

allowed to stand, deprive Petitioner of his fundamental rights to due process of law, as guaranteed by the Fifth and Seventh Amendments.

III.

This Court Has Jurisdiction To Hear Appeals Of Matters Of Legal Interpretation

The Order granting the Motion To Dismiss cited to IIRIRA §309(a) 8 U.S.C. §1101(a)(47)(A), §1252(a). This is *inconsistent* with *Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998), in which this Court held that BIA determinations of purely legal questions are reviewed de novo, and more recently with the amended decision in **Montero-Martinez v. Ashcroft**, No. 99-70596 (9th Cir. Jan. 16, 2002), in which this Court held that it has jurisdiction over “purely legal and hence non-discretionary” questions of immigration law. **Montero-Martinez** involved the appeal of a BIA interpretation of the definition of “child” under the INA. This Court reversed an earlier decision in the case, and held it had jurisdiction to review the matter. This Court stated,

This question would require us to review the BIA's construction of the INA, which is *a pure question of law*. This question would not require us to review a discretionary determination by the BIA. For the reasons explained below, we hold that under the jurisdiction-limiting provision of §1252(a)(2)(B)(i), we retain jurisdiction to review the issue presented,...

In the case at bar, Petitioners are appealing two very important questions of law, specifically:

1. the BIA's interpretation of 8 C.F.R. §245.2 as it relates to their deportation proceedings which were pending upon their return to the U.S. on advance parole and
2. the application of the "Stop Time" provisions of the IIRIRA, which were misinterpreted by the Immigration Judge as being proper grounds to deny Petitioners' Applications for Suspension of Deportation under the pre-IIRIRA requirement of seven years continuous presence.

Upon examination, Respondent's Motion To Dismiss merely makes a general argument that this Court lacks jurisdiction to hear Petitioner's case based on the provisions of IIRIRA §309(a). Given this Court's holding in **Montero-Martinez v. Ashcroft**, No. 99-70596 (9th Cir. Jan. 16, 2002), however, it is clear that this Court has jurisdiction to review the BIA's interpretation of two crucial questions of law. This Court should reconsider its decision and accept jurisdiction over this matter.

IV.

It was Error For The BIA To Uphold The Misapplication Of The "Stop-Time" Provisions Of IIRIRA To Petitioners' Applications For Suspension Of Deportation

- A. The Denial of the Applications for Suspension of Deportation was a Final determination based on a legal misinterpretation, and this Court has Jurisdiction to hear this Claim for relief.**

Petitioners filed applications for Suspension of Deportation on December 27, 1996, after accruing seven years of continuous presence in the United States. (The applications are **pages 201-209** of the **Certified Administrative Record**). Under INA §244(a)(1), 8 U.S.C. § 1254(a)(1), which was the law in effect at the

time Petitioners' made their application, an alien was eligible for suspension of deportation if

- (1) they had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of application" for suspension of deportation;
- (2) they were a "person of good moral character"; and
- (3) if deportation would result in an "extreme hardship" to the alien or to an immediate family member who was a U.S. citizen or a lawful permanent resident.

The passage of the Illegal Immigrant Responsibility and Immigration Reform Act of 1996 ("IIRIRA") made sweeping changes in this area of immigration law. In Otarola v. INS, No. 99-71405 (9th Cir. Oct. 18, 2001) this Court explained that,

"Before the stop-time rule went into effect, an alien accrued time towards the continuous physical presence requirement until applying for suspension of deportation. The issuance of an OSC had no effect on this accrual. Congress altered this system by enacting IIRIRA's stop-time rule, which provides that the period of continuous physical presence in the United States shall end when the INS initiates removal proceedings. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1). Thus, under the stop-time rule, an alien must meet the continuous physical presence requirement before he or she is served with an OSC." Otarola, supra, footnote 3, 14780

In Otarola, this Court reversed a BIA decision imposing the "Stop Time" provision to a case where the alien had applied for Suspension of Deportation and been granted relief *before the effective date of the stop-time rule*.

"Despite the fact that the IJ had correctly applied pre-IIRIRA law, the BIA applied the stop-time provision, which terminated Otarola's accrual of time toward the physical presence requirement upon service of the OSC."

The Decision of the BIA in **Otarola** was reversed. In the case at bar, the Immigration Judge failed to correctly apply pre-IIRIRA law. The BIA, as in **Otarola**, imposed the “stop-time” provision of IIRIRA, when it was clearly not appropriate. With its decision in **Otarola**, this Court explained that,

“Otarola, on the other hand, had completed the seven-year requirement before the IJ ruled and before the effective date of IIRIRA.”

The same is true in the case at bar. Petitioners had accrued seven years of continuous presence when they applied for Suspension of Deportation in December 1996. The Orders terminating proceedings, **Pages 48-52 of the Certified Administrative Record**, clearly indicate that Petitioners’ Applications For Suspension Of Deportation were denied on July 29, 1998, *nearly two years after Petitioners had accrued seven years continuous presence.*

The transcript of proceedings shows that the Immigration Judge determined that the stop-time provision of IIRIRA and NACARA section 203 barred Petitioners’ from continuing to pursue their applications for Suspension of Deportation (See pages 80-81 of the Certified Administrative Record). But, as shown above, this Court has already determined that the amended transition rules in IIRIRA section 309 should not have been applied in Petitioners’ case.

An incorrect final legal determination of the Immigration Judge was affirmed by the BIA, and this Honorable Court has jurisdiction to review and reverse this clearly wrong and severely adverse ruling.