

of determination as defined in section 235(b)(1)(B)(iii)(II) of the Act, including a copy of the alien's written request for review, if any.

(b) *Record of proceeding.* The Immigration Court shall create a Record of Proceeding for a review of an adverse credible fear determination. This record shall not be merged with any later proceeding pursuant to section 240 of the Act involving the same alien.

(c) *Procedures and evidence.* The Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the review. The testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. If an interpreter is necessary, one will be provided by the Immigration Court. The Immigration Judge shall determine whether the review shall be in person, or through telephonic or video connection (where available). The alien may consult with a person or persons of the alien's choosing prior to the review.

(d) *Standard of review.* The immigration judge shall make a *de novo* determination as to whether there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge, that the alien could establish eligibility for asylum under section 208 of the Act or withholding under section 241(b)(3) of the Act or withholding under the Convention Against Torture.

(e) *Timing.* The Immigration Judge shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date the supervisory asylum officer has approved the asylum officer's negative credible fear determination issued on Form I-869, Record of Negative Credible Fear Finding and Request for Review.

(f) *Decision.* If an immigration judge determines that an alien has a credible fear of persecution or torture, the immigration judge shall vacate the order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. Subsequent to the order being vacated, the Service shall issue and file Form I-862, Notice to Appear, with the Immigra-

tion Court to commence removal proceedings. The alien shall have the opportunity to apply for asylum and withholding of removal in the course of removal proceedings pursuant to section 240 of the Act. If an immigration judge determines that an alien does not have a credible fear of persecution or torture, the immigration judge shall affirm the asylum officer's determination and remand the case to the Service for execution of the removal order entered pursuant to section 235(b)(1)(B)(iii)(I) of the Act. No appeal shall lie from a review of an adverse credible fear determination made by an immigration judge.

(g) *Custody.* An Immigration Judge shall have no authority to review an alien's custody status in the course of a review of an adverse credible fear determination made by the Service.

[62 FR 10335, Mar. 6, 1997, as amended at 64 FR 8487, Feb. 19, 1999]

§ 3.43 Motion to reopen for suspension of deportation and cancellation of removal pursuant to section 203(c) of the Nicaraguan Adjustment and Central American Relief Act (NACARA).

(a) *Standard for adjudication.* Except as provided in this section, a motion to reopen proceedings under section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) *Aliens eligible to reopen proceedings under section 203 of NACARA.* A motion to reopen proceedings to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, must establish that the alien:

(1) Is prima facie eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(2) Was or would be ineligible:

(i) For suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or

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(ii) For cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(3) Has not been convicted at any time of an aggravated felony; and

(4) Is within one of the following six classes:

(i) A national of El Salvador who:

(A) First entered the United States on or before September 19, 1990;

(B) Registered for benefits pursuant to the settlement agreement in *American Baptist Churches, et al. v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991) (ABC) on or before October 31, 1991, or applied for Temporary Protected Status (TPS) on or before October 31, 1991; and

(C) Was not apprehended after December 19, 1990, at time of entry; or

(ii) A national of Guatemala who:

(A) First entered the United States on or before October 1, 1990;

(B) Registered for ABC benefits on or before December 31, 1991; and

(C) Was not apprehended after December 19, 1990, at time of entry; or

(iii) A national of Guatemala or El Salvador who applied for asylum with INS on or before April 1, 1990; or

(iv) An alien who:

(A) Entered the United States on or before December 31, 1990;

(B) Applied for asylum on or before December 31, 1991; and

(C) At the time of filing such application for asylum 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; or

(v) The spouse or child of a person who is described in paragraphs (b)(4)(i) through (b)(4)(iv) of this section and such person is *prima facie* eligible for and has applied for suspension of deportation or special rule cancellation of removal under section 203 of NACARA.

(vi) An unmarried son or daughter of a person who is described in paragraph (b)(4)(i) through (b)(4)(iv) of this section and such person is *prima facie* eligible for and has applied for suspension of deportation or special rule cancellation of removal under section 203 of

NACARA. If the son or daughter is 21 years of or older, the son or daughter must have entered the United States on or before October 1, 1990.

(c) *Motion to reopen under section 203 of NACARA.* (1) An alien filing a motion to reopen proceedings pursuant to section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, may initially file a motion to reopen without an application for suspension of deportation or cancellation of removal and supporting documents, but the motion must be filed no later than September 11, 1998. The alien must allege in such motion to reopen that the alien:

(i) Is *prima facie* eligible for suspension of deportation pursuant to section 244(a) of the INA (as in effect prior to April 1, 1997) or the special rule for cancellation of removal pursuant to section 309(g) of IIRIRA, as amended by section 203(b) of NACARA;

(ii) Was or would be ineligible:

(A) For suspension of deportation by operation of section 309(c)(5) of IIRIRA (as in effect prior to November 19, 1997); or

(B) For cancellation of removal pursuant to section 240A of the INA, but for operation of section 309(f) of IIRIRA, as amended by section 203(b) of NACARA;

(iii) Has not been convicted at any time of an aggravated felony; and

(iv) Falls within one of the six classes described in paragraph (b)(4) of this section.

(2) A motion to reopen filed pursuant to paragraph (c)(1) shall be considered complete at the time of submission of an application for suspension of deportation or special rule cancellation of removal and accompanying documents. Such application must be submitted no later than 150 days after the effective date of the rule implementing section 203 of NACARA. Aliens described in paragraph (b)(4)(v) or (b)(4)(vi) of this section must include, as part of their submission, proof that their parent or spouse is *prima facie* eligible and has applied for relief under section 203 of NACARA.

(3) The Service shall have 45 days from the date the alien serves the Immigration Court with either the EOIR Form 40 or the Form I-881 application for suspension of deportation or special

rule cancellation of removal to respond to that completed motion. If the alien fails to submit the required application within 150 days after the effective date of the rule implementing section 203 of NACARA, the motion will be denied as abandoned.

(d) *Fee for motion to reopen waived.* No filing fee is required for a motion to reopen to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA.

(e) *Jurisdiction over motions to reopen under section 203 of NACARA and remand of appeals.* (1) Notwithstanding any other provisions, any motion to reopen filed pursuant to the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA, shall be filed with the Immigration Court, even if the Board of Immigration Appeals issued an order in the case. The Immigration Court that last had jurisdiction over the proceedings will adjudicate a motion to reopen filed pursuant to the special rules of section 309(g) of IIRIRA, as amended by section 203(c) of NACARA.

(2) The Board will remand to the Immigration Court any presently pending appeal in which the alien appears eligible to apply for suspension of deportation or cancellation of removal under the special rules of section 309(g) of IIRIRA, as amended by section 203 of NACARA, and appears prima facie eligible for that relief. The alien will then have the opportunity to apply for suspension or cancellation under the special rules of NACARA before the Immigration Court.

[63 FR 31894, June 11, 1998; 63 FR 35117, June 29, 1998, as amended at 64 FR 13666, Mar. 22, 1999]

Subpart D [Reserved]

Subpart E—List of Free Legal Services Providers

SOURCE: 62 FR 9073, Feb. 28, 1997, unless otherwise noted.

§ 3.61 List.

(a) The Chief Immigration Judge shall maintain a current list of organi-

zations and attorneys qualified under this subpart which provide free legal services. This list, which shall be updated not less than quarterly, shall be provided to aliens in immigration proceedings. The Chief Immigration Judge may designate an employee or employees to carry out his or her responsibilities under this subpart. Organizations and attorneys may be included on the list of free legal services providers if they qualify under one of the following categories:

(1) Organizations recognized under § 292.2 of this chapter that meet the qualifications set forth in § 3.62(a) and whose representatives, if any, are authorized to practice before the Board and Immigration Courts;

(2) Organizations not recognized under § 292.2 of this chapter that meet the qualifications set forth in § 3.62(b);

(3) Bar associations that meet the qualifications set forth in § 3.62(c); and

(4) Attorneys, as defined in § 1.1(f) of this chapter, who meet the qualifications set forth in § 3.62(d).

(b) The listing of an organization qualified under this subpart is not equivalent to recognition under § 292.2 of this chapter.

§ 3.62 Qualifications.

(a) *Organizations recognized under § 292.2.* An organization that is recognized under § 292.2 of this chapter that seeks to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge must have on its staff:

(1) An attorney, as defined in § 1.1(f) of this chapter; or

(2) At least one accredited representative, as defined in § 292.1(a)(4) of this chapter, who is authorized to practice before the Board and Immigration Courts.

(b) *Organizations not recognized under § 292.2.* An organization that is not recognized under § 292.2 of this chapter that seeks to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge must declare that:

(1) It is established in the United States;

(2) It provides free legal services to indigent aliens; and