to Congress.<sup>231</sup> President Clinton made it clear that he would apply administrative solutions if the Senate and House of Representatives were not in accord over the new proposals.<sup>232</sup> The proposals were debated and discussed on September 1997.

The road to reforming IIRIRA has not been paved completely with good intentions. Although Nicaraguans and Cubans received amnesty, similarly situated Haitians and other Central Americans were not equally recognized on the bill.<sup>233</sup> In fact, from its inception, there were many critics of the proposed legislation.<sup>234</sup> Even Haitian President Rene Préval plead with

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226. *Id.*

227. *Id.*

228. *Reno Vacates N-J-B Suspension Decision, Proposes Changes to 1996 Act*, *supra* note 7, at 1073.

229. *Id.*

230. Mabel Dieppa, *Presentan proyecto a favor de los nicas* [Project Presented in Favor of Nicas], *NUEVO HERALD*, July 30, 1997, at 3A.

231. *Id.*

232. *Id.*

233. Carol Rosenberg & Maria Traverso, *Bill signing lets immigrants breathe free*, *MIAMI HERALD*, Jan. 20, 1997, at 1A.

234. See Letter from Carrie P. Meek, member of Congress, to President Clinton (Nov. 5, 1997). Mr. Meek considers that the issue of equal relief provided to Haitians is "the single most important immigration issue affecting people of color. It is extremely important to me and to other members of the Congressional Black Caucus." *Id.* Moreover, in this letter Mr. Meek requests that the 14,000 Haitians similarly situated

President Clinton for equal treatment of Haitian immigrants,<sup>235</sup> indicating that repatriation would exacerbate the political and economic conditions in Haiti.<sup>236</sup> In response, President Clinton assured that administrative relief would be provided to Haitians.<sup>237</sup> The relief would be in the form of staying their deportation and deferred enforced departure, which would allow many Haitians to cancel their deportation/exclusion proceedings and receive work permits while Congress considers other legislation on this issue.<sup>238</sup>

#### IV. CONCLUSION

The interaction between IIRIRA and NACARA suggests that the current approach to resolving the adjustment of status of immigrants has not been resolved due to two issues. First, NACARA fails to address similarly situated immigrants by omitting them from those eligible to obtain relief under the legislation. Second, the government argues that only the federal courts had jurisdiction under IIRIRA to originally bring this claim to the court system.

NACARA is deceptive on its face. It is ideological in nature because it favors only Nicaraguans, Cubans, and a number of Europeans to the exclusion of other groups similarly situated. Thus, it is contrary to the non-ideological framework of other immigration legislation including the Refugee Act of 1980.<sup>239</sup> Therefore, it can be argued that as such the law is likely to inflame the divisiveness among immigrants and perpetrate

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should, "receive exactly the same amnesty relief that Nicaraguans would get." *Id.* He advocates that promoting equal treatment of Haitians will prevent reliving the mistakes of the past. *Id.*

235. See Letter from Rene Préval, President of Haiti, to President Clinton (Nov. 6, 1997). In the letter, President Préval states:

We recognize the importance of equal treatment for our citizens abroad as I know you recognize the current economic and political situation in my country ...[we] hope that you will ensure that Haitians who are currently in the United States will be given the same status as that accorded Nicaraguan citizens in the legislation currently proposed in Congress.

*Id.*

236. *Id.*

237. Interview with Esther O. Cruz, Managing Attorney of Florida Immigrant Advocacy Center in Miami, Fla. (Nov. 18, 1997).

238. *Id.*

239. Interview with Joan Friedland, Attorney of Florida Immigrant Advocacy Center, in Miami, Fla. (Nov. 13, 1997).

discriminatory practices. The trend of immigrant bashing is likely to solidify during 1998 since it is an election year. Additionally, the precedent at the Court of Appeals for the Eleventh Circuit is indicative that the challenge may fail on the jurisdictional argument.<sup>240</sup> While NACARA remains implicitly deceptive, it may, ironically, represent for the legislature the last token of equality extended to immigrants in the United States for some time.

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240. See *supra* text accompanying note 9.

\* J.D. Candidate 1999, University of Miami School of Law. This article is dedicated to God for granting the author the opportunity to write this Case Note. The author thanks her parents and Vince for their faith and love. Special thanks to Professor Ira J. Kurzban for his insight. In addition, this article is dedicated to Maricarmen Roca Cuello and Lydia Quesada for their friendship throughout law school.