



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: [REDACTED]

Date of this Notice: 6/9/2023

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Userteam: Docket

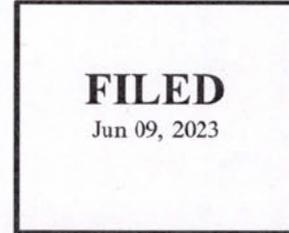
NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

[REDACTED]

Respondent



ON BEHALF OF RESPONDENT: Yasmin E. Voglewede, Esquire

ON BEHALF OF DHS: Yolanda C. Rodriguez, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS

On Appeal from a Decision of the Immigration Court, Pearsall, TX

Before: Montante, Appellate Immigration Judge

MONTANTE, Appellate Immigration Judge

The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 4, 2023, decision terminating these proceedings without prejudice. The DHS has filed a brief in support of the appeal. The respondent has filed a motion to dismiss the appeal.¹ The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Honduras. On December 10, 2020, the DHS personally served the respondent with a notice to appear (Form I-862) ("NTA"). The NTA ordered the respondent to appear before the San Antonio Immigration Court at a date and time "to be set." DHS filed the notice to appear with the San Antonio Immigration Court on January 4, 2020. Venue was changed to the Pearsall Immigration Court following the respondent's being taken into DHS custody. On November 15, 2022, the respondent appeared at the Pearsall Immigration Court and made an oral motion to terminate these proceedings to terminate these proceedings without prejudice pursuant to *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022) because the notice to appear lacked a date and time of the respondent's initial hearing before the Immigration Judge (IJ

¹ We deny the respondent's motion to dismiss the DHS appeal because the Notice of Appeal was served on the respondent rather than his attorney of record in removal proceedings. Under the circumstances here, service of the Notice of Appeal directly to the respondent provided adequate notice of the DHS appeal.

at 1-3; Tr. at 37-40). The respondent argued that his notice to appear was legally defective and was insufficient to commence removal proceedings, because it did not contain the date and time of his initial removal hearing. *See* section 239(a)(1) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1229(a)(1).

The Immigration Judge granted the respondent’s oral motion over the written objection of the DHS. In terminating, the Immigration Judge concluded that: (1) NTA violated a claims processing rule because it did not specify the time and date that the proceedings will be held; (2) the respondent timely objected to the deficiency; (3) the DHS’ attempt to cure the defect was insufficient; and (4) termination of the proceedings without prejudice was the appropriate remedy (IJ at 1-3). The DHS’ appeal followed.

On appeal, the DHS contends that the Immigration Judge erred in concluding that its attempt to cure the defect in the NTA, by filing Additional Charges of Inadmissibility/Deportability (Form I-261) on November 17, 2022, that purported to amend the NTA to indicate that the proceedings would be held on January 14, 2021, was not sufficient (IJ at 1-3; Exh. 2 (unpaginated); DHS Br. at 3-8).²

We affirm the Immigration Judge’s determination that the DHS may not remedy a defective NTA by filing a Form I-261. The starting point for this inquiry is with the regulation that authorizes the use of a Form I-261 namely, 8 C.F.R. § 1003.30. The salient part of the regulation for this case is its first sentence: “At any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations may be lodged by the Service in writing.” DHS argues that this provision authorizes it to use a Form I-261 to remedy a defective NTA by including a specific date and time (DHS Br. at 8). The gist of DHS’ argument is that in other contexts a Form I-261 is used to effectively amend the NTA so it should be permitted to do so in this context. While that argument seems reasonable in the abstract, we are required to follow the text of the regulation and that is where DHS runs into trouble. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (requiring agencies to follow the plain language of a regulation). A Form I-261 can only be used to add or substitute: (1) charges; or (2) factual allegations.

The date and time that is required to be written on the NTA is not a charge because charges are the legal grounds for removal (*see* sections 212 and 237 of the INA; 8 U.S.C. §§ 1182 and 1227). The date and time of the removal proceeding are not factual allegations at least as ordinarily understood for a NTA. Factual allegations ordinarily include an identification of the country where the respondent is a citizen, how the respondent came to the United States, and any other pertinent information supporting the charge(s). The date and time that respondent is ordered to appear before an Immigration Judge is not a fact. The very structure of the NTA belies DHS’ implicit argument here because the factual allegations are contained in top half of the form, followed by the charges. The space for identifying the date and time on the NTA is at the bottom of the form and prefaced by “YOU ARE ORDERED to appear” language. The plain language of the

² DHS does not challenge the finding that the NTA was defective or that the respondent timely objected to the deficiency.

regulation thus does not allow amendment of the date and time on the NTA by using a Form I-261. Nothing, of course, prohibits the Attorney General from modifying the regulation in the future to permit DHS to take the action it has done so here, but that must be done through the regulatory process.

We are reluctant to interpret the regulation the way DHS asks for another reason. In *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021), the Supreme Court emphasized the government's obligation to "turn square corners." Just as we expect a respondent to comply with an Immigration Judge's scheduling order or to make an asylum claim on an asylum application (and not a cancellation of removal application), it is only fair to expect the government to utilize its official forms the way it prescribes and not differently. Authorizing DHS to use a Form I-261 to amend the date and time of the defective NTA would not be faithful to our obligation to "turn square corners" and so we must say no to DHS' request to remedy the defective notice to appear this way. See *Niz-Chavez*, 141 S. Ct. at 1485-86 (providing that "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text'"); see also *Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989) (providing that the Board and Immigration Judges only have such authority as is created and delegated by the Attorney General).

There is a second problem with the DHS' proposal that relates back to *Niz-Chavez* and whether a notice of hearing can cure a defective NTA that lacks a date and time. Describing this as "notice-by-installment," the Supreme Court in *Niz-Chavez* rejected it because the statute requires "a single document containing the required information, not a mishmash of pieces with some assembly required." *Niz-Chavez*, 141 S. Ct. at 1480. This conclusion, therefore, presents another dilemma for DHS' proposed solution as the required information will be in two documents – the NTA and the Form I-261 and the DHS needs to remedy the defective NTA in a way that harmonizes with the Supreme Court's "single document" requirement. See *Niz-Chavez*, 141 S. Ct. at 1480. That has not happened here.³

We remind DHS of the "safe harbor" that we set forth in *Matter of Fernandes* – request that the Immigration Judge dismiss the case without prejudice and file a new NTA that includes the date and time. See *Matter of Fernandes*, 28 I&N Dec. at 616 (citing 8 C.F.R. §§ 239.2(a), (c), 1239.2(a), (c)). Doing so will end this aspect of the litigation (in this case and others like it).⁴ Accordingly, the following order will be entered.

ORDER: The DHS' appeal is dismissed.

³ Nor does the retroactive "amendment" of an NTA to include the time and date of a past hearing satisfy the notice requirement embodied in section 239(a)(1)(G)(i) of the INA, 8 U.S.C. § 1229(a)(1)(G)(i) (requiring an NTA to include "the time and place at which proceedings *will be held.*") (emphasis added).

⁴ The DHS is free to file a new NTA in relation to this respondent that is compliant with the requirements set forth section 239(a)(1) of the INA, 8 U.S.C. § 1229(a)(1).