JAMES J. GARRETT
MORRISON & FOERSTER
101 Ygnacio Valley Road
Suite 450
P.O. Box 8130
Walnut Creek, CA 94596
(925) 295 3365

LUGAS GUTTENTAG
AMERICAN CIVIL LIBERTIES UNION
1663 Mission Street, 4th Floor
San Francisco, CA 94104
(415) 621-2493

MARC VAN DER HOUT
DEBORAH SMITH
NATIONAL LAWYERS GUILD
180 Sutter Street, Fifth Floor
San Francisco, California 94104
(415)- 981-3000

CAROLYN P. BLUM
BOALT HALL SCHOOL OF LAW
University of California
Berkeley, CA 94720

Attorneys for Plaintiffs

ROBERT S. MUELLER (California State Bar No. 59775)
United States Attorney
GAIL KILLEFER (California State Bar No. 157248)
Assistant United States Attorney
Chief, Civil Division
ROBERT YEARGIN (D.C. Bar No. 387641)
Special Assistant United States Attorney
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-6915

DAVID W. OGDEN
Acting Assistant Attorney General
ROBERT L. BOMBAUGH
Director, Office of Immigration Litigation
FRANCESCO ISGRO (D.C. Bar No. 384999)
Senior Litigation Counsel
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D. C. 20044-0878
Telephone: (202) 616-4877

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

| | |
|---|---|
| **AMERICAN BAPTIST CHURCHES, et al,** | |
| **Plaintiffs,** | **Civ. No. C-85-3255-CAL** |
| **v.** | |
| **RICHARD THORNBURGH, et al.** | |
| **Defendants.** | |

**STIPULATION AND ~~PROPOSED~~ ORDER TO MODIFY SETTLEMENT AGREEMENT**

The parties respectfully ask the Court to approve two changes to the procedures by which the government adjudicates an asylum claim under the stipulated settlement agreement approved by the Court on January 31, 1991, in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991)("ABC"). These changes, if approved by the Court, would assist the government in implementing the Nicaraguan Adjustment and Central American Relief Act ("NACARA") (Public Law No. 105-100, 111 Stat. 2160, 2193 (1997), which provides immigration relief to certain named individuals, including ABC class members. As we further explain below, the Court's approval of these two procedural changes will not affect any substantive rights under the agreement.

The first proposed change would streamline the procedures for terminating proceedings before the Executive Office for Immigration Review ("EOIR"), in those cases in which the Immigration and Naturalization Service ("INS") intends to grant asylum to an eligible class member whose immigration proceedings have been administratively closed. The second proposed change would streamline the procedures governing Department of State review of asylum applications submitted by class members eligible for ABC benefits.

If approved, these two changes will permit the INS to adjudicate more rapidly and

efficiently the asylum claims of eligible ABC class members. Both procedural changes will reduce delays in processing claims caused by present requirements of the agreement. These changes will also benefit many of the ABC class members who are eligible to apply for suspension of deportation or special rule cancellation of removal under Section 203 of NACARA, many of whom will be eligible to apply for these benefits before the INS in conjunction with their de novo asylum adjudication.

## I.

## AUTOMATIC TERMINATION OF PROCEEDINGS IN IMMIGRATION COURT IF THE INS GRANTS ASYLUM OR ADJUSTS A CLASS MEMBER'S STATUS TO LAWFUL PERMANENT RESIDENT

Under paragraph 19(a)(1) of the ABC settlement agreement the INS is not permitted to grant asylum to class members whose cases were administratively closed by EOIR until it first moves to terminate proceedings before the Immigration Court. If the Immigration Judge declines to terminate the proceedings, the INS must bring the case to the Immigration Court and must stipulate that the class member be granted asylum and, if necessary, join in an appeal from a denial of asylum. In practice, this requirement creates an additional and purely administrative step, thus delaying, sometimes by months, resolution of the class member's immigration status, without benefit to either the applicant or the government.

This potential delay takes on greater significance within the context of NACARA, a statute enacted on November 19, 1997, which permits certain ABC class members to apply for suspension of deportation or cancellation of removal under the more lenient standards that existed prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996 (Public Law 104-208; 110 Stat. 3009-625). See Sections 309(c)(5) and 309(f) of IIRIRA, as amended by NACARA. On February 2, 1998 the Attorney General authorized the INS to develop a program to implement Section 203 of NACARA by permitting certain persons, including eligible ABC class members, to apply for suspension of deportation or cancellation of removal before the INS asylum corps. In general, the INS will accept applications filed by NACARA beneficiaries whose asylum applications are currently pending before the INS.

The vast majority of the persons eligible for this new program are ABC class members. Under this program, Asylum Officers would be authorized to grant suspension of deportation or cancellation of removal to qualified applicants, just as they are authorized to grant asylum.[1]/ Consequently, an ABC class member would have the opportunity to apply for suspension of deportation before the INS and to have that application adjudicated concurrent with his or her asylum application.

Although the settlement agreement does not relate to the adjudication of NACARA applications by ABC class members, certain procedural constraints governing the adjudication of a class members' ABC asylum claim could delay the processing of both applications. This delay can be avoided, in part, by revising the procedure for terminating cases in which the INS intends to grant asylum to a class member. The proposed modification would allow the INS to grant asylum without first moving to terminate proceedings before the Immigration Court. Instead, by regulation, a grant of asylum by the INS would automatically terminate those proceedings for class members. This modification would reduce the resources expended by all parties and, by creating a more streamlined process, would be easier to administer within the context of the joint NACARA application process.

To accomplish this change in procedures, the parties request that paragraphs 19 and 20 be modified as described below.

**Paragraph 19(a)(1) would be amended to read in its entirety as follows:**

> 19(a)(1). ADMINISTRATIVE CLOSING OF CASES PENDING BEFORE EOIR. Proceedings before EOIR will be administratively closed (except for class members detained under the provisions of paragraph 17 whose proceedings shall be stayed if they request such action) pending an adjudication by an Asylum Officer. The adjudication will proceed even if the case is pending before EOIR. In those cases where an Asylum Officer determines that asylum should be granted or where the class member's status has been adjusted to that of alien lawfully admitted for permanent residence, the proceedings before EOIR shall be terminated as a matter of law.

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[1] Suspension of deportation and cancellation of removal are discretionary forms of relief available under the Immigration and Nationality Act. See former Section 244 of the INA, (formerly, 8 U.S.C. § 1254) and section 240A of the INA, 8 U.S.C. § 1229b. The immigration status of an individual granted suspension of deportation or cancellation of removal under NACARA will be adjusted to that of lawful permanent resident.

**Paragraph 20 would be amended to read as follows:**

20. RESUMPTION OF CASES IF ASYLUM IS DENIED. If the asylum application is finally denied under the procedures set forth in this agreement, and the class member's status has not been adjusted to that of alien lawfully admitted for permanent residence, the following rules will apply to resumption of proceedings: . . . .

**II.**

**AMENDMENT TO PROCEDURES FOR *DE NOVO* ASYLUM INTERVIEW OF ELIGIBLE ABC CLASS MEMBERS BEFORE AN ASYLUM OFFICER**

Under Paragraph 15 of the settlement agreement, an asylum officer may not issue a final decision until the Department of State has issued a response or until a period of 60 days has elapsed since the date the asylum officer sent the Department of State a preliminary assessment on the application. This period of delay impedes the administrative efficiency of the program and will also affect the ability of the INS to process NACARA applications efficiently. Consequently, the parties have agreed to modify the procedures for Department of State review to conform more closely with current asylum procedures, which allow asylum officers to issue asylum decisions without waiting for comment by the Department of State. An ABC class member's substantive right to a *de novo* asylum adjudication would be preserved by maintaining the existing settlement requirement that the Asylum Officer cannot make a non-committal preliminary assessment and cannot review any advisory opinion issued by the Department of State until after the asylum officer has made a preliminary determination on eligibility.

This procedural change may be accomplished, if approved by the Court, by revising paragraphs 2 and 15 of the settlement agreement and by revising Exhibit 10.

**Paragraph 2 would be revised to read as follows:**:

2. CLASS MEMBERS ELIGIBLE FOR DE NOVO ASYLUM ADJUDICATION. The following class members, if they have not been convicted of an aggravated felony as that term is defined in the Immigration and Nationality Act, as amended, will be afforded a *de novo*, unappealable asylum adjudication before an Asylum Officer, including a new interview, under the regulations in effect on October 1, 1990, except that the 60-day waiting period mandated by 8 CFR § 208.11(b) (1990) (regarding the waiting time for a response from the Bureau of Democracy, Human Rights and Labor, formerly the "BHRHA") is inapplicable.

. . . .

**Paragraph 15 would be modified to read as follows:**

15. PRELIMINARY ASSESSMENT AFTER INTERVIEW. After an Asylum Officer has interviewed an eligible class member and before the Asylum Officer reviews any prior administrative file or comments on the case from the Bureau of Democracy, Human Rights and Labor (DRL) (formerly the "BHRHA"), the Asylum Officer shall make a preliminary assessment on whether or not the applicant appears to have established a *prime facie* case of either past persecution or a well-founded fear of persecution based on one of the five statutory grounds, which shall be noted on the INS assessment sheet. The Asylum Officer shall not reserve judgment or otherwise make a "non-committal" recommendation or assessment. When the INS sends a preliminary assessment on a class member's eligibility for asylum to the DRL for comments, the preliminary assessment shall contain a specific recommendation by the Asylum Officer to grant or to deny asylum. If the initial determination is that it appears that either past persecution or a well-founded fear of persecution based on one of the five statutory grounds has been established, the application will not be denied without (1) informing the applicant in writing of the specific facts and reasons for such change, (2) informing the applicant of the right to inspect the record of proceedings, including any non-privileged adverse information, and (3) informing the applicant of the opportunity to submit comments or evidence to rebut the notice of intent to deny.

**Paragraphs 7 and 8 of Exhibit 10 would be revised to read as follows:**:

EXHIBIT 10

INTERVIEW INSTRUCTION SHEET FOR ASYLUM OFFICERS

. . . .

(7) Every preliminary assessment sent to the DRL must set forth your recommendation to grant or deny the application. A "non-committal" recommendation is not permitted. You may not review any DRL opinion regarding the application until after you have made in writing a preliminary assessment to grant or deny the application.

(8) If your decision is to deny asylum, you must inform the applicant in writing of the decision and give the applicant 30 days to rebut the facts and reasons for your decision, before you may make a final decision.

For the Court's convenience, we have attached a redlined version of the paragraphs we propose to amend.

## CONCLUSION

For the foregoing reasons, we request that the Court issue an order approving these two changes sought by the parties.

Respectfully submitted,

| FOR THE PLAINTIFFS | FOR THE DEFENDANTS |
|---|---|
| MARC VAN DER HOUT | DAVID W. OGDEN<br>Acting Assistant Attorney General |
| See attached FAX<br>MARC VAN DER HOUT | FRANCESCO ISGRO<br>ROBERT L. BOMBAUGH<br>Office of Immigration Litigation<br>Civil Division<br>U.S. Department of Justice |
| Dated: | Dated: |

## ~~PROPOSED~~ ORDER

Upon consideration of the stipulation of the parties, it is so ORDERED.

5/30/99

Charles A. Legge

CHARLES A. LEGGE, J.

## CONCLUSION

For the foregoing reasons, we request that the Court issue an order approving these two changes sought by the parties.

Respectfully submitted,

FOR THE PLAINTIFFS

MARC VAN DER HOUT

MARC VAN DER HOUT

Dated: 5/21/99

FOR THE DEFENDANTS

DAVID W. OGDEN
Acting Assistant Attorney General

FRANCESCO ISGRO
ROBERT L. BOMBALIGH
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Dated:

## PROPOSED ORDER

Upon consideration of the stipulation of the parties, it is so ORDERED.

CHARLES A. LEGGE, J.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the office of the United States Attorney for the Northern District of California, and is a person of suitable age and discretion as to be competent to serve papers. The undersigned further certifies that on this date the undersigned caused a copy of the following documents to be served upon all parties to this action:

**Stipulation and Proposed Order to Modify Settlement Agreement**

American Baptist Churches v. Thornburgh, et al., Case No. 85-3255 CAL

The undersigned caused the afore-described documents to be served by **FIRST CLASS MAIL** by placing a true copy of each such document in a sealed envelope with postage thereon fully prepaid in the U.S. Mail, addressed as follows:

Marc Van Der Hout
National Lawyers Guild
180 Sutter Street, Fifth Floor
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of May 1999 at San Francisco, California.

Tiffani Chiu
Legal Technician

**ADDENDUM 1**

2. CLASS MEMBERS ELIGIBLE FOR DE NOVO ASYLUM ADJUDICATION. The following class members, if they have not been convicted of an aggravated felony as that term is defined in the Immigration and Nationality Act, as amended, will be afforded a de novo, unappealable asylum adjudication before an Asylum Officer, including a new interview, under the regulations in effect on October 1, 1990~~;~~ except as provided in 8 CFR § 208.11(b) (1990) (relating to BHRHA review).

15. PRELIMINARY ASSESSMENT AFTER INTERVIEW. After an ~~eligible class member has been interviewed by an Asylum Officer and before any prior administrative file is reviewed or the application is sent to the BHRHA for comment~~Asylum Officer has interviewed an eligible class member and before the Asylum Officer reviews any prior administrative file or comments on the case from the Bureau of Democracy, Human Rights and Labor (DRL) (formerly the "BHRHA"), the Asylum Officer shall make a preliminary ~~assessment on~~decision of whether or not the applicant appears to have established a prime facie case of either past persecution~~,~~ or a well-founded fear of persecution~~,~~ based on one of the five statutory grounds~~,~~ which shall be noted on the INS assessment sheet. ~~Any transmittal to the Bureau of Human Rights and Humanitarian Affairs of the State Department (hereinafter "BHRHA") by the INS requesting BHRHA comments on a class member's asylum application shall contain a specific recommendation by the Asylum Officer to grant or deny asylum.~~ The Asylum Officer shall not reserve judgment or otherwise make a "non-committal" recommendation or assessment. If the INS sends a preliminary assessment on a class member's eligibility for asylum to the DRL for comments, the preliminary assessment shall contain a specific recommendation by the Asylum Officer to grant or to deny asylum. If the initial determination is that it appears that either past persecution or a well-founded

fear of persecution based on one of the five statutory grounds has been established, the application will not be denied without (1) informing the applicant in writing of the specific facts and reasons for such change, (2) informing the applicant of the right to inspect the record of proceedings, including any non-privileged adverse information, and (3) informing the applicant of the opportunity to submit comments or evidence to rebut the notice of intent to deny.

19(a)(1). ADMINISTRATIVE CLOSING OF CASES PENDING BEFORE EOIR. Proceedings before EOIR will be administratively closed (except for class members detained under the provisions of paragraph 17 whose proceedings shall be stayed if they request such action) pending an adjudication by an Asylum Officer. The adjudication will proceed even if the case is pending before EOIR. In those cases where an Asylum Officer determines that asylum should be granted, ~~the government will move to terminate proceedings before EOIR so that the officer will have jurisdiction to grant the asylum request. If the Immigration Judge decides not to~~ or where the class member's status has been adjusted to that of alien lawfully admitted for permanent residence, the proceedings before EOIR shall be terminated as a matter of law. ~~terminate such proceedings, the INS will stipulate before the Immigration Judge that the class members shall be granted asylum, and, if necessary, join in an appeal from the denial of asylum.~~

20. RESUMPTION OF CASES IF ASYLUM IS DENIED. If the asylum application is finally denied under the procedures set forth in this agreement, and the class member's status has not been adjusted to that of alien lawfully admitted for permanent residence, the following rules will apply to resumption of proceedings:

. . .

EXHIBIT 10

INTERVIEW INSTRUCTION SHEET FOR ASYLUM OFFICERS

~~(7) Every application sent to the BHRHA~~ (7) Every preliminary decision sent to the DRL must set forth your recommendation to grant or deny the application. A "non-committal" recommendation is not permitted. You may not review any DRL opinion regarding the application until after you have made in writing a preliminary decision to grant or deny the application.

(8) ~~After you receive the BHRHA opinion or an indication of no comment,~~ If your decision is to deny asylum, you must inform the applicant in writing of ~~your decision,~~ the decision and give the applicant 30 days to rebut the facts and reasons for your decisions ~~if it is a denial~~, before you may make a final decision.