NO. 97-1784

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARY OSEI,

A27 884 263

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF
THE BOARD OF IMMIGRATION APPEALS

# SUPPLEMENTAL BRIEF FOR RESPONDENT

STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division

LINDA S. WENDTLAND
Assistant Director

JOHN J. ANDRE
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C.  20044

**(202) 616-4879**

**ATTORNEYS FOR RESPONDENT**

## SUMMARY OF THE CASE

This is an immigration case in which the petitioner, Mary Osei, a native and citizen of Ghana, seeks review of a final order of the Board of Immigration Appeals denying her motion to reopen her deportation proceeding. Ms. Osei was ordered deported by the Board on January 21, 1993. She petitioned this Court for review of the Board's decision, and the Court dismissed her petition on September 9, 1993.

In 1996, Ms. Osei moved before the Board to reopen to apply for the discretionary relief of suspension of deportation. The Board denied her motion on March 7, 1997, applying a transitional "stop-time" provision at section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), pertaining to suspension of deportation. Ms. Osei petitioned this Court for review of the Board's 1997 order.

The question presently before the Court is whether the transitional provision applied by the Board became effective on the date of its enactment (September 30, 1996), or on the general effective date of the 1996 IIRIRA amendments (April 1, 1997). Respondent believes that the arguments are sufficiently presented in the parties' briefs and that the Court's deliberation would not be aided by oral argument.

## TABLE OF CONTENTS

SUMMARY OF THE CASE

INTRODUCTION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF JURISDICTION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF THE ISSUE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Apposite Caselaw . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Apposite Statutes . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

STATEMENT OF THE CASE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

STATEMENT OF FACTS AND DECISION BELOW . . . . . . . . . . . . . . . . . . . 6

SUMMARY OF ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

ARGUMENT . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

I. Standard of Review . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

II. General Statutory Provisions And Administrative Decisions . . . . . . 9

III. IIRIRA's Effective Date Provisions Make Clear That The Stop-Time Rule Became Effective On IIRIRA's Date Of Enactment Of September 30, 1996 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

IV. The Ninth Circuit's Decision In Astrero v. INS Is Incorrect . . . . . 21

V. The Board Properly Applied The Stop-Time Rule In Ms. Osei's Case . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24

APPENDIX
CERTIFICATE OF COMPLIANCE

CERTIFICATE OF VIRUS-FREE DISKETTE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

## CASES

Afolayan v. INS,
219 F.3d 784 (8th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . 3, 14, 23

Angel-Ramos v. Reno,
227 F.3d 942 (7th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

Appiah v. I.N.S.,
202 F.3d 704 (4th Cir.), cert. denied, 121 S. Ct. 140 (U.S. Oct. 2, 2000) . 14

Ashki v. I.N.S.,
233 F.3d 913 (6th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

Astrero v. INS,
104 F.3d 264 (9th Cir. 1996) . . . . . . . . . . . . . . . . . . . . . . . . . . . 8, 21, 22

Caron v. United States,
524 U.S. 308 (1998) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

Giova v. Rosenberg,
379 U.S. 18 (1964) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Gonzalez-Torres v. I.N.S.,
213 F.3d 899 (5th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

Guadalupe-Cruz, et al. v. INS,
240 F.3d 1209 (9th Cir. March 15, 2001) . . . . . . . . . . . . . . . . . . . . . . . 22

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

I.N.S. v. Abudu,

485 U.S. 94 (1988) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

I.N.S. v. Aguirre-Aguirre,
526 U.S. 415 (1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

Pinho v. I.N.S.,
— F.3d —, 2001 WL 487907 (3rd Cir. May 9, 2001) . . . . . . . . . . . . . . . 14

Ram v. I.N.S.,
243 F.3d 510 (9th Cir. March 15, 2001) . . . . . . . . . . . . . . . . . . . . . . . . 14

Richardson v. United States,
526 U.S. 813 (1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 16

Rivera-Jimenez v. I.N.S.,
214 F.3d 1213 (10th Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

Rojas-Reyes v. I.N.S.,
235 F.3d 115 (2nd Cir. 2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

Vue v. I.N.S.,
92 F.3d 696 (8th Cir. 1996) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

**DOCKETED CASES**

Khamenei v. I.N.S.,
No. 97-2270 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4, 5

Osei v. INS,
No. 93-1601 (8th Cir. 1993) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

**ADMINISTRATIVE DECISIONS**

In re Lopes,
No. A73 536 395 (BIA Jan. 10, 2001) . . . . . . . . . . . . . . . . . . . . . . 3, 5, 15

In re N-J-B-,
21 I. & N. Dec. 812 (BIA 1997), vacated and remanded on other grounds,

Att'y Gen. Order No. 2093-97 (July 10, 1997 and Aug. 20, 1999) . 3, passim

In re Nolasco-Tofino,
Int. Dec. 3385 (BIA 1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3, passim

## STATUTES

### Illegal Immigration Reform and Immigrant Responsibility Act of 1996:

Section 304 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3, 10

Section 304(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

Section 308(b)(6) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

Section 309 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Section 309(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11, 17, 22, 23

Section 309(c) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11, 17, 18, 22

Section 309(c)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2, passim

Section 309(c)(4) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, passim

Section 309(c)(4)(C) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Section 309(c)(5) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11, passim

Section 309(c)(5)(A) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5, passim

Section 309(c)(5)(B) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

Section 309(c)(5)(C) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

Section 309(c)(5)(C)(i) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 13

Section 309(d)(2) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

**Immigration and Nationality Act of 1952, as amended:**

Section 101,
8 U.S.C. § 1101 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Section 106(a),
8 U.S.C. § 1105a(a) (Supp. III 1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

Section 239(a),
8 U.S.C. § 1229(a) (Supp. III 1997) . . . . . . . . . . . . . . . . . . . . . . . . . 10, 12

Section 240,
8 U.S.C. § 1230 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

Section 240A,
8 U.S.C. § 1229b . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

Section 240A(b),
8 U.S.C. § 1229b(b) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

Section 240A(d),
8 U.S.C. § 1229b(d) (Supp. II 1996) . . . . . . . . . . . . . . . . . . . . . . . . . 3, 11

Section 240A(d)(1),
8 U.S.C. § 1229b(d)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10, 13

Section 241(a)(2),
8 U.S.C. § 1251(a)(2) (Supp. 1987) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

Section 242B(a)(1),
8 U.S.C. § 1252b(a)(1) (1994) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

Section 244,
8 U.S.C. § 1254 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

Section 244(a),
8 U.S.C. § 1254(a) (1994; repealed 1996) . . . . . . . . . . . . . . . . . . . . . 3, 9, 11

Section 244(a)(1),
8 U.S.C. § 1254(a)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

**Nicaraguan Adjustment and Central American Relief Act:**

Section 203(a) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

Section 203(a)(1) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12, 13

Section 203(f) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

**REGULATIONS**

8 C.F.R. § 3.1(d)(3) (2000) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 18

8 C.F.R. § 3.1(h)(1)(i) (1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

8 C.F.R. § 3.2(a) (1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1, 18

**MISCELLANEOUS**

142 Cong. Rec. H11808 (daily ed. Sept. 28, 1996) . . . . . . . . . . . . . . . . . . . . . . 21

143 Cong. Rec. S12265-12266, available in 1997 WL 693186 . . . . . . . . . . . . . . 20

143 Cong. Rec. S12660, available in 1997 WL 712581 . . . . . . . . . . . . . . . . 15, 16

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

---

**No. 97-1784**

**AGENCY # A27 884 263**

---

**MARY OSEI,**

**Petitioner,**

**v.**

**IMMIGRATION AND NATURALIZATION SERVICE,**

**Respondent.**

---

# SUPPLEMENTAL BRIEF FOR RESPONDENT

---

## INTRODUCTION

Respondent Immigration and Naturalization Service ("INS"), submits this supplemental brief pursuant to the Court's order dated April 4, 2001, as modified on April 23, 2001.

## STATEMENT OF JURISDICTION

The jurisdiction of the Board of Immigration Appeals arose under 8 C.F.R. § 3.2(a) (1997), which provides it with authority to reopen any case in which it has previously rendered a decision. The jurisdiction of this Court arises under section

106(a) of the INA, 8 U.S.C. § 1105a(a) (Supp. III 1997), as amended by the transitional changes in judicial review set forth in section 309(c)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996). These provisions establish the exclusive procedure for judicial review of all final orders of deportation issued against aliens who were placed in deportation proceedings prior to April 1, 1997. See IIRIRA § 309(c)(1). Denials of motions to reopen administrative proceedings by the BIA are final, reviewable orders. Giova v. Rosenberg, 379 U.S. 18 (1964) (reversing 308 F.2d 347 (9th Cir. 1962)).

Section 309(c)(4) of IIRIRA provides for transitional changes in judicial review applicable to final orders of deportation issued more than 30 days after IIRIRA's date of enactment (September 30, 1996). See IIRIRA section 309(c)(4), 8 U.S.C. § 1101, note ("Effective Date of 1996 Amendments"). Ms. Osei's BIA decision was issued on March 7, 1997. Administrative Record ("A.R.") 2-3. Her petition for review is therefore governed by the transitional judicial review provisions set forth in IIRIRA section 309(c)(4). Ms. Osei filed her petition for review in this Court on March 31, 1997, making it timely under section 309(c)(4)(C) of IIRIRA, which provides that a petition for review must be filed no later than 30 days after the date of the final order of deportation.

## STATEMENT OF THE ISSUE

Whether IIRIRA's transitional "stop-time" rule regarding suspension of deportation became effective on the date of its enactment (September 30, 1996), or on the general effective date of the 1996 IIRIRA amendments (April 1, 1997)?

### Apposite Caselaw:

Afolayan v. INS, 219 F.3d 784 (8th Cir. 2000);

In re Nolasco-Tofino, Int. Dec. 3385 (BIA 1999);

In re N-J-B-, 21 I. & N. Dec. 812 (BIA 1997), vacated and remanded on other grounds, Att'y Gen. Order No. 2093-97 (July 10, 1997 and Aug. 20, 1999);

In re Lopes, No. A73 536 395 (BIA Jan. 10, 2001) (unpublished disposition) (copy appended to this brief).

### Apposite Statutes:

Former section 244(a) of the INA, 8 U.S.C. § 1254(a) (1994; repealed 1996);

Sections 304 and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996); as amended by Pub. L. No. 104-302, § 2(2), 110 Stat. 3657 (Oct. 11, 1996);

Section 240A(d) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(d) (Supp. II 1996);

Section 203(a) of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, tit. II, 111 Stat. 2193 (1997), as amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997).

## STATEMENT OF THE CASE

This is a petition to review a decision of the Board of Immigration Appeals ("Board") denying petitioner Mary Osei's motion to reopen her deportation proceedings. On June 22, 1988, an immigration judge denied Ms. Osei asylum and ordered her deported to her native country, Ghana. A.R. 262-272. Ms. Osei appealed the immigration judge's decision to the Board, which dismissed the appeal on January 21, 1993. A.R. 213-17. Ms. Osei petitioned this Court for review of the Board's decision, and her petition was dismissed on September 9, 1993. Osei v. INS, No. 93-1601 (8th Cir. 1993)

On January 26, 1996, Ms. Osei filed before the Board a motion to reopen her immigration proceedings, requesting the discretionary relief of suspension of deportation. A.R. 30-211. On March 7, 1997, the Board denied the motion based on its precedent decision in In re N-J-B-, 21 I. & N. Dec. 812 (BIA 1997), vacated and remanded on other grounds, Att'y Gen. Order No. 2093-97 (July 10, 1997, and Aug. 20, 1999), which held that IIRIRA's transitional stop-time rule was applicable to aliens whose deportation proceedings commenced prior to the enactment of IIRIRA. A.R. 2-3. Ms. Osei filed this petition for review of the Board's decision. The parties filed initial briefs in June and July 1997. On July 1, 1997, the Court consolidated this case with Khamenei v. I.N.S., No. 97-2270, which raises similar issues regarding suspension of deportation.

On July 10, 1997, pursuant to 8 C.F.R. § 3.1(h)(1)(i) (1997), the Attorney General vacated the Board's decision in In re N-J-B-, and directed the Board to refer the case to the Attorney General for review. On July 22, 1997, pursuant to a request by the parties in this case, on July 22, 1997, the Court held briefing in abeyance until the Attorney General had decided In re N-J-B-, or until the Board issued another decision addressing the stop-time issue that had been decided in In re N-J-B-.

On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), title II of Division A of the District of Columbia Appropriations Act of 1998, Pub. L. 105-100, 111 Stat. 2160, as amended, Pub. L. 105-139, 111 Stat. 2644 (December 2, 1997). This statute amended and clarified IIRIRA with respect to the stop-time issue raised in N-J-B. The parties did not immediately request briefing following the enactment of NACARA because In re N-J-B- remained pending before the Attorney General.

On April 15, 1999, the Board issued its precedent decision in In re Nolasco-Tofino, Int. Dec. 3385 (BIA 1999), which addressed and resolved the issue raised in N-J-B-. Pursuant to an unopposed motion by the INS on May 18, 1999, the Court ordered supplemental briefing on the impact of Nolasco on this case. Before supplemental briefs were filed, INS counsel became aware of an issue that had not been explicitly raised in Ms. Osei's case regarding whether the stop-time rule at

§ 309(c)(5)(A) of IIRIRA is applicable in deportation cases that were decided by the agency after IIRIRA's enactment but prior to the general effective date of IIRIRA of April 1, 1997. At the time, the issue was pending before the Board in In re Lopes, No. A73 536 395 (BIA Jan. 10, 2001) (unpublished disposition) (copy appended to this brief). Consequently, the INS again moved to hold briefing in Ms. Osei's case in abeyance, pending the Board's resolution of In re Lopes. On July 9, 1999, the Court granted respondent's unopposed motion to hold briefing in abeyance.[1]

On January 10, 2001, the Board issued an unpublished order in Lopes, affirming the immigration judge's decision denying Lopes' application for suspension of deportation. The Board held that it had properly applied IIRIRA § 309(c)(5)(A) in Lopes' case prior to the IIRIRA general effective date. On April 4, 2001, pursuant to an unopposed motion by the INS, the Court directed the parties to submit supplemental briefs in this case.

## STATEMENT OF FACTS AND DECISION BELOW

The relevant facts are not in dispute. Petitioner Mary Osei entered the United States on July 5, 1984, as a temporary visitor for pleasure whose visa expired on

---

[1] The effective date issue does not arise in the companion case, Khamenei v. INS, No. 97-2270, because the Board's final decision in that case was issued on April 29, 1997, after IIRIRA's general effective date. See No. 97-2270, A.R. at 2. The parties in Khamenei v. INS filed post-Nolasco briefs in June and July 1999. That case remains pending before the Court.

September 24, 1984. A.R. 413. She did not depart the United States upon the expiration of her visa, and she has remained in this country unlawfully since that time. Id. In 1987, Ms. Osei entered into a fraudulent marriage with Leroy Kyle, a United States citizen, to whom she paid $2000 in return for his agreement to petition for her adjustment of status to that of legal permanent resident as the spouse of a U.S. citizen. A.R. 47, 57. Mr. Kyle subsequently revealed to the INS that the marriage was not bona-fide. A.R. 335. Upon questioning by an INS investigator regarding the validity of the marriage, Ms. Osei swore under oath that the marriage was genuine. A.R. 332-339. During her deportation proceedings, she admitted that her marriage to Mr. Kyle was a sham. A.R. 314-315.

On December 14, 1987, the INS served an Order to Show Cause and Notice of Hearing ("OSC") on Ms. Osei, charging her with deportability pursuant to former section 241(a)(2) of the INA, 8 U.S.C. § 1251(a)(2) (Supp. 1987), for remaining in the United States longer than permitted. A.R. 413-14. Her period of physical presence in the United States from the time of her initial entry to the service of the OSC was three years and three months.

On March 7, 1997, in a per curiam order, the Board denied Ms. Osei's motion to reopen and her accompanying application for suspension of deportation. A.R. 2-3. Applying its then-precedent decision in In re N-J-B-, the Board held that Ms. Osei was statutorily ineligible for suspension of deportation because she had

accumulated less than seven years' continuous physical presence in the United States at the time she was served by INS with an order to show cause. A.R. 2-3. One Board Member filed a separate opinion concurring with the Board's decision, but disagreeing with the reasoning in N-J-B-. A.R. 4-5.

## SUMMARY OF ARGUMENT

The Board properly applied IIRIRA's transitional stop-time rule in Ms. Osei's case. As originally enacted, the IIRIRA effective dates provisions stated that the IIRIRA amendments to the INA were generally inapplicable to aliens in administrative proceedings "as of" the general IIRIRA effective date of April 1, 1997, unless the aliens fell within specified exceptions to IIRIRA's general effective date, including certain "transitional" provisions. The "as of" language arguably meant that IIRIRA's transitional provisions could not be applied in pending administrative cases until IIRIRA's general effective date, since an alien could not be determined to be in administrative proceedings "as of" IIRIRA's effective date until that date had arrived.

On October 11, 1996, Congress enacted a technical amendment to the IIRIRA transitional provision that replaced the phrase "as of" with the word "before." This amendment clarified that the IIRIRA transitional provisions are generally applicable in pending cases "before" the IIRIRA general effective date of April 1, 1997. The transitional stop-time provision, under which an alien's

continuous presence in the United States is terminated by orders to show cause issued "before, on or after" the enactment of IIRIRA, is one such transitional provision that became effective immediately upon IIRIRA's date of enactment of September 30, 1996.

The Ninth Circuit's determination in Astrero v. INS that the stop-time rule did not take effect until IIRIRA's general effective date of April 1, 1997, is incorrect because it relied on the original "as of" language of the IIRIRA transition provision that was repealed by the technical amendment. Moreover, Astrero failed to take into account that the transition rule regarding suspension of deportation is an express *exception* to the IIRIRA general effective date. Further, the Astrero-like reading of the statute urged by Ms. Osei would frustrate the intent of Congress in enacting the stop-time rule of eliminating delays in aliens' deportation proceedings. Because Ms. Osei fell within the general class of transition-rule aliens to whom the stop-time rule applies, the Board properly determined on March 7, 1997, that she had failed to meet the statutory eligibility requirement for suspension relief.

## ARGUMENT

### I. Standard of Review

The Court of Appeals reviews an agency's legal determinations de novo, but accords substantial deference to the agency's interpretation of the statutes and regulations it administers. Vue v. I.N.S., 92 F.3d 696, 699 (8th Cir. 1996) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984)). "Judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting I.N.S. v. Abudu, 485 U.S. 94, 110 (1988)).

## II. General Statutory Provisions And Administrative Decisions

Under former section 244(a) of the INA, 8 U.S.C. § 1254(a) (1994), the Attorney General may, in his discretion, grant suspension of deportation to an alien who:

> is deportable [and] . . . has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

Section 244(a)(1) of the INA, 8 U.S.C. § 1254(a)(1).

On September 30, 1996, Congress enacted IIRIRA, two purposes of which were to expedite the removal of deportable aliens and to limit their ability to obtain discretionary relief from deportation. Pub. L. No. 104-208, 110 Stat. 3009 (1996). Under IIRIRA, "suspension of deportation" under INA § 244 was replaced with a more limited form of discretionary relief, "cancellation of removal" under INA § 240A(b), 8 U.S.C. § 1229b(b) (Supp. III 1997). See IIRIRA § 304(a).[2] Along with making substantive changes in the eligibility requirements for relief, the new cancellation of removal provisions at IIRIRA § 304 changed the method for calculating an alien's period of continuous physical presence, providing that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under § 239(a). . .." Id. (amending INA § 240A(d)(1)).

Congress enacted this provision in part to eliminate the problem of aliens delaying their deportation proceedings until they had sufficient "continuous presence" in the United States to apply for suspension of deportation. H.R. Jud. Comm. Rep. No. 104-469(I) (Mar. 4, 1996) (1996 WL 168955 at 390). Now, upon service of the charging document upon the alien, continuous physical presence is

[2] As of April 1, 1997, all aliens charged as being "inadmissible" or "deportable" under the INA are placed by INS in "removal" proceedings. See IIRIRA § 304 [INA § 240]. Hence, the change in the title from "suspension of deportation" to "cancellation of removal." Id.; see also IIRIRA § 309(d)(2).

no longer accrued, thus eliminating an alien's incentive for delaying his administrative proceedings. This provision has come to be referred to as the "stop-time" rule.

Under the general effective date provisions of IIRIRA §§ 309(a) and 309(c)(1), most of the IIRIRA amendments to the INA do not apply to aliens, such as Ms. Osei, who were placed in deportation proceedings prior to April 1, 1997. For example, the "cancellation of removal" provisions of new INA § 240A are generally applicable to aliens placed in removal proceedings on or after April 1, 1997, while aliens who were placed in proceedings prior to April 1, 1997, still may seek "suspension of deportation" under § 244(a). See IIRIRA § 309(c)(1).

However, IIRIRA § 309(c) created special "Transition [Rules] For Certain Aliens" that provide exceptions to the general rule that the IIRIRA amendments do not apply to aliens in proceedings prior to April 1, 1997. One of those rules, § 309(c)(5), the "Transitional Rule With Regard To Suspension Of Deportation," stated, before it was amended on November 19, 1997, that the new stop-time rule in INA § 240A(d) "shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 30, 1996]."

The original reference in IIRIRA § 309(c)(5) to "notices to appear" created confusion, since no "notices to appear" initiating removal proceedings were issued until after IIRIRA's effective date of April 1, 1997. Prior to IIRIRA's effective

date, aliens were notified of the commencement of deportation proceedings by service of an order to show cause and notice of hearing.[3]

In In re N-J-B-, the Board initially resolved this ambiguity by interpreting the phrase "notices to appear" to encompass all charging documents initiating deportation/removal proceedings, including orders to show cause. See 21 I. & N. Dec. at 817-821. The Board also held that the stop-time rule became effective on IIRIRA's enactment date of September 30, 1996, rather than on IIRIRA's general effective date of April 1, 1997. Id. at 814-817. Ms. Osei (and many other aliens) challenged the Board's interpretation in federal court, arguing that IIRIRA's new "stop-time" rule, as then worded, could not be applied to aliens such as themselves whose deportation proceedings commenced prior to April 1, 1997. See Petitioner's Initial Brief at 6-21.

On November 19, 1997, after In re N-J-B- was vacated by the Attorney General pending her further consideration, the NACARA amendments to IIRIRA were enacted. Section 203(a)(1) of NACARA amended IIRIRA § 309(c)(5) – effective as if originally enacted in IIRIRA, see NACARA § 203(f) – to read as follows:

---

[3] Former § 242B(a)(1) of the INA, 8 U.S.C. § 1252b(a)(1) (1994), provided the statutory authority and procedures for issuance and filing of an order to show cause commencing a deportation proceeding. This provision was stricken by § 308(b)(6) of IIRIRA and replaced by § 239(a) of the INA, 8 U.S.C. § 1229(a) (Supp. III 1997), entitled "Notice To Appear".

> Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

IIRIRA § 309(c)(5)(A), as amended by NACARA § 203(a)(1) (emphasis added). This amendment removed any ambiguity that may have previously existed, and made clear that the stop-time provision set forth in INA § 240A(d)(1) and (2) applies in the cases of aliens who were issued orders to show cause before, on, or after IIRIRA's September 30, 1996, enactment date. NACARA codified the Board's decision in In re N-J-B-, and provided that for purposes of determining eligibility for suspension of deportation, the alien's period of continuous physical presence is terminated with the service of an order to show cause, irrespective of when the OSC was issued.[4]

On April 15, 1999, the Board issued its precedent decision In re Nolasco-Tofino, in which an alien asserted that the stop-time provision of IIRIRA should

---

[4] Section 203(a)(1) of NACARA provides an exception to the stop-time provision, in the creation of new IIRIRA § 309(c)(5)(C)(i), for certain qualifying Salvadorans, Guatemalans, and Eastern Europeans. This exception allows qualifying aliens of these nationalities to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence cut off at the time they were served with notice of deportation or removal proceedings. Aliens of other nationalities – including Ms. Osei – cannot benefit from this exception.

not be applied to him, since his case was pending prior to the enactment of IIRIRA and its amendments. Rejecting this argument, the Board looked to the language of the transition rule at IIRIRA § 309(c)(5), as amended by NACARA, and concluded that the title "Transitional Rules With Regard To Suspension of Deportation," and the amended textual reference to "orders to show cause issued before, on, or after" the IIRIRA enactment date, made clear that Congress intended for the Attorney General to generally apply the IIRIRA transitional rules to all pending applications for suspension of deportation, regardless of when the alien was placed in deportation proceedings. Int. Dec. 3385 at 5-7. The Board's decision in Nolasco was endorsed by this Court in Afolayan v. I.N.S., 219 F.3d 784, 787-789 (8th Cir. 2000), and by every other circuit court to consider it. See Pinho v. I.N.S., — F.3d —, 2001 WL 487907 (3rd Cir. May 9, 2001); Ram v. I.N.S., 243 F.3d 510 (9th Cir. March 15, 2001); Ashki v. I.N.S., 233 F.3d 913 (6th Cir. 2000); Rojas-Reyes v. I.N.S., 235 F.3d 115 (2nd Cir. 2000); Angel-Ramos v. Reno, 227 F.3d 942 (7th Cir. 2000); Gonzalez-Torres v. I.N.S., 213 F.3d 899 (5th Cir. 2000); Rivera-Jimenez v. I.N.S., 214 F.3d 1213 (10th Cir. 2000); Appiah v. I.N.S., 202 F.3d 704 (4th Cir.); cert. denied, 121 S. Ct. 140 (U.S. Oct. 2, 2000) (No. 99-10039)

The Board's final decision in Nolasco, was issued on April 15, 1999. The question of whether the stop-time rule could be applied in cases that were administratively decided prior to the general IIRIRA effective date of April 1, 1997,

did not arise in that case. While not addressing that issue, the Board in Nolasco stated that "Congress intended [the IIRIRA transition rules] to apply to suspension of deportation applications pending *as of* the date the IIRIRA's changes took effect." Int. Dec. 3385 at 5 (emphasis added). Somewhat contrarily, the Board quoted from the legislative history of IIRIRA:

> Section 203 modifies certain transition rules established by IIRIRA with regard to suspension of deportation and cancellation of removal. The changes state that the "stop-time" rule established by that Act in section 240A of the INA shall apply generally to individuals in deportation proceedings *before* April 1, 1997.

Interim Decision 3385 at 15 (quoting 143 Cong. Rec. S12660, available in 1997 WL 712581) (emphasis added). The Board's references to both the phrase "as of" and the word "before" left ambiguous the question of whether the stop-time rule may be applied prior to IIRIRA's general effective date.

On January 10, 2001, a three-judge panel of the Board issued an unpublished order in In re Lopes, which addressed the effective date issue left unanswered in Nolasco. See Addendum. In Lopes, an immigration judge on January 19, 1996, denied Lopes' pre-IIRIRA application for suspension of deportation, finding that she had failed to demonstrate extreme hardship that would arise from her deportation, and that she did not merit relief as a matter of discretion. Addendum at 2. The Board dismissed Lopes' appeal on March 14, 1997, applying the newly-

enacted IIRIRA stop-time rule. Id. Lopes petitioned for review in the Court of Appeals for the Third Circuit.

Following a remand requested by the INS, the Board found that it had properly applied the stop-time rule prior to April 1, 1997, stating that the amended IIRIRA § 309(c)(5) specifically provides that the stop-time rule "shall apply" to orders to show cause issued "before, on, or after the date of enactment of IIRIRA" of September 30, 1996. Id. The Board also noted that the NACARA amendment to IIRIRA § 309(c)(5) was a codification of the Board's holding in In re N-J-B-, which had directly addressed the effective date issue raised in Lopes' case, and that the Board had relied on N-J-B- in dismissing Lopes' initial appeal. Id. The Board finally held that, regardless of whether the stop-time rule was applicable prior to April 1, 1997, Lopes' administrative case remained open on remand, and hence the stop-time rule was now applicable. Id.

Similar to Lopes, Ms. Osei's administrative case was decided prior to IIRIRA's general effective date of April 1, 1997. Ms. Osei's case thus squarely presents the effective date issue that the Board addressed and decided in Lopes, of whether IIRIRA's transitional stop-time rule is applicable in deportation cases decided by the agency *before* April 1, 1997. While the Board did not explicitly address that issue in its March 7, 1997, order dismissing Ms. Osei's appeal, its decision in Lopes indicates that a similar disposition would have likely resulted in

Ms. Osei's case had the question been explicitly raised below. Now that the Board has addressed and answered that question (albeit in an unpublished order), the Court may proceed to decide Ms. Osei's case.

## III. IIRIRA's Effective Date Provisions Make Clear That The Stop-Time Rule Became Effective On IIRIRA's Date Of Enactment Of September 30, 1996

"When interpreting a statute, we look first to the language." Richardson v. United States, 526 U.S. 813, 818 (1999). The general effective date provision for IIRIRA's removal-related amendments to the INA is set forth in IIRIRA § 309(a), which states:

> (a) In General. — *Except as provided in this section* and sections 303(b), 306(c), 308(d)(2)(D), or 308(d)(5) of this division [the latter of which are inapplicable in this case], this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act [i.e., on April 1, 1997] (in this title referred to as the "title III-A effective date)".

(Emphasis added). The phrase "[e]xcept as provided in this section" refers to the existence elsewhere in section 309 of exceptions to the general IIRIRA effective date of April 1, 1997. Section 309(c) of IIRIRA lists several such exceptions, setting forth provisions that include special transitional rules for deportation and exclusion cases initiated prior to IIRIRA's effective date.

Originally, IIRIRA § 309(c)(1) provided that, subject to the specific exceptions set forth in the transitional rules, the IIRIRA amendments were not

applicable "in the case of an alien who is in deportation proceedings *as of* the title III-A effective date [April 1, 1997]." See IIRIRA § 309(c)(1), Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996) (emphasis added).[5] The "as of" language created confusion, because an alien could not have been determined to be in administrative proceedings "as of" the general effective date until that date had arrived. Arguably, the original language meant that, paradoxically, none of the transitional provisions set forth at IIRIRA § 309(c), which created exceptions to IIRIRA's general effective date, could be applied prior to IIRIRA's general effective date.

On October 11, 1996, Congress eliminated this confusion with a technical amendment to section 309(c)(1) that struck the words "as of", and inserted in their place the word "before." Pub. L. 104-302, § 2(2), Oct. 11, 1996, 110 Stat. 3657. The amendment was made effective as of IIRIRA's effective date, September 30, 1996. Id. The amendment clarified that the IIRIRA transitional provisions are applicable to aliens in administrative proceedings before IIRIRA's general effective

---

[5] As initially enacted, section 309(c)(1) stated:
TRANSITION FOR ALIENS IN PROCEEDINGS. —

(1) 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. (Emphasis added).

date of April 1, 1997, regardless of whether they remained in proceedings "as of" that date.

The need for the amended language is illustrated by the transitional provision at IIRIRA section 309(c)(4), which governs judicial review of final orders of exclusion or deportation entered more than 30 days following the IIRIRA enactment date, i.e., after October 30, 1996. In general, a final order issued by the Board terminates an alien's administrative proceeding, except in cases that are subsequently reopened, or reviewed by the Attorney General. 8 C.F.R. §§ 3.1(d)(3); 3.2(a) (2000). Thus, an alien who received a final order of exclusion or deportation between October 30, 1996 and April 1, 1997, would have been in administrative proceedings "before," but not "as of" April 1, 1997. To such an alien, the transitional judicial review provision of IIRIRA § 309(c)(4) as originally enacted arguably would not have applied, since he was no longer in proceedings "as of" April 1, 1997. Yet, IIRIRA § 309(c)(4) governs judicial review of all transitional cases in which final orders were issued after October 30, 1996. Such an anomaly was remedied by the insertion in § 309(c)(1) of "before" in place of "as of," which clarified that the IIRIRA transitional provisions are applicable to aliens whose administrative proceedings were pending "before" the general IIRIRA effective date of April 1, 1997, even if they were administratively decided before that date.

Like the transitional provision governing judicial review, IIRIRA § 309(c)(5), the "Transitional Rules With Regard To Suspension Of Deportation," is an exception to IIRIRA's general effective date of April 1, 1997, which governs transitional cases pending as of IIRIRA's date of enactment. As amended by NACARA, section 309(c)(5)(A) states:

> (A) In General. – Subject to subparagraphs (B) and (C) [both of which are not applicable in this case], paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause . . . issued before, on, or after the date of the enactment of this Act.

The statute's broad language, "before, on, or after the *date of enactment"* of IIRIRA, indicates that Congress intended the transitional stop-time rule to become effective immediately upon IIRIRA's *enactment* date of September 30, 1996, as to all deportation cases pending on and after that date. Had Congress intended this transitional provision to become effective on April 1, 1997, it would have more accurately referred in § 309(c)(5)(A) to IIRIRA's *effective date*. Moreover, as noted above, Congress enacted the stop-time rule to eliminate the problem of deportable aliens delaying their deportation proceedings until they had established sufficient longevity in the United States to apply for suspension of deportation. It would have been anomalous for Congress to build into § 309(c)(5) a six-month delay in the implementation of the transitional stop-time provision beyond its

enactment date, when the very purpose of the rule was to eliminate such delay. See generally Caron v. United States, 524 U.S. 308, 315 (1998) (declining to adopt a reading of the statute that would yield a "bizarre" result contrary to a likely and rational congressional policy). Congress' elimination of the "as of" terminology of section 309(c)(1) gave full effect to the transitional rule regarding suspension of deportation by allowing its immediate implementation upon its date of enactment.[6]

## IV. The Ninth Circuit's Decision In Astrero v. INS Is Incorrect

The Ninth Circuit is the only federal circuit court to date to directly address the effective date issue at bar. In Astrero v. INS, 104 F.3d 264 (9th Cir. 1996), the alien had petitioned for judicial review of the Board's denial of his application for suspension of deportation prior to IIRIRA's enactment. While the petition for review was pending, IIRIRA was enacted, and the INS sought dismissal of Astero's suspension claim based on his lack of eligibility under the stop-time rule. In rejecting the government's argument that IIRIRA § 309(c)(5) became effective immediately upon IIRIRA's date of enactment, the court stated:

---

[6] The repealed "as of" language resurfaced in a memorandum prepared by the Senate Appropriations Committee explaining the 1997 NACARA amendment to IIRIRA. See Nolasco, Int. Dec. #3385 at 11-12 (quoting 143 Cong. Rec. S12265-12266, available in 1997 WL 693186). To the extent that this particular legislative history is contrary to the amended language of IIRIRA, the plain language of the statute prevails: "As in any case of statutory construction, our analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted).

> The effective date for the new [INA] § 240A is "the first day of the first month beginning more than 180 days after the date of the enactment of th[e] Act . . . " or April 1, 1997. . . [IIRIRA] Section 309(c)(5) concerns the retroactivity of the new § 240A *once it becomes effective.* It qualifies the "general rule that the new rules do not apply . . . in the case of an alien who is in exclusion or deportation proceedings as of the . . . effective date. [IIRIRA] § 309(c)(1)."

104 F.3d at 266 (emphasis in original).

One of the flaws in the Ninth Circuit's analysis is that it relied on the original version of section 309(c)(1) containing the repealed "as of" terminology. The technical amendment to IIRIRA which replaced the "as of" language with "before" was made effective as if it were originally enacted in IIRIRA on September 30, 1996. See Pub. L. 104-302, § 2(2), Oct. 11, 1996, 110 Stat. 3657; see also 142 Cong. Rec. H11808 (daily ed. Sept. 28, 1996) for original language. The Astrero court thus effectively interpreted and applied a repealed statute that has no application in any past, present, or future immigration case.

Moreover, Astrero overlooked that section 309(c)(5), like the other subparagraphs of section 309(c), is an express *exception* to the general IIRIRA effective date of April 1, 1997. See IIRIRA § 309(a) ("Except as provided in this section . . ."). If, as apparently concluded by the Astrero court, all the transition rules enumerated under section 309(c), including section 309(c)(5), were effective only as of April 1, 1997, that would result in anomalies such as the one discussed

above regarding the transitional rule at section 309(c)(4) governing judicial review, which was clearly intended to take effect no later than October 31, 1996. Nor is there any logical reason for Astrero to inconsistently treat section 309(c)(4) as effective immediately on IIRIRA's date of enactment, but section 309(c)(5) as effective on April 1, 1997. Because Astrero was based on a flawed reading and analysis of section 309(c)(5), it was wrongly decided and should carry little weight in this case.[7]

## V. The Board Properly Applied The Stop-Time Rule In Ms. Osei's Case

The transitional rule with regard to suspension of deportation, IIRIRA § 309(c)(5)(A), is among the specific enumerated exceptions to IIRIRA § 309(a)'s general effective date of April 1, 1997. It is applicable to aliens such as Ms. Osei who were in deportation proceedings "before" April 1, 1997. See IIRIRA § 309(c)(1). This transition rule is made generally applicable to aliens to whom an order to show case was issued "before, on or after" IIRIRA's enactment date of September 30, 1996. See IIRIRA § 309(c)(5)(A). Ms. Osei was issued an OSC

[7] The Ninth Circuit recently applied its erroneous Astrero holding in Guadalupe-Cruz, et al. v. INS, 240 F.3d 1209 (9th Cir. March 15, 2001), which reversed the Board's affirmance of an immigration judge's pre-April 1, 1997, application of the stop-time rule. Id. at 1211-1212 & n.5. Guadalupe-Cruz has spawned a number of unpublished decisions in the Ninth Circuit remanding similar cases to the Board, and Ms. Osei has cited several of those unpublished decisions in her supplemental brief. See Petitioner's Supplemental Brief at 1, n.1, addendum.

on December 14, 1987, a date which is "before, on or after" IIRIRA's enactment date of September 30, 1996. A.R. 413-414. Ms. Osei does not fall within any of the exceptions to the transitional stop-time rule enumerated at § 309(c)(5)(B), (C). Accordingly, her case falls within the general class of transitional aliens to whom the stop-time rule applies to cut off the period of continuous physical presence upon service of the order to show cause. See Afolayan v. INS, 219 F.3d at 787-789. When Ms. Osei was served with her OSC on December 14, 1987, she had accrued three years and three months of continuous physical presence in the United States. A.R. 413-414. The Board thus properly determined on March 7, 1997, that Ms. Osei had failed to meet the statutory eligibility requirement of seven years' continuous physical presence for suspension relief.

/

/

/

/

/

**CONCLUSION**

For the foregoing reasons, the Board's decision should be affirmed and the petition for review should be denied.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General

LINDA S. WENDTLAND
Assistant Director

___________________________________
_
JOHN J. ANDRE
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-4879

Attorneys for Respondent

May 25, 2001

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 28A(c), I hereby certify that the Supplemental Brief For Respondent was prepared with WordPerfect software, has a Times New Roman typeface of Font size 14, and contains 640 lines of text.

___________________________________

JOHN J. ANDRE
Senior Litigation Counsel
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

May 25, 2001

## CERTIFICATE OF VIRUS-FREE DISKETTE

Pursuant to Local Rule 28A(d), I certify that the enclosed 3½ inch computer diskette containing Respondent's Supplemental Brief has been scanned with McAfee VirusScan and is virus-free.

________________________________________

JOHN ANDRE<br>
Senior Litigation Counsel<br>
Office of Immigration Litigation<br>
Civil Division<br>
U.S. Department of Justice

May 25, 2001

## CERTIFICATE OF SERVICE

I certify that on May 25, 2001, I served two copies of the foregoing Respondent's Supplemental Brief upon counsel for Petitioner by placing them in a mail collection room of the United States Department of Justice for same day delivery to:

Michael H. Davis, Esq.
Davis Dodd Levine & Miller, Ltd.
1219 Marquette Avenue South, Suite 200
Minneapolis, MN 55403

____________________________________

JOHN ANDRE
Office of Immigration Litigation
Civil Division