Strategies and Considerations in the Wake of *Niz-Chavez v. Garland*

Practice Advisory[1]

June 30, 2021

I. Introduction

On April 29, 2021, the U.S. Supreme Court issued *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), holding unequivocally that a Notice to Appear (NTA)—the charging document that commences immigration court removal proceedings—must contain the time and place of the hearing in a single document in order to trigger the stop-time rule in cancellation of removal cases, and that a subsequently-issued hearing notice does not stop time if the NTA did not include the required information. This decision answered some, though by no means all, of the questions raised by the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). Following *Pereira*, the Board of Immigration Appeals (BIA or Board) issued several precedential decisions that interpreted *Pereira* very narrowly, and U.S. courts of appeals issued sometimes conflicting decisions on the numerous arguments that arose post-*Pereira.* This practice advisory will discuss the Supreme Court's decisions in *Niz-Chavez* and *Pereira* and provide strategies for practitioners to consider in cases where the client's NTA was defective. As this area of the law continues to develop, practitioners should use this practice advisory as a starting point, but be sure to do their own research into the state of the law.

II. Overview

a. Cancellation of Removal

Cancellation of removal is a form of immigration relief that is available in removal proceedings initiated on or after April 1, 1997. It is available to lawful permanent residents (LPRs) under Immigration and Nationality Act (INA) section 240A(a), to non-lawful permanent residents (non-LPRs)[2] under INA § 240A(b)(1), and to certain battered spouses and children under INA

[1] Copyright (c) 2021, American Immigration Council, The Catholic Legal Immigration Network, Inc. (CLINIC), and the National Immigration Project of the National Lawyers Guild (NIPNLG). Click here for information on reprinting this practice advisory. This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice supplied by legal counsel familiar with a client's case. The authors of this advisory are Khaled Alrabe, Gianna Borroto, Kate Melloy Goettel, Michelle Mendez, Victoria Neilson, Rebecca Scholtz, Cristina Velez, and Karolina Walters. The authors would like to thank Grant Chamness, Kristin Macleod-Ball, Aimee Mayer-Salins, Abby Nyberg, Trina Realmuto, David Stern, Patrick Taurel, Stacy Tolchin, Ben Winograd, and Valerie Zukin for their contributions.

[2] An LPR may also apply for non-LPR cancellation. *See Matter of A-M-*, 25 I&N Dec. 66, 74-76 (BIA 2009).

§ 240A(b)(2).[3] Each type of cancellation has its own set of statutory criteria. If an immigration judge (IJ) determines that an individual meets these criteria and merits a favorable exercise of discretion, the IJ may "cancel" removal and the individual either retains or gains LPR status.[4]

i. Cancellation of Removal for LPRs

To be eligible for LPR cancellation under INA § 240A(a), an individual must demonstrate:

- that they have been an LPR for not less than 5 years;
- that they have continuously resided in the United States for 7 years after admission in any status; and
- that they have not been convicted of an aggravated felony.

ii. Non-LPR Cancellation of Removal[5]

To be eligible for non-LPR cancellation under INA § 240A(b)(1), an individual must demonstrate:

- continuous physical presence in the United States for not less than 10 years immediately preceding the date of application;
- good moral character during such period;
- that they have not been convicted of certain criminal offenses; and
- that removal would result in exceptional and extremely unusual hardship to the individual's U.S. citizen or LPR spouse, parent, or child.

iii. The Stop-Time Rule

Section 240A(d) of the INA, also known as the stop-time rule, governs the calculation of continuous residence or physical presence for accumulating either the 7 years of continuous residence required for LPR cancellation or the 10 years of continuous physical presence required for non-LPR cancellation. Subsection (A) of INA § 240A(d)(1) provides that the accrual of these time periods "shall be deemed to end . . . when the [noncitizen] is served a notice to appear under [INA § 239(a)]."[6]

---

[3] This advisory does not address the specific requirements for this form of cancellation of removal because applicants continue to accrue physical presence toward the required 3-year period even after a charging document is issued, and thus *Niz-Chavez* and *Pereira* do not impact eligibility for this form of relief. *See* INA § 240A(b)(2)(A)(ii).

[4] The applicant bears the burden of establishing both statutory eligibility and that they merit a favorable exercise of discretion. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d).

[5] For more information on non-LPR cancellation, see Immigrant Legal Resource Center, *Non-LPR Cancellation of Removal* (June 2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf.

[6] Subsection (B) of INA § 240A(d)(1) is triggered by the commission of certain crimes. That provision is not at issue in *Pereira* or *Niz-Chavez* and is thus beyond the scope of this practice advisory.

b. Supreme Court Decision in *Pereira v. Sessions*

i. Facts and Holding

In *Pereira*, the Supreme Court held that an NTA that does not include the time or place of the scheduled immigration court hearing does not trigger the stop-time rule for purposes of cancellation. Mr. Pereira had been served in 2006 by the Department of Homeland Security (DHS) with an NTA that did not include the time and place of his hearing. Subsequently, the court mailed a hearing notice advising Mr. Pereira of the hearing's time and place to the wrong address. As a result, he did not appear at the hearing and he was ordered removed *in absentia* in 2007. He did not learn of this order until 2013. Due to the lack of proper notice, the immigration court subsequently rescinded the *in absentia* order and reopened proceedings. On the merits, the IJ denied his application for non-LPR cancellation, finding that the 2006 NTA stopped the accrual of continuous physical presence in the United States and thus he did not have the requisite 10 years, because he had entered the United States in 2000.

In an 8-1 decision authored by Justice Sotomayor, the Supreme Court concluded that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' [INA § 239(a)] and therefore does not trigger the stop-time rule."[7] The Court found that the plain language of INA § 239(a)(1)—which unambiguously defines an NTA as specifying, among other things, where and when the noncitizen must appear for removal proceedings—compelled this result.[8] Thus, the Court concluded that Mr. Pereira's NTA did not stop time and remanded his case for further proceedings.[9]

ii. *Pereira's* Impact Beyond the Stop-Time Context

In the wake of *Pereira*, practitioners argued that the Supreme Court's decision applied beyond the cancellation of removal context. Those arguments centered on five major questions: (1) whether removal proceedings initiated through a defective NTA[10] should be terminated because the immigration court lacks jurisdiction over the proceedings; (2) whether a defective NTA violates a claim-processing rule providing a separate basis for termination if the noncitizen meets certain requirements; (3) whether an IJ may issue an *in absentia* order in a case commenced through a defective NTA; (4) whether a defective NTA satisfies the post-conclusion voluntary departure stop-time rule; and (5) whether a prior removal order based on a defective NTA could support a charge of criminal reentry under 8 U.S.C. § 1326.[11] In the months following *Pereira*, IJs terminated approximately 9,000 removal proceedings, a 160 percent increase over

[7] *Pereira*, 138 S. Ct. at 2110.
[8] *Id.*
[9] *Id.* at 2113-14, 2120.
[10] For purposes of this practice advisory, the term "defective NTA" means that the NTA lacks time and/or place information as required by INA § 239(a)(1).
[11] The implications of *Pereira* and *Niz-Chavez* on criminal re-entry cases is beyond the scope of this practice advisory.

terminations for the same period the year before.[12]

On August 31, 2018, in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the BIA held that a defective NTA does not deprive the immigration court of jurisdiction and is thus not a basis for the termination of removal proceedings, so long as the court serves a subsequent notice of hearing on the noncitizen that provides the time and place of hearing. After *Bermudez-Cota*, the BIA issued other decisions taking an extremely narrow view of *Pereira* in the context of jurisdiction[13] and rescission and reopening of *in absentia* removal orders.[14]

iii. *Pereira*'s Aftermath in the Cancellation Stop-Time Context

In *Matter of Mendoza-Hernandez & Capula Cortez*,[15] the BIA issued a ruling narrowing *Pereira* in the context of the cancellation stop-time rule itself. In an *en banc* opinion, the BIA held that even when the NTA issued by DHS is deficient, a subsequent hearing notice issued by the immigration court "cures" the defective NTA and triggers the cancellation of removal stop-time rule. A circuit split on this issue subsequently emerged, with the Third and Tenth Circuits ruling that only a statutorily compliant NTA could stop time,[16] and the Fifth and Sixth Circuits agreeing with the BIA that a subsequently issued hearing notice supplying the missing information cured the NTA's defect and stopped time.[17]

On April 29, 2021, in *Niz-Chavez v. Garland*, the Supreme Court issued a decision responding to the argument that arose after *Pereira* about whether a subsequent hearing notice could "cure" a defective NTA for purposes of triggering the stop-time rule. Siding with the Third and Tenth Circuits, the Court answered unequivocally: no.

The Court calls the *Niz-Chavez* case the "next chapter" in the *Pereira* story, noting that though the government could have responded to *Pereira* by issuing NTAs with the information required

---

[12] Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS, Oct. 17, 2018, https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK.

[13] *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020) (concluding that an NTA lacking the immigration court's address as required by 8 C.F.R. § 1003.15(b)(6) or a certificate of service as required by 8 C.F.R. § 1003.14(a) did not deprive the immigration court of jurisdiction).

[14] *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019) (concluding that neither rescission of an *in absentia* order nor termination of proceedings is required due to an NTA's failure to list the time and place of the hearing where subsequent hearing notice with time and place information was properly sent to respondent); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019) (concluding that an NTA's failure to list the time and place of the hearing did not require rescission of an *in absentia* order where the respondent did not provide an address where notice could be sent).

[15] *Matter of Mendoza-Hernandez & Capula Cortez*, 27 I&N Dec. 520 (BIA 2019).

[16] *Guadalupe v. Att'y Gen. U.S.*, 951 F.3d 161, 165 (3d Cir. 2020); *Banuelos v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020).

[17] *Yanez-Pena v. Barr*, 952 F.3d 239, 241 (5th Cir. 2020), *cert. granted, vacated, sub nom. Yanez-Pena v. Garland*, No. 19-1208, 2021 WL 1725146 (U.S., May 3, 2021); *Garcia-Romo v. Barr*, 940 F.3d 192, 205 (6th Cir. 2019), *cert. granted, vacated, sub nom. Garcia-Romo v. Garland*, No. 19-1316, 209 L. Ed. 2d 729 (U.S. May 3, 2021); *see also Lopez v. Barr*, 948 F.3d 989 (9th Cir. 2020) (granting *en banc* rehearing of previous Ninth Circuit panel decision that had rejected *Mendoza-Hernandez*), *remanded sub nom. Lopez v. Garland*, 2021 WL 2325134 (9th Cir. June 8, 2021) (remanding in light of *Niz-Chavez*).

by INA § 239(a)(1), "it seems the government has chosen instead to continue down the same old path."[18] In rejecting the government's argument that its regulations authorize providing the statutorily required information over multiple notices, the Court cites *Pereira*, stating that "this Court has long made plain, pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'"[19]

This practice advisory will discuss the holding of *Niz-Chavez* and examine the viability of the major *Pereira*-related arguments after the Supreme Court's decision in *Niz-Chavez*.

III. Supreme Court Decision in *Niz-Chavez v. Garland*

a. Facts and Holding

In *Niz-Chavez*, Justice Gorsuch authored the Court's 6-3 majority opinion, holding that to trigger the stop-time rule, DHS must serve the noncitizen with a single-document NTA containing all the information about an individual's removal proceedings specified in INA § 239(a)(1).

Mr. Niz-Chavez entered the United States in 2005. In 2013, DHS served him an NTA that did not list a time or place for his initial hearing. Two months later, Mr. Niz-Chavez received a hearing notice stating the time and place of his hearing. Mr. Niz-Chavez applied for withholding of removal and protection under the Convention Against Torture, which the IJ denied. Mr. Niz-Chavez appealed to the BIA, also requesting that the BIA remand to the IJ so that he could apply for non-LPR cancellation of removal based on *Pereira*. The BIA denied Mr. Niz-Chavez's motion to remand and the Sixth Circuit subsequently denied Mr. Niz-Chavez's petition for review, holding that the stop-time rule was triggered when the government had finished delivering all of the information required by INA § 239(a)(1), which occurred when Mr. Niz-Chavez received his hearing notice.

The Supreme Court then reversed the Sixth Circuit. The Court found that the plain language of INA § 239(a)(1)—which uses the indefinite article "a" when referring to "a 'notice to appear'"—leaves no room to permit a second document to cure the defect. Reversing the Sixth Circuit's decision, the Court concluded that "the government must issue a single and comprehensive notice before it can trigger the stop-time rule."[20] As discussed below, the more expansive language used in *Niz-Chavez* calls into question the ongoing validity of the BIA and court of appeals decisions that interpreted *Pereira* in the narrowest way possible.

[18] *Niz-Chavez*, 141 S. Ct. at 1479.
[19] *Id.* at 1485.
[20] *Id.* at 1479.

b. Impact on Cancellation Stop-Time Rule[21]

As a result of the Supreme Court decisions in *Pereira* and *Niz-Chavez*, noncitizens accrue physical presence and continuous residence for cancellation purposes from the time they enter the United States until DHS serves a single-document NTA containing *all* of the information required by INA § 239(a)(1), including the hearing's time and place. Therefore, if DHS serves an NTA lacking information about the hearing's time or place, that NTA does not stop time and the noncitizen continues to accrue physical presence or continuous residence in the United States for purposes of cancellation eligibility. Similarly, if the immigration court later issues a hearing notice with time and place information, that document does not stop time, as a hearing notice is not a "Notice to Appear." The hearing notice does not make up for DHS's failure to comply with INA § 239(a)(1) because even "if the government finds filling out forms a chore,"[22] Congress intended for DHS to issue "'a' single document"[23] correctly. In other words, DHS's sole opportunity to stop a noncitizen's accrual of physical presence and continuous residence for cancellation purposes is by issuing an NTA that complies with all of the requirements of INA § 239(a)(1).

Practitioners should review cases of clients in removal proceedings—including clients who have a final order of removal, *see infra* section V.b—who have now been in the United States for at least 10 years (for non-LPR cancellation) or who have resided in the United States continuously for 7 years after admission in any status (for LPR cancellation) and meet the other requirements for cancellation, to assess whether their NTA contains all of the information required by INA § 239(a)(1). If the NTA is missing required information such as the hearing's time or place, the stop-time rule is not triggered and the client will continue to accrue the statutorily required time until DHS serves an NTA that meets all the requirements of INA § 239(a)(1).

It is possible that following *Niz-Chavez*, DHS may seek to nominally comply with the Supreme Court's decision by issuing NTAs with "fake" hearing dates, as it did after the *Pereira* decision.[24] Advocates refer to these hearing dates as "fake" because the government never intended to hold a hearing on the date and time listed—sometimes a time when the court was closed—and instead ostensibly picked a date merely so that the portion of the NTA providing the date and time would not be left blank.[25] Though *Niz-Chavez* notes that after the government has

---

[21] While this practice advisory focuses on NTAs, practitioners representing clients eligible for suspension of deportation should consider if *Niz-Chavez* may apply to Orders to Show Cause. Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) states that section 240A(d) "shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 30, 1996]." Pub. L. 104-208, 110 Stat. 3009-546. Congress then enacted the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), and included a provision stating that INA § 240A(d) "shall apply to orders to show cause" issued before, on, or after NACARA's effective date. NACARA (Nov. 19, 1997), § 203(a)(1), Pub. L. No. 105-100, 111 Stat. 2160. The BIA then held that the stop-time rule applies to all pending deportation proceedings, not just removal cases. *See Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999) (en banc).

[22] *Niz-Chavez*, 141 S. Ct. at 1485.

[23] *Id*. at 1480.

[24] *See* AILA, *Practice Alert: DHS Issuing NTAs with Fake Times and Dates* (Nov. 26, 2019), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-dhs-issuing-ntas-with-fake-times.

[25] *See also* Catherine E. Shoichet, *100+ Immigrants Waited in Line in 10 Cities for Court Dates That Didn't Exist*, CNN, Nov. 2, 2018, https://www.cnn.com/2018/10/31/us/immigration-court-fake-dates/index.html. Under current

served a compliant NTA, it is permitted under INA § 239(a)(2) to modify the time and place of the hearing if logistics require a change,[26] practitioners could argue that NTAs containing "fake" hearing dates[27] are not valid NTAs because a date the government never intends to actually hold a hearing does not provide the "time . . . at which the proceedings will be held" as required by INA § 239(a)(1)(G)(i).[28]

IV. Potential Arguments Based on *Niz-Chavez* and *Pereira*

The *Niz-Chavez* Court's holding is limited to the determination that the government must serve a noncitizen with a single notice that includes all the statutorily required information in INA § 239(a)(1) to trigger the stop-time rule for cancellation of removal. But the Court's rationale for that holding—building upon the statutory interpretation of INA § 239(a) conducted by the *Pereira* Court—lends additional support to many of the arguments that practitioners raised post-*Pereira* before the BIA foreclosed them.

a. Arguing that *Niz-Chavez* applies to the post-conclusion voluntary departure stop-time rule

Under the voluntary departure stop-time rule, IJs may grant voluntary departure in lieu of a removal order at the conclusion of proceedings if, in addition to meeting other statutory criteria, the noncitizen "has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under [INA § 239(a)]."[29] While *Niz-Chavez* does not explicitly mention the voluntary departure stop-time rule, practitioners should argue that the decision's reasoning compels the conclusion that a notice of hearing served after an individual receives a defective NTA does not stop time for purposes of the nearly identical voluntary departure stop-time rule found in an adjacent statute, INA § 240B. Both the cancellation stop-time rule at issue in *Niz-Chavez* and the voluntary departure stop-time rule

---

policy, EOIR is instructed to reject any NTA "in which the time or date of the scheduled hearing is facially incorrect—e.g. a hearing scheduled on a weekend or holiday or at a time when the court is not open." Memorandum from James R. McHenry III, Dir., EOIR, "Acceptance of Notices to Appear and Use of the Interactive Scheduling System," at 2 (Dec. 21, 2018), https://www.justice.gov/eoir/file/1122771/download.

[26] *Niz-Chavez*, 141 S. Ct. at 1485.

[27] "Fake" hearing dates refer to both impossible hearing dates and times, such as hearings on weekends, holidays, or outside of the court's business hours (*e.g.*, midnight, 6 a.m.), as well as a hearing date or time that the respondent learns EOIR never intended to honor. The latter category can be difficult to show factually but could include situations where a respondent appears for court and is told that no hearing was scheduled, hearing dates that are not recognized when calling the EOIR hotline, or an over-scheduled hearing time. *See, e.g.*, Maria Sacchetti, *Hundreds Show Up for Immigration-Court Hearings That Turn Out Not to Exist*, WASH. POST, Jan. 31, 2019, https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html ("[C]onfusion erupted on Oct. 31, when hundreds of immigrants turned up for court nationwide and were told they did not have hearings scheduled.").

[28] Practitioners should note that if DHS serves an NTA with a "fake" date DHS does not satisfy the notice requirements through a single document. Either DHS must serve a second NTA that contains a valid date and time or the immigration court must send a hearing notice with the actual time and place. Thus, if DHS chooses to proceed with an NTA bearing a "fake" date it would have to engage in another two-step notice process reminiscent of the scheme rebuked by *Niz-Chavez*. Such a process would also likely cause confusion that would lead to *in absentia* removal orders.

[29] INA § 240B(b)(1)(A).

cross-reference INA § 239(a), which defines "a 'notice to appear.'" As the *Pereira* Court reasoned, "it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[30]

In deciding *Niz-Chavez*, the Supreme Court emphasized the significance of the use of definite and indefinite articles preceding nouns in statutory interpretation. The *Niz-Chavez* Court focused on the indefinite article "a" in the phrase "a 'notice to appear'" in INA § 239(a)—referenced in the voluntary departure stop-time statute as well—and concluded that "a" means a single document containing the required information. The *Niz-Chavez* decision also interpreted the word "a" in the cancellation stop-time rule's reference to "*a* notice to appear under [INA § 239(a)]."[31] The Court reasoned that indefinite articles, like "a," normally precede "*countable* nouns," and thus the statute's reference to "a" Notice to Appear means it takes a "single statutorily compliant document to trigger the stop-time rule."[32] While the voluntary departure stop-time statute uses the word "the" rather than the word "a," both of these words are articles, and "the"—the only *definite* article in the English language—even more strongly conveys reference to one specific thing.[33] Indeed, the *Niz-Chavez* Court recognized that other references to "the notice to appear" in the INA "seem[] to speak of the charging document as a discrete thing, using a definite article with a singular noun ('the notice')."[34]

DHS may argue that IJs are bound by *Matter of Viera-Garcia & Ordonez-Viera*, 28 I&N Dec. 223 (BIA 2021), which held that a defective NTA does not trigger the voluntary departure statute's stop-time rule, but a subsequent hearing notice containing the missing information "perfects" the NTA and stops time. However, *Viera-Garcia & Ordonez-Viera* pre-dated the *Niz-Chavez* decision and applied the now-invalidated reasoning of *Matter of Mendoza-Hernandez & Capula-Cortes* which had permitted a "two-step process" for purposes of triggering the stop-time rule for cancellation of removal.[35] Because *Niz-Chavez* invalidated *Mendoza-Hernandez*, practitioners should argue that *Viera-Garcia & Ordonez-Viera* can no longer be relied upon and that pursuant to *Niz-Chavez* only a complete NTA can trigger the voluntary departure stop-time

---

[30] *Pereira*, 138 S. Ct. at 2115 (quoting *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)).
[31] INA § 240A(d)(1) (emphasis added).
[32] *Niz-Chavez*, 141 S. Ct. at 1481.
[33] *See* The Chicago Manual of Style §5.71 "Definite Article" (17th ed.); Grammarly, "The Definite Article," https://www.grammarly.com/blog/articles/; *see also Matter of Alyazji*, 25 I&N Dec. 397, 405 (BIA 2011) ("The phrase 'within five years after the date of admission' is more specific; it contains a definite article ('the') and a singular object ('date'). This narrower language most naturally connotes a single date.").
[34] 141 S. Ct. at 1483. While acknowledging that the decision may seem "semantic, focused on a single word," the Court explains that "words are how the law constrains power." *Id.* at 1486.
[35] *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520, 529 (BIA 2019). In *Matter of Viera-Garcia & Ordonez-Viera*, the BIA recognized that two circuits—the Third and the Tenth—had rejected the two-step notice theory and that in these jurisdictions the voluntary departure stop-time rule is only triggered by an NTA meeting all of INA § 239(a)'s requirements. 28 I&N Dec. at 226 n.2 (citing *Banuelos v. Barr*, 953 F.3d 1176, 1178–79 (10th Cir. 2020); *Guadalupe v. Att'y Gen. U.S.*, 951 F.3d 161, 165 (3d Cir. 2020)). To the authors' knowledge, the only circuit court to have explicitly addressed *Pereira*'s application to the voluntary departure stop-time rule was the Fifth Circuit, in *Martinez-Lopez v. Barr*, 943 F.3d 766, 770 n.1 (5th Cir. 2019). In that case, the Fifth Circuit concluded that a subsequent notice of hearing cured the NTA's defect and stopped time. Because the Fifth Circuit's decision was based on a two-step notice process that *Niz-Chavez* invalidated, practitioners should argue that similar to *Matter of Viera-Garcia & Ordonez-Viera* it is no longer good law.

rule. If the IJ nevertheless decides to follow *Viera-Garcia & Ordonez-Viera*, practitioners should appeal the issue when an appeal is otherwise in the client's interest.

b. Arguing that an IJ may not issue an *in absentia* order or must rescind and reopen a previously-issued order in cases with defective NTAs

Whether an IJ may issue an *in absentia* order where the respondent received a defective NTA, despite receipt of a subsequent hearing notice, was not before the Court in *Niz-Chavez*. As of the date of this advisory's issuance, no U.S. court of appeals has expressly held that rescission and reopening of an *in absentia* order is required based solely on the fact that an NTA lacked time or place information. Nonetheless, the *Niz-Chavez* decision provides strong support for arguments that rescission of an *in absentia* order is warranted when the NTA lacks time or place information, regardless of any subsequent hearing notice. Practitioners should closely monitor developments in the U.S. courts of appeals following *Niz-Chavez* regarding rescission and reopening of *in absentia* orders based on defective NTAs.[36]

Like the cancellation stop-time rule at issue in *Pereira*, the statute permitting IJs to proceed *in absentia* when a noncitizen fails to appear at a hearing also cross-references INA § 239(a)(1). Section 240(b)(5)(A) of the INA states that IJs may issue an *in absentia* order if the noncitizen was provided "written notice required under paragraph (1) or (2) of [INA § 239(a)]" and certain other requirements are met. The statute allows for rescission of an *in absentia* order if the noncitizen demonstrates in a motion to reopen that they "did not receive notice in accordance with paragraph (1) or (2) of [INA § 239(a)]."[37] In *Pereira*, the Court rejected the government's argument that the *in absentia* statute's reference to INA § 239(a)(1) meant something different than the stop-time rule's reference to the same provision. The Court found that, "[t]he far simpler explanation, and the one that comports with the actual statutory language and context, is that each of these . . . phrases refers to notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1) [INA § 239(a)(1)]."[38] Following *Pereira*, practitioners argued that if the government had to strictly comply with INA § 239(a) to trigger the stop-rule, the same strict compliance should be necessary to confer the notice required for an IJ to proceed *in absentia* when a respondent fails to appear at a hearing.

After *Pereira*, the Fifth and Sixth Circuits rejected arguments for rescission of *in absentia* orders based on NTAs lacking time or place information, where a subsequent hearing notice supplied the information.[39] Then, in 2019, the BIA issued two decisions concluding that a defective NTA did not require the rescission of an *in absentia* removal order: *Matter of Pena-Mejia* and *Matter of Miranda-Cordiero*.[40] Relying in part on the Fifth and Sixth Circuit decisions that had rejected *Pereira*-based rescission arguments, the BIA reasoned that the statutory text of the *in*

---

[36] *See, e.g.*, *Yanez-Pena v. Barr*, 952 F.3d 239, 246 (5th Cir. 2020), *cert. granted, vacated sub nom. Yanez-Pena v. Garland*, No. 19-1208, 2021 WL 1725146 (U.S. May 3, 2021).
[37] INA § 240(b)(5)(C)(ii).
[38] *Pereira*, 138 S. Ct. at 2118.
[39] *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018); *see also Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished).
[40] *Matter of Pena-Mejia*, 27 I&N Dec. 546, 548 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 553-54 (BIA 2019).

absentia provision, INA § 240(b)(5)(A), differs from INA § 240A(d)(1) because the former allows the time and place information to be provided *either* in accordance with INA § 239(a)(1) (through issuance of the NTA) *or* in accordance with INA § 239(a)(2) (through a subsequent notice of hearing).[41] As a result, the BIA held that in cases where the noncitizen fails to provide or update their address with the immigration court, or cannot overcome the presumption that the notice of hearing was delivered, there is no basis to rescind the *in absentia* order based on an NTA that did not provide the time or place of the hearing.[42] Thus, the BIA and several U.S. courts of appeals concluded, two or more documents could comply with INA § 240(b)(5) and provide written notice under paragraph (1) or (2) of INA § 239(a).[43]

Practitioners should consider arguments grounded in *Pereira* and *Niz-Chavez* in seeking to rescind and reopen *in absentia* removal orders where the IJ found that that the government had met its burden of "clear, unequivocal, and convincing evidence" through a defective NTA. Specifically, practitioners may argue that *Niz-Chavez*, when read in conjunction with *Pereira*, compels a reading of the *in absentia* rescission statute, INA § 240(b)(5)(C)(ii), as requiring rescission when the NTA lacks time or place information, irrespective of any subsequent hearing notice.

First, practitioners can argue that the use of the word "or" in the rescission statute means that a noncitizen is entitled to rescission based on defective notice under INA § 239(a)(1) regardless of whether the IJ concludes there is adequate notice under INA § 239(a)(2). Recall that the rescission statute provides for rescission of an *in absentia* order if the noncitizen demonstrates in a motion to reopen that they "did not receive notice in accordance with paragraph (1) *or* (2) of [INA § 239(a)]."[44] Based on the plain meaning of "or," this statute allows a noncitizen to prevail on a notice-based rescission argument with *either* a showing of inadequate (a)(1) notice *or* a showing of inadequate (a)(2) notice.[45] Indeed, in a 2020 decision, the Sixth Circuit observed that "[o]n first read, the disjunctive 'or' suggests that immigrants need only prove a lack of notice under *either* paragraph (1) *or* paragraph (2) in the 'alternative.'"[46] The Sixth Circuit ultimately did not decide the issue, however, because in that case, following then-existing precedent that *Niz-Chavez* undermines, the court concluded that the hearing notice perfected the NTA's defect under INA § 239(a)(1).

Other courts of appeals decisions interpreting the *in absentia* rescission statute before *Niz-Chavez* have appeared to recognize that lack of INA § 239(a)(1) notice is sufficient for rescission, regardless of whether the noncitizen received a hearing notice under INA §

---

[41] *Matter of Pena-Mejia*, 27 I&N Dec. at 548; *Matter of Miranda-Cordiero*, 27 I&N Dec. at 554.
[42] *Matter of Pena-Mejia*, 27 I&N Dec. at 548-49 n.1; *Matter of Miranda-Cordiero*, 27 I&N Dec. at 553.
[43] *See, e.g.*, *Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 n.1 (5th Cir. 2018); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019); *Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished).
[44] INA § 240(b)(5)(C)(ii) (emphasis added).
[45] *See, e.g., United States v. Woods*, 134 S. Ct. 557, 567 (2013) ("[T]he operative terms are connected by the conjunction 'or.' . . . [That term's] ordinary use is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979))).
[46] *Valadez-Lara v. Barr*, 963 F.3d 560, 569 (6th Cir. 2020).

239(a)(2).[47] Nevertheless, many of these same courts have concluded that (a)(1) notice was satisfied for purposes of the *in absentia* statute, despite the NTA's lacking time and/or place information, when the government subsequently issued a hearing notice supplying the missing information.[48] In other words, those courts allowed a hearing notice to fulfill INA § 239(a)(1)'s NTA requirements. While IJs may feel constrained by these BIA and courts of appeals decisions, those decisions presume that the government can fulfill INA § 239(a)(1)'s time and place requirements through a subsequent hearing notice, precisely what *Niz-Chavez* forbids. Indeed, following issuance of *Niz-Chavez*, the Supreme Court granted certiorari and vacated, and remanded a Fifth Circuit decision, *Yanez-Pena v. Barr*, which had upheld an *in absentia* order despite a defective NTA. The Fifth Circuit had held "that the information in the written notice required under paragraph (1) of [INA § 239(a]), otherwise referred to as an NTA, may be contained in one or more documents."[49] Practitioners may wish to argue that contrary decisions are no longer good law in light of *Niz-Chavez*, and that a noncitizen who was issued a defective NTA should be eligible for rescission of an *in absentia* order, because they "did not receive notice in accordance with paragraph (1) . . . of [INA § 239(a)]."

Second, practitioners can argue that *Niz-Chavez* also confirmed that INA § 239(a)(2) notice cannot be satisfied if the government did not fulfill its INA § 239(a)(1) obligation. In rejecting the government's policy arguments regarding the difficulty of providing notice in one single compliant document, the *Niz-Chavez* Court recognized that "*once the government serves a compliant notice to appear*, [the statute] permits it to send a supplemental notice amending the time and place of a [noncitizen's] hearing."[50] Similarly, the *Pereira* Court had reasoned that the plain language of INA § 239(a)(2), "allowing for a 'change or postponement' of the proceedings . . . presumes that the Government has already served a 'notice to appear under section 1229(a) [INA § 239(a)]' that specified a time and place as required by 1229(a)(1)(G)(i) [INA §

[47] *See, e.g.*, *Yanez-Pena v. Barr*, 952 F.3d 239, 241 (5th Cir. 2020), *cert. granted, vacated sub nom. Yanez-Pena v. Garland*, No. 19-1208, 2021 WL 1725146 (U.S. May 3, 2021); *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir. 2009); *Haider v. Gonzales*, 438 F.3d 902 (8th Cir. 2006); *Martinez v. Barr*, 941 F.3d 907, 921–22 (9th Cir. 2019); *see also Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished).

[48] *See, e.g.*, *Molina-Guillen v. U.S. Att'y Gen.*, 758 F. App'x 893 (11th Cir. 2019) (unpublished) (concluding that the IJ properly issued an *in absentia* order, reasoning that the petitioner's deficient NTA and subsequent hearing notice together "fulfilled the notice requirements in [INA § 239(a)(1)"); *Mauricio-Benitez v. Sessions*, 908 F.3d 144 (5th Cir. 2018) (reaffirming the validity of the court's previous ruling that "an NTA need not include the specific time and date of a removal hearing in order for the statutory notice requirements to be satisfied; that information may be provided in a subsequent [hearing notice]"). Years before *Pereira*, the Ninth Circuit held that a defective NTA could be "combined" with a hearing notice to satisfy INA § 239(a)(1) in the *in absentia* context, but recognized in a post-*Pereira* cancellation case that *Pereira* invalidated this two-step process. *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019), *reh'g en banc granted*, 948 F.3d 989 (9th Cir. 2020), *and on reh'g en banc sub nom. Lopez v. Garland*, 998 F.3d 851 (9th Cir. 2021).

[49] *Yanez-Pena v. Barr*, 952 F.3d 239, 247 (5th Cir. 2020), *cert. granted, vacated sub nom. Yanez-Pena v. Garland*, No. 19-1208, 2021 WL 1725146 (U.S. May 3, 2021).

[50] *Niz-Chavez*, 141 S. Ct. at 1485 (emphasis added). The Court reasoned that "[t]he world is awash in forms, and rarely do agencies afford individuals the same latitude in completing them that the government seeks for itself today." *Id.* For example, the Court contrasted the government's policy arguments with the burdens it places on asylum seekers to complete a lengthy application form and comply with 14 pages of instructions or face dire consequences, such as criminal penalties or being unable to apply for protection altogether. *Id.*

239(a)(1)(G)(i)]."[51] Without a single compliant NTA, the government may not rely on INA § 239(a)(2) and, indeed, the INA § 239(a)(2) provision entitled "Notice of change in time or place of hearing," underscores the foundational significance of the NTA before turning to the hearing notice. If the NTA complies fully with INA § 239(a)(1) by including the hearing's time and place, then EOIR may change or postpone the time and place of removal proceedings through a hearing notice bearing "the *new* time and place of the proceedings" pursuant to INA § 239(a)(2) (emphasis added). In other words, the time and place cannot be "changed" if there is no time and place established in the first instance by the NTA.

Separately, practitioners may argue the government cannot meet its burden of proving by "clear, unequivocal, and convincing evidence" that it provided written notice by relying on a defective NTA. A respondent who receives an NTA lacking time or place information, followed by a notice of hearing, receives defective notice under *Niz-Chavez*, because this incomplete notice scheme does not qualify as "written notice required under" INA § 239(a)(1) or (a)(2).[52] As such, it is improper for an IJ to issue an *in absentia* order of removal pursuant to a defective NTA.

Practitioners can access a template motion to rescind an *in absentia* removal order and reopen removal proceedings in light of *Niz-Chavez* by visiting the National Immigration Litigation Alliance website.[53]

c. Moving to terminate based on the argument that IJs lack jurisdiction over proceedings commenced by defective NTAs

After the Supreme Court issued *Pereira*, many noncitizens filed motions to terminate removal proceedings, arguing that if an NTA that fails to include a time or place of hearing "is not a 'notice to appear'"[54] for purposes of the stop-time rule, then the defective NTA cannot confer jurisdiction over the proceedings. These arguments largely centered on a regulation, 8 C.F.R. § 1003.14(a), which states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by [DHS]." Practitioners argued that an NTA—the "charging document," *see* 8 C.F.R. § 1003.13—that lacks time or place information "is not a 'notice to appear under section 1229(a),'" *Pereira*, 138 S. Ct. at 2110, and thus does not vest jurisdiction in the immigration court pursuant to 8 C.F.R. § 1003.14(a).

The BIA and all U.S. courts of appeals that addressed the issue have rejected the argument that a defective NTA does not vest the immigration court with jurisdiction, under varying legal theories

---

[51] *Pereira*, 138 S. Ct. at 2114. While *Pereira* also briefly discussed INA § 239(a)(2), *Niz Chavez*'s discussion of INA § 239(a)(2) confirms that INA § 239(a)(2) notice is only possible after issuance of a single NTA with all statutorily required information, and that a hearing notice may not supply the missing information. The interplay of these two U.S. Supreme Court decisions provides an opening to practitioners in jurisdictions where the court has already rejected the notice argument based on a defective NTA to argue that previous precedent foreclosing the argument is no longer applicable.

[52] INA § 240(b)(5)(A).

[53] The template is available on the National Immigration Litigation Alliance's practice advisory webpage, https://immigrationlitigation.org/practice-advisories/.

[54] *Pereira*, 138 S. Ct. at 2110.

described below.[55] Although *Niz-Chavez*, like *Pereira*, does not address the issue of jurisdiction and looked only to the question of what qualifies as an NTA sufficient to trigger the stop-time rule in a cancellation case, *Niz-Chavez* invalidates the two-step notice process upon which some of these decisions rely and, therefore, may make a jurisdictional argument colorable, at least in some jurisdictions. That being said, if the BIA or federal courts of appeals were to find that the immigration court lacked jurisdiction over proceedings commenced with defective NTAs, then tens of thousands of cases would be amenable to termination and even decisions where EOIR granted relief might be called into question.[56] Given these extraordinary policy concerns, courts will likely be drawn to arguments that would not lead to massive terminations of proceedings. Since *Niz-Chavez* was decided, already at least two courts—the Fifth Circuit in a published decision and the Second Circuit in an unpublished decision—have affirmed their prior precedent on jurisdiction.[57]

The BIA addressed the issue of whether a defective NTA deprived the immigration court of jurisdiction first in *Matter of Bermudez-Cota* and again in *Matter of Rosales Vargas & Rosales Rosales*. In *Bermudez-Cota*, the Board held that "a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, *so long as a notice of hearing specifying this information is later sent to the alien*."[58] The BIA noted that 8 C.F.R. § 1003.15(b), the regulation listing the requirements for an NTA, "does not mandate that the time and date of the initial hearing must be included in that document."[59] Then, in *Matter of Rosales Vargas & Rosales Rosales*, the BIA concluded that even where an NTA lacks the immigration court's address—information specifically required by 8 C.F.R. § 1003.15(b)(6)—this deficiency can be remedied with a subsequent hearing notice.[60] The BIA also shifted from

---

[55] *See, e.g.*, *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020); *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018); *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019); *Banegas Gomez v. Barr*, 922 F.3d 101, 110 (2d Cir. 2019); *Nkomo v. Att'y Gen. of United States*, 930 F.3d 129, 133 (3d Cir. 2019); *United States v. Cortez*, 930 F.3d 350, 355 (4th Cir. 2019), *as amended* (July 19, 2019); *Pierre-Paul v. Barr*, 930 F.3d 684, 691 (5th Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314–15 (6th Cir. 2018); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158, 1159 (9th Cir. 2019); *Martinez-Perez v. Barr*, 947 F.3d 1273, 1279 (10th Cir. 2020); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155 (11th Cir. 2019); *see also Matter of L-E-A-*, 28 I&N Dec. 304, 306 n.3 (A.G. 2021).

[56] *Cf., e.g., Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129, 134 (3d Cir. 2019) ("So while *Pereira*'s holding expands the class of those eligible for discretionary relief in removal proceedings, Nkomo's argument would invalidate scores of removal orders (and, presumably, grants of relief)."); *Bermudez-Cota*, 27 I&N Dec. at 444 (noting that the *Pereira* decision "did not indicate that proceedings involving similar notices to appear, including those where cancellation of removal, asylum, or some other form of relief had been granted, should be invalidated"); *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. at 752 n.11 (BIA 2020) (noting that under respondents' theory, "proceedings involving grants of relief" initiated by a defective NTA would be ultra vires).

[57] *See Maniar v. Garland*, 998 F.3d 235, 424 n.2 (5th Cir. 2021) ("*Niz-Chavez* does not dislodge our ultimate holding in *Pierre-Paul* that it is 'the regulations, not 8 U.S.C. § 1229(a), [that] govern what a notice to appear must contain to constitute a valid charging document.'" (citing *Pierre-Paul*, 930 F.3d at 693); *Herrera-Antunez v. Garland*, No. 19-2253, 2021 WL 2181067 (2d Cir. May 28, 2021) (unpublished).

[58] *Bermudez-Cota*, 27 I&N at 447 (emphasis added).

[59] *Id.* at 445.

[60] *See also id.* at 750 ("We should read 8 C.F.R. § 1003.15(b)(6) in conjunction with 8 C.F.R. § 1003.18(b), which provides that the notice to appear should provide the 'time, place and date of the initial removal hearing, where practicable.'").

Bermudez-Cota in concluding that though the regulations used the word "jurisdiction," they were actually "'claim-processing' or 'internal docketing' rules, which do not implicate subject matter jurisdiction."[61] The BIA recognized that a "claim-processing rule may be challenged in a timely manner," but suggested that even a timely challenge requires a showing of prejudice, which the respondents in that case had not demonstrated.[62]

The courts of appeals have reached, in a variety of ways, the unanimous conclusion that despite *Pereira*, a deficient NTA does not deprive the court of jurisdiction. The First, Third, Eighth, and Ninth Circuits held that the regulations, not the statute, govern immigration court jurisdiction, and that the regulations do not require time or place information for jurisdiction to vest.[63] The Second and Sixth Circuits held that the regulations govern jurisdiction, and that a defective NTA confers jurisdiction *so long as* a hearing notice subsequently supplies the missing information.[64] And Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have found that INA § 239(a)(1)'s requirements, and/or the regulations governing immigration court "jurisdiction," are claim-processing rules, not jurisdictional provisions. Claim-processing arguments as a basis for termination are discussed in the subsequent section of this advisory.

In jurisdictions, like the Second and Sixth Circuits, that have concluded that immigration court jurisdiction in defective NTA cases depends on issuance of a subsequent hearing notice, *Niz-Chavez* calls the ongoing viability of these decisions into question. First, while these cases authorized respondents' receipt of the information required by INA § 239(a)(1) in more than one document, the Supreme Court in *Niz-Chavez* rejected the multi-document approach. In these jurisdictions, practitioners could thus argue that after *Niz-Chavez*, respondents must receive all required statutory information in a single document in order for immigration court jurisdiction to vest. Practitioners may also wish to argue that *Niz-Chavez*'s interpretation of the word "a" in the statute's reference to "a 'Notice to Appear'" informs the use of "a" in the jurisdiction regulation's reference to "*a* charging document."[65] Practitioners may wish to argue that under the reasoning of *Niz-Chavez*, the regulation's use of the term "a" means that only a single document—an NTA—can vest the court with jurisdiction. While the Board stated in *Bermudez Cota* and *Rosales Vargas & Rosales Rosales* that the regulations do not specify what information a "charging document" must include, *Niz-Chavez* made clear that the agency cannot narrow by regulation what is required by the statute. The *Niz-Chavez* Court dismissed the government's argument that the regulations did not require the NTA to contain time and place information, stating that "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'"[66]

---

[61] 27 I&N Dec. at 747.
[62] *Id.* at 753-54.
[63] *Goncalves Pontes v. Barr*, 938 F.3d 1, 5–7 (1st Cir. 2019); *Nkomo v. Att'y Gen.*, 930 F.3d 129, 134 (3d Cir. 2019); *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019); *United States v. Mendoza*, 963 F.3d 158 (1st Cir. 2020); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019); *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020); *United States v. Bastide-Hernandez*, 986 F.3d 1245, 1248 (9th Cir. 2021).
[64] *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018); *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019)
[65] 8 C.F.R. § 1003.14(a) (emphasis added).
[66] *Niz-Chavez*, 141 S. Ct. at 1485.

Despite the questionable viability of the Second and Sixth Circuit precedent following *Niz-Chavez*, practitioners everywhere wishing to make jurisdictional arguments after *Niz-Chavez* will likely face an uphill battle given the existing precedents concluding that the statute is not jurisdictional, and/or that the regulations do not require any particular information in the NTA to vest jurisdiction. Because the *Niz-Chavez* decision focuses heavily on the statutory requirements found at INA § 239(a)(1) rather than the regulations, and because many courts have concluded that only Congress, not the agency through regulations, can define or limit the agency's jurisdiction,[67] practitioners may want to ground any jurisdictional arguments solely on the statute. Some courts, in reaching the conclusion that the statute is not jurisdictional, have relied on the absence of a clear statement from Congress "that the immigration court's jurisdiction depends on the content of notices to appear."[68] But it appears that courts that have assumed "congressional silence" overlooked an explicit statement from Congress at the time it enacted INA § 239(a)(1) through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[69] In section 309(c) of IIRIRA, a transitional rule governing removal proceedings, Congress specified that the newly-described NTA in INA § 239 "confer[s] jurisdiction on the immigration judge."[70] Practitioners could point out this explicit congressional statement in asking courts to reconsider previous decisions concluding that the statute does not make jurisdiction over immigration proceedings dependent on the NTA.

Practitioners could also use the broad language in *Niz-Chavez* about the significance of INA § 239(a)(1) to argue that strict compliance with that statute is necessary to trigger consequences set forth in the INA that are tied to the NTA's issuance. One such consequence, of course, is the "Initiation of Removal Proceedings," the title Congress afforded to INA § 239. The *Niz-Chavez* Court notes that an NTA "serves as the basis for commencing a grave legal proceeding" and is the "case-initiating document" in removal proceedings.[71] The Court goes on to state, "We are no more entitled to denigrate this modest statutory promise as some empty formality than we might dismiss as pointless the rules and statutes governing the contents of civil complaints or criminal indictments."[72] Practitioners might draw on *Niz-Chavez* to argue that INA § 239(a)(1) "constrains [the government's] power" to hear a case, since "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."[73] Thus, practitioners could argue that *Niz-Chavez* provides a foothold, despite previous adverse decisions, for arguing that the immigration court

---

[67] *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019) (stating that the attorney general cannot, by regulation, "tell himself what he may or may not do"); *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019) (the agency cannot define the scope of its own power); *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019) (same); *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148 (11th Cir. 2019) (same); *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019) (attorney general cannot unilaterally restrict congressionally-delegated agency jurisdiction).

[68] *Pierre-Paul*, 930 F.3d at 692.

[69] *But see United States v. Lira-Ramirez*, 951 F.3d 1258, 1262 (10th Cir. 2020) (rejecting argument concerning the transitional provision because language was unclear, not a "clear statement" of jurisdictional power).

[70] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-209, Div. C, § 309(c)(2) (Sept. 30, 1996).

[71] *Niz-Chavez*, 141 S. Ct. at 1482.

[72] *Id*. at 1485.

[73] *Id.* at 1486.

lacks authority to proceed and must terminate proceedings if the NTA, the case-initiating document, lacks information required by INA § 239(a)(1).

d. Moving to terminate based on the argument that a defective NTA violates a claim-processing rule

After *Pereira* and before *Niz-Chavez,* the BIA and five U.S. courts of appeals held that the requirements relating to NTAs are non-jurisdictional, claim-processing rules.[74] While the Seventh, Tenth, and Eleventh Circuits concluded that INA § 239(a)(1)'s NTA requirements are claim-processing rules, the BIA and the Fourth and Fifth Circuits thus far have only concluded that the regulatory NTA requirements are claim-processing rules. As the Seventh Circuit explained, a "claim-processing rule is one that 'seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'"[75] A party's "failure to comply with [a claim-processing rule] may be grounds for dismissal of the case" but "such a failure may also be waived or forfeited."[76] A violation of a claim-processing rule, such as the initiation of removal proceedings through a defective NTA, may therefore serve as a basis for a motion to terminate a case. Courts that have found these rules to be claim-processing have articulated somewhat different requirements for what a noncitizen must show to warrant termination based on a defective NTA. In particular, while courts appear to agree that timely objection to the NTA is a requirement for a claim-processing challenge, there is variation among jurisdictions as to whether the noncitizen must also show they were prejudiced by the NTA's defect and in what circumstances, in any, untimeliness may be excused.

The Seventh Circuit has the most developed body of law regarding claim-processing challenges based on defective NTAs. In *Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019), the Seventh Circuit held that INA § 239(a)(1)'s NTA requirements are claim-processing rules and that "[r]elief will be available for those who make timely objections, as well as those whose timing is excusable and who can show prejudice."[77] Thus, in the Seventh Circuit, noncitizens who timely move for termination based on an NTA that does not comply with INA § 239(a)(1) may be successful, without needing to make any prejudice showing. But, in the Seventh Circuit, if a noncitizen does not timely raise the NTA defect, they might still prevail if they can show

---

[74] *Matter of Rosales Vargas & Rosales Rosales*, 27 I&N Dec. 745, 747 (BIA 2020) ("We conclude that the regulations at issue are 'claim-processing' or 'internal docketing' rules, which do not implicate subject matter jurisdiction"); *Perez-Sanchez*, 935 F.3d at 1150 ("[T]he regulations set forth a claim-processing rule as opposed to a jurisdictional one. We recognize § 1229(a)(1) as setting out a claim processing rule as well."); *Cortez*, 930 F.3d at 359 (agreeing that 8 C.F.R. § 1003.14(a), the regulations governing when immigration jurisdiction vests, "is a procedural claim-processing rule without jurisdictional implications."); *Pierre-Paul*, 930 F.3d at 691 ("8 C.F.R. § 1003.14 is not jurisdictional but is a claim-processing rule."); *Martinez-Perez*, 947 F.3d at 1278 (Agreeing that "the requirements relating to notices to appear are non-jurisdictional, claim-processing rules."); *Ortiz-Santiago*, 924 F.3d at 958 ("A failure to comply with the statute dictating the content of a Notice to Appear is not one of those fundamental flaws that divests a tribunal of adjudicatory authority. Instead, just as with every other claim-processing rule, failure to comply with that rule may be grounds for dismissal of the case.").

[75] *Ortiz-Santiago*, 924 F.3d at 963 (*quoting Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

[76] *Ortiz-Santiago*, 924 F.3d at 963.

[77] *Id.* at 965. The Seventh Circuit re-affirmed this approach in *Avila De La Rosa v. Garland*, --- F. 4th ---, No. 20-1956, 2021 WL 2587566 (7th Cir. June 24, 2021), where it held that the agency erred by requiring the petitioner—who had timely objected to the defective NTA in his case—to also show prejudice.

both excusable delay and prejudice. Other jurisdictions are not as clear about whether a noncitizen must only show prejudice if they fail to timely object—as is the case in the Seventh Circuit—or whether the prejudice showing required in all cases.[78] However, the BIA decision in *Rosales Vargas & Rosales Rosales*—which had concluded that the regulation but not the statute is a claim-processing rule—appears to require both a timely challenge to the NTA and prejudice.[79] But in a June 1, 2021 decision, an Arlington IJ terminated removal proceedings based on a defective NTA where the practitioner had argued that *Rosales*'s prejudice requirement was *ultra vires* given INA § 239(a)(1)'s clear language as interpreted by *Niz-Chavez*.[80]

In order to ensure that their claim-processing-based objection is deemed timely, practitioners making this argument should not concede removability and should object to the defective NTA as early as possible in the case. For instance, the Seventh Circuit has concluded that even raising the issue on a motion to remand while a BIA appeal is pending is not timely.[81]

Practitioners should investigate prejudice requirements in their jurisdiction. Many cases that have looked at the prejudice inquiry in the defective NTA context have concluded that the noncitizen must show that prejudice resulted from the defective NTA itself, such as by "depriv[ing] the alien of the ability to attend or prepare for the hearing, including the ability to secure counsel."[82] Where possible, practitioners should argue that prejudice is not required and, in the alternative, that the client has shown prejudice in their case. In arguing prejudice clients suffer when an NTA is defective, practitioners may wish to highlight *Niz-Chavez*'s comments about the impact of defective NTAs on noncitizens. Justice Gorsuch criticizes the government's position that a hearing notice can cure a defective NTA, noting that accepting this position would mean that the government "would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of American bureaucracies—a series of letters. These might trail in over the course of weeks, months, maybe years, each containing a new morsel of vital information."[83]

---

[78] *See, e.g.*, *Martinez-Perez v. Barr*, 947 F.3d 1273, 1279 (10th Cir. 2020) (concluding that a "claim-processing rule is mandatory to the extent a court must enforce the rule if a party properly raises it").
[79] 27 I&N Dec. at 754-754.
[80] *See* Daniel M. Kowalski, *Niz-Chavez Prompts IJ to Terminate NTA*, LexisNexis Legal Newsroom, June 8, 2021, https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/niz-chavez-prompts-ij-to-terminate-proceedings-defective-nta.
[81] *See Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683 (7th Cir. 2021); *see also Ortiz-Santiago*, 924 F.3d at 963; *Pierre-Paul v. Barr*, 930 F.3d 684, 693 (5th Cir. 2019) (concluding that claim-processing challenge failed noting that "Pierre-Paul never challenged the validity of his notice to appear before the immigration judge or the BIA. He has raised the issue for the first time in his petition for review."); *Benitez v. Barr*, 775 F. App'x 87, 88 (4th Cir. 2019) (unpublished) ("Benitez's claim that the removal proceedings were not properly commenced against him because he did not receive proper notice because the NTA was defective is waived because he never raised the issue prior to appearing before the immigration judge (IJ) and conceding removability.").
[82] *Hernandez-Alvarez v. Barr*, 982 F.3d 1088, 1096 (7th Cir. 2020); *see also, e.g.*, *Meraz-Saucedo v. Rosen*, 986 F.3d 676, 683–84 (7th Cir. 2021); *Zaldivar Anzardo v. U.S. Att'y Gen.*, 835 F. App'x 422, 431 (11th Cir. 2020) ("[T]he appropriate prejudice inquiry is whether [the petitioner] was harmed *by the NTA's defect—i.e.*, the NTA stating his removal hearing would be at a date and time 'to be set' rather than setting forth an actual date and time—not by his removal proceedings taking place when they did.").
[83] *Niz-Chavez*, 141 S. Ct. at 1485.

In jurisdictions that have not as of yet recognized that INA § 239(a)(1) is a claim-processing rule and thus a basis for termination in certain circumstances,[84] practitioners may argue that *Niz-Chavez* supports a reading of INA § 239(a)(1) as a claim-processing rule that gives rise to termination when a noncitizen objects. This is so because *Niz-Chavez* makes clear that the law requires a single-document NTA complying fully with INA § 239(a)(1). This Court notes that "the law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."[85] *Niz-Chavez*'s mandatory and strict language about the government complying with the law with respect to the "case-initiating document" (the NTA), supports the argument that INA § 239(a)(1) "requir[es] . . . the [government] take certain procedural steps at certain specified times"—the essence of a claim-processing rule.[86] Indeed, in the wake of *Niz-Chavez*, an IJ in the jurisdiction of the Sixth Circuit terminated removal proceedings based on the conclusion that a defective NTA violated INA § 239(a)(1), a claim-processing rule, concluding that *Niz-Chavez* invalidated the Sixth Circuit and BIA's precedents condoning a two-step process.[87] The authors of this advisory are also aware of other IJ decisions granting such a motion to terminate following *Niz-Chavez.*[88] Given the decision in *Niz-Chavez*, practitioners should consider whether termination would be in their client's interests, and if it is, should move to terminate at the earliest opportunity.

V. Procedural Considerations When Raising Arguments Based on *Niz-Chavez*

As discussed above, the *Niz-Chavez* decision renders many individuals newly eligible for cancellation of removal and may provide new arguments in other contexts, such as eligibility for post-conclusion voluntary departure, for rescission of an *in absentia* order, and termination based on a defective NTA. To benefit from the holding in *Niz-Chavez*, individuals must alert the adjudicator with jurisdiction over the case of the new eligibility for relief. The process for doing so depends on the case's procedural posture.

---

[84] In unpublished decisions following their precedential rulings on the jurisdiction question, both the Third and Sixth Circuits expressed potential support for the claim-processing approach. *Rufino-Silva v. U.S. Att'*y Gen., 816 F. App'x 642, 644 n.2 (3d Cir. 2020); *Dable v. Barr*, 794 F. App'x 490, 495 n.6 (6th Cir. 2019) ("Were we writing on a blank slate, we would be inclined to follow the Seventh Circuit's approach and at least conclude that § 1003.14 is a claims-processing rule.").

[85] *Niz-Chavez*, 141 S. Ct. at 1486.

[86] *Ortiz-Santiago*, 924 F.3d at 963 (*quoting Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

[87] IJ Order Terminating Removal Proceedings Without Prejudice (Cleveland, OH May 18, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/niz_chavez_termination.pdf. Practitioners in the Sixth Circuit wishing to make *Niz-Chavez*-based termination arguments should read this decision as it may provide a roadmap for a successful motion.

[88] *See, e.g.*, Daniel M. Kowalski, *Niz-Chavez Prompts IJ to Terminate NTA*, LexisNexis Legal Newsroom, June 8, 2021, https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/niz-chavez-prompts-ij-to-terminate-proceedings-defective-nta.

a. Cases pending before IJs and the BIA

Whether to raise a *Niz-Chavez*-based argument orally or in a brief depends on the posture of the removal proceedings and the IJ's approach with regard to the case flow processing policy memo.[89] If the IJ has scheduled a forthcoming master calendar hearing, the practitioner may choose to raise the *Niz-Chavez*-based argument orally at that future hearing. If the IJ has scheduled a forthcoming individual hearing, practitioners may file a brief presenting the *Niz-Chavez*-based argument and, where relevant, attach the cancellation application or proof of voluntary departure eligibility by mail or in person at the immigration court clerk's window. If the IJ has already conducted the individual hearing on another type of relief and has not issued a decision, practitioners should move for another individual hearing for the IJ to consider cancellation relief. Practitioners should abide by the Immigration Court Practice Manual, especially the 30-day filing deadline for non-detained individual hearings, and follow any applicable local rules or individual IJ practices.[90] If the IJ has issued a removal order, practitioners should consider the post-order options discussed below.

Individuals with cases pending on appeal to the BIA who are newly eligible for cancellation or post-conclusion voluntary departure under *Niz-Chavez* could either rely on the brief in support of the appeal to obtain a remand or file a motion to remand, both of which will result in the BIA returning jurisdiction to the IJ. The approach practitioners take will depend on the circumstances of the case.[91]

Practitioners should consider arguing for a remand in the brief in support of the appeal, rather than filing a separate motion to remand, if the IJ denied the noncitizen's request for cancellation based on the IJ's faulty interpretation of the stop-time rule. Practitioners may rely on the merits brief to obtain a remand because the BIA has the authority to resolve a case by remanding it to the IJ.[92] Therefore, practitioners with cases pending on appeal to the BIA who unsuccessfully argued they were eligible for cancellation before the IJ and now benefit from the change in law effectuated by *Niz-Chavez* should argue to the BIA through the brief in support of appeal that BIA must remand so that the IJ can consider that relief in light of *Niz-Chavez.* Practitioners who have already filed the brief in support of the appeal should consider submitting a "Statement of New Legal Authorities," which is limited to the citation of new authorities and "may not contain

[89] *See* EOIR PM 21-18, "Revised Case Flow Processing Before the Immigration Courts" (Apr. 2, 2021), https://www.justice.gov/eoir/book/file/1382736/download.

[90] EOIR Policy Manual, Pt. II, Immigration Court Practice Manual, Ch. 3.1(b)(2), https://www.justice.gov/eoir/eoir-policy-manual/ii/3/1.

[91] If the practitioner did not seek cancellation of removal before the IJ because BIA or U.S. court of appeals precedent foreclosed the stop-time argument prior to *Niz-Chavez*, practitioners should consider the best strategy for seeking remand in light of the specific facts, procedural posture, and U.S. court of appeals precedent. However, in such cases practitioners may highlight that the IJ had a duty to develop the record and identify relief. *See* 8 C.F.R. § 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter. . . ."); *see also Matter of J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006).

[92] *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992) ("Where a motion to remand simply articulates the remedy requested by an appeal, we treat it as part of the appeal and do not require it to conform to the standards for consideration of motions."). As such, practitioners would still title the brief as a "Brief in Support of Appeal."

any legal argument or discussion," or a "Motion to Accept Supplemental Brief," which should include the reasons that the BIA should permit the respondent to supplement the original brief.[93]

On the other hand, a motion to remand is required if the client would not have been eligible for cancellation of removal or voluntary departure even if *Niz-Chavez* had been the law at the time the case was decided before the IJ—*e.g.*, because they then lacked the requisite period of physical presence or continuous residence. In this example, the new facts—the requisite time completed in the United States—combined with the new law make the client eligible for cancellation. A motion to remand seeks to return jurisdiction of a case pending before the BIA to the IJ for consideration of newly available evidence or newly acquired eligibility for relief.[94] Practitioners may file a motion to remand at any time while the appeal is pending at the BIA and must include new evidence or applications for relief with the motion.[95] In granting a motion to remand, the BIA may consolidate the motion with the underlying appeal.

Practitioners may also wish to seek termination of the removal proceedings either before the IJ or before the BIA and preserve the argument that a defective NTA deprives the court of authority to proceed, or that the defective NTA violates a claim-processing rule.

b. Cases with final orders by IJs or the BIA

Whether or not an individual appealed a removal order to the BIA or the court of appeals, practitioners may consider a motion to reconsider or a motion to reopen to benefit from the *Niz-Chavez* decision. However, practitioners should be aware of the numerical limitations and filing deadlines for each type of motion. Congress afforded all individuals the opportunity to file a motion to reconsider or a motion to reopen and these motions, respectively, must be filed within 30 or 90 days of the final order.[96] Motions to reconsider are appropriate when the IJ or BIA errs as a matter of law or fact and the motion must specify the "errors of law or fact in the previous order and . . . be supported by pertinent authority,"[97] An example of an error of law would be the adjudicator's incorrect interpretation of the stop-time rule prior to *Niz-Chavez* allowing a hearing notice to "cure" a defective NTA and stop time. Motions to reopen are appropriate to present new evidence, for example new eligibility for cancellation in light of the *Niz-Chavez* decision in cases where the noncitizen did not seek cancellation during the original IJ proceedings.[98]

---

[93] EOIR Policy Manual, Part III, BIA Practice Manual, Ch. 4.6(g)(i)-(ii), https://www.justice.gov/eoir/eoir-policy-manual/iii/4/6.
[94] *See* EOIR Policy Manual, Pt. III, BIA Practice Manual, Ch. 5.8(a), https://www.justice.gov/eoir/eoir-policy-manual/iii/5/8; *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (recognizing motions to remand for cases on appeal with the BIA and noting that substantive motion to reopen standard applies); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996) (setting forth general standard for reopening).
[95] EOIR Policy Manual, Pt. III, BIA Practice Manual, Ch. 5.8(b)-(c), https://www.justice.gov/eoir/eoir-policy-manual/iii/5/8; *see* 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3).
[96] INA § 240(c)(6) (motions to reconsider); INA § 240(c)(7) (motions to reopen). In the Seventh Circuit, which has concluded that INA § 239(a)(1) is a claim-processing rule, practitioners may want to argue excusable delay and prejudice in motion to reopen cases in which the respondent did not timely challenge the defective NTA during the previous immigration court proceedings. *See Chen v. Barr*, 960 F.3d 448, 449 (7th Cir. 2020).
[97] INA § 240(c)(6)(C); *see also Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006).
[98] 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3).

In deciding whether to pursue a motion to reconsider or a motion to reopen, assuming either option is available to the client, practitioners should consider the filing requirements for each.[99] For example, a motion to reconsider does not require submitting the cancellation application and evidence of eligibility for relief, unlike a motion to reopen which requires a higher evidentiary standard.[100]

Practitioners with clients newly eligible for cancellation in light of *Niz-Chavez* whose removal orders were issued fewer than 90 days before seeking to reopen should consider filing a motion to reopen presenting the client's defective NTA, a short declaration from the client regarding continuous physical presence or continuous residence as new evidence of cancellation eligibility, and the cancellation application. Practitioners pursuing a motion to reopen within 90 days of the removal order should argue in the alternative that "even if this motion is construed as a motion to reconsider, it should still be treated as timely filed because [insert tolling argument]," should the adjudicator believe that the correct vehicle is a motion to reconsider. Motions to reopen or reconsider denied by IJs are appealable to the BIA.[101] BIA decisions affirming an IJ denial of a motion or denying a motion in the first instance are reviewable on petition for review (PFR) to the U.S. court of appeals with jurisdiction over the immigration court.[102]

Both the time and numerical limitations on these statutory motions are subject to equitable tolling, a longstanding principle through which courts can excuse failure to comply with non-jurisdictional deadlines that litigants miss despite diligent efforts to comply. Therefore, if more than 30 or 90 days have elapsed since a removal order became final, individuals nevertheless may file a statutory motion if they successfully make—and document with evidence—an argument that the filing deadline should be equitably tolled. In general, to succeed on an equitable tolling argument, a noncitizen must demonstrate an extraordinary circumstance that prevented timely filing and that they acted with due diligence in pursuing their rights.[103]

Generally, it is best practice to file the motion to reconsider within 30 days or a motion to reopen within 90 days of discovering facts that merit equitable tolling of the deadline, which in this case is the *Niz-Chavez* decision, *i.e*., by Tuesday, June 1, 2021 (while Saturday, May 29 is 30 days, Monday is Memorial Day) or Wednesday, July 28, 2021 (90 days). However, since the 30-day deadline for a motion to reconsider has passed and the motion to reopen 90-day deadline is

---

[99] *Compare* 8 C.F.R. §§ 1003.2(b), 1003.23(b)(2) (stating filing requirements for motions to reconsider); *with* 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3) (stating filing requirements for motions to reopen).

[100] Practitioners pursuing a motion to reopen to seek cancellation should ensure that the motion includes a cancellation application and evidence of eligibility for relief, or else risk summary denial by the IJ or BIA. For more information on motions to reopen, see, for example, American Immigration Council, *The Basics of Motions to Reopen EOIR-Issued Removal Orders* (Feb. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf; CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (Oct. 12, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders.

[101] 8 C.F.R. § 1003.1(b).

[102] 8 U.S.C. § 1252(b)(2).

[103] *See, e.g., Holland v. Florida*, 560 U.S. 631, 649 (2010) (stating that a petitioner is entitled to equitable tolling only if he shows (1) that "he has been pursuing his rights diligently" and (2) that "some extraordinary circumstance stood in his way" and prevented timely filing).

imminent, practitioners who are unable to comply with these deadlines may still present an equitable tolling argument based on facts specific to the client.[104] In *Niz-Chavez*-based motions with equitable tolling claims, practitioners may wish to argue that the extraordinary circumstance that prevented timely filing was DHS's error in issuing a defective NTA and/or EOIR's erroneous (now rejected) construction of the stop-time rule, in addition to facts specific to the client. It is important to document a noncitizen's diligence from the time of the final order of removal through the filing of a motion within a reasonable time of the *Niz-Chavez* decision. Note, however, that after *Pereira*, the Tenth and Third Circuits issued decisions concluding that only a compliant NTA could trigger the stop-time rule.[105] It will thus be challenging for practitioners in these jurisdictions to argue equitable tolling based on the *Niz-Chavez* decision, though they may have other tolling arguments or other bases to seek untimely reopening. In addition to a tolling argument, practitioners should also include a *sua sponte* reconsideration or reopening argument in the alternative.[106]

In absentia orders of removal are subject to different rescission and reopening rules.[107] There is no deadline to file a motion to rescind and reopen *in absentia* removal orders based on lack of notice.[108] Practitioners proceeding on a lack of notice argument when filing a *Niz-Chavez*-based motion to rescind and reopen because a defective NTA does not provide the statutorily required notice may therefore file a motion to rescind and reopen at any time. Practitioners may include an alternative request for *sua sponte* reopening, especially when claiming new eligibility for cancellation relief. If claiming new eligibility for relief in the motion to rescind and reopen, practitioners should include the cancellation application and evidence of *prima facie* eligibility.

While practitioners may benefit from equitable tolling and the lack of a deadline for lack of notice-based motions to rescind and reopen, practitioners should consider seeking prosecutorial discretion on motions to reopen. On June 9, 2021, DHS issued "Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland*" instructing ICE attorneys appearing before EOIR to exercise prosecutorial discretion on a case-by-case basis by joining or not opposing a motion to reopen that demonstrates that the

[104] Equitable tolling claims should be well documented, including through declarations from the noncitizen detailing all efforts made to pursue their claims and/or obstacles that prevented them from timely filing as well as declarations from counsel evidencing how and when the noncitizen learned of *Niz-Chavez* and its impact on the case. *See, e.g.*, *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344-45 (5th Cir. 2016) (stating that the BIA should give due consideration to the specific facts and realities of the case and should not apply the equitable tolling standard "too harshly"); *Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017).

[105] *Guadalupe v. Att'y Gen. U.S.*, 951 F.3d 161, 165 (3d Cir. 2020); *Banuelos v. Barr*, 953 F.3d 1176 (10th Cir. 2020).

[106] 8 C.F.R. §§ 1003.2(a), 1003.23; *see also Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999) (stating that *sua sponte* is "an extraordinary remedy reserved for truly exceptional situations"); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (finding *sua sponte* reopening is warranted "in unique situations where it would serve the interest of justice"); *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (noting that the BIA can "reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy.").

[107] INA § 240(b)(5)(C); 8 C.F.R. § 1003.26.

[108] INA § 240(b)(5)(C)(ii). Motions to rescind and reopen *in absentia* removal orders based on exceptional circumstances must be filed within 180 days of the IJ's final order. However, the 180-day deadline for seeking rescission based on exceptional circumstances also is subject to equitable tolling.

respondent is *prima facie* eligible for cancellation of removal.[109] Consistent with motions to reopen requirements, practitioners must submit complete cancellation of removal applications, including supporting documentation. The guidance instructs ICE attorneys to join or not oppose these motions to reopen from now until 180 days from the date of the *Niz-Chavez* decision.[110] While typically practitioners should file a motion within 90 days of discovering the facts that merit equitable tolling (which in this case would be Wednesday, July 28, 2021), this 180-day period is significantly more generous. In reviewing these requests, ICE attorneys will follow applicable guidance on the exercise of prosecutorial discretion, including the May 27, 2021, memorandum from the ICE Principal Legal Advisor, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities.[111] EOIR will then decide whether to reopen such cases, and the June 11, 2021 EOIR memorandum titled "Effect of Department of Homeland Security Enforcement Priorities," reminds IJs that "[t]he role of the immigration court and the BIA, like all other tribunals, is to resolve disputes" and that "it is imperative that EOIR's adjudicators use adjudication resources to resolve questions before them in cases that remain in dispute."[112] Indeed, unopposed motions to reopen and joint motions to reopen do not present questions that remain in dispute.

c. Cases before the Courts of Appeals

Individuals with a pending PFR before a circuit court who preserved a challenge to a defective NTA should consider filing a motion to summarily grant the PFR or a motion to remand to the BIA. Furthermore, petitioners with PFRs pending for other reasons, such as an appeal of a denied asylum application, may wish to confer with opposing government counsel to seek an unopposed motion to remand for consideration of new *prima facie* cancellation eligibility. If briefing moves forward, *Niz-Chavez*'s applicability may be raised in briefing. If briefing is complete, the appropriate way to raise *Niz-Chavez* is a letter under Federal Rule of Appellate Procedure (FRAP) 28(j). In a PFR where arguments under *Niz-Chavez* were not preserved, it is advisable to file a *Niz-Chavez*-based motion to reconsider or motion to reopen with the BIA.[113] If the PFR is at the briefing stage, practitioners should file a motion with the circuit court to hold PFR briefing in abeyance pending the BIA's adjudication of the *Niz-Chavez* motion. In this situation, practitioners should attach the *Niz-Chavez* motion as an exhibit to the abeyance motion.

---

[109] "ICE Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland*" (June 9, 2021), https://www.ice.gov/legal-notices.

[110] *Id*. Note that if ICE OPLA joins a motion to reopen, there is no motion to reopen filing fee. *See* 8 CFR §§ 1003.24(b)(2)(vii).

[111] Memorandum from John D. Trasvina, ICE Principal Legal Advisor, "Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities" (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf. Practitioners should also be familiar with guidance issued by the OPLA office with jurisdiction over the joint motion to reopen request, which may be more specific and require further documentation.

[112] Memorandum from Jean King, Acting Director, EOIR, "Effect of Department of Homeland Security Enforcement Priorities" (June 11, 2021), https://www.justice.gov/eoir/book/file/1403401/download.

[113] *See, e.g.*, *Mazariegos-Paiz v. Holder*, 734 F.3d 57, 63 (1st Cir. 2013) (a court must "allow[] the agency the first opportunity to correct its own bevues.").

VI. CONCLUSION

The Supreme Court's *Niz-Chavez* decision signals that the BIA and U.S. courts of appeals that gave *Pereira* its narrowest possible reading, erred. It is clear following *Niz-Chavez* that many noncitizens whose ability to seek cancellation of removal was foreclosed by the stop-time rule, may now have the ability to seek this relief. Whether *Niz-Chavez* has broader implications for voluntary departure applicants and for those filing motions to terminate or motions to reopen or rescind *in absentia* removal orders, remains to be seen. It is likely that issues surrounding defective NTAs will continue to be litigated for some time and practitioners should be certain to preserve every possible issue for appeal as answers to the many questions raised by *Pereira* and *Niz-Chavez* are resolved by the courts.