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U. S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF:	**)**
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Amicus Invitation No. 20-21-07	**)**
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BRIEF FOR THE ROUND TABLE OF FORMER IMMIGRATION JUDGES AS *AMICUS CURIAE*

INTERESTS OF AMICI

Amici curiae are former Immigration Judges and members of the Board of Immigration Appeals, who seek to address the issue presented in the Board of Immigration Appeal's amicus invitation, specifically, "[w]hether, and if so to what extent, *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), impacts the jurisdiction of an Immigration Court where the Notice to Appear fails to satisfy the statutory requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a)."

Amici were appointed to serve at Immigration Courts around the United States and with the BIA, and in senior positions within the Executive Office of Immigration Review. From their combined centuries of service, *amici* have intimate knowledge of the operation of the Immigration Courts and the practical workings of the Immigration Courts and BIA. The individual *amici* are listed by name in the attached request to appear as *amicus curiae*.

DISCUSSION

Niz-Chavez further clarified *Pereira*

In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court held that a putative charging document that lacks a date and place of hearing is not a notice to appear under section 239(a) of the Immigration & Nationality Act, and therefore does not trigger the stop-time rule for cancellation of removal under section 240A(b) of the Act.

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Court clarified its decision in *Pereira* as follows: (1) It made clear that all references to an NTA refer to the same document, thus rejecting DHS's claim that there can be two distinct documents using the same name. *Niz-Chavez*, *supra* at 1483. (2) The Court further described the NTA as "the basis for commencing a grave legal proceeding," which it noted the government likened to an indictment in a criminal case. *Id*. at 1482. (3) The Court held that all of the information that the statute requires an NTA to contain must be included in a single document, thus rejecting the two-step notice process accepted by the Board in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), in which the information absent from the Notice to Appear ("NTA") is contained in a subsequent hearing notice mailed by the Immigration Court. In the view of the Court, a government may not "charge a defendant in 'an indictment' issued piece by piece over months or years. And it is unclear why we should suppose Congress meant for this case-initiating document to be different." *Id*. at 1482.

These subsequent clarifications have serious implications for the Board's decision in *Bermudez-Cota*. The BIA's holding in that case relied upon its view that a two-step, two-agency system of notice could together constitute an NTA as defined by section 239(a) of the Act. That view cannot survive *Niz-Chavez*, which unambiguously rejects the multiple notice theory. *Niz-Chavez* clarified that those provided with incomplete charging documents lacking times and dates of hearings

have not been served with NTAs, the specific document that serves as the basis for commencing removal proceedings. The remaining question to be answered concerns what consequences arise from the failure to initiate proceedings with a valid NTA.

Case law appears to provide two options. The first is that since 8 C.F.R. § 1003.14(a) states that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service," then jurisdiction does not vest when what was served on the Immigration Court by DHS does not meet the definition of a "charging document" under 8 C.F.R. § 1003.13.

In the second option, the above-cited regulatory requirements would constitute "claim-processing rules," which the Supreme Court has defined as "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). The Court stated that claim-processing rules "should not be described as jurisdictional," but added that the question "is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule." *Id*.

The U.S. Court of Appeals for the Seventh Circuit reached the conclusion (subsequent to *Pereira* but prior to *Niz-Chavez*) that the filing of a defective NTA

is not jurisdictional, but constitutes "the agency's version of a claim-processing rule, violations of which can be forfeited if an objection is not raised in a timely manner." *Ortiz-Santiago v. Barr*, 924 F.3d 956, 958 (7th Cir. 2019). The Seventh Circuit explained that the "failure to comply with that rule may be grounds for dismissal of the case." *Ortiz-Santiago v. Barr*, *supra* at 963. The court continued that in order to obtain a dismissal, a party must make a timely objection. *Id*. at 964 (citing *Eberhart v. U.S.*, 126 S. Ct. 403 (2005)). The court held 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." *Ortiz-Santiago v. Barr*, *supra* at 965.

We agree with the arguments in support of the first option as set forth in the briefs of *amici* National Immigration Law Center and the University of Houston Law Center. We wish to add as former EOIR judges (who, in some cases, were previously attorneys with DHS or legacy INS) that in spite of the prosecutorial function of other divisions within the Department of Justice, in the Immigration Court and BIA context, there exists a clear separation of duties between DHS and EOIR. DHS is the prosecutor charged with commencing proceedings by properly serving the Immigration Court with an NTA that complies with all legal requirements. And it is EOIR's role to conduct fair and independent hearings only after they have been properly commenced by DHS. Any misapprehension over these roles that is reflected in the language of 8 C.F.R. § 1003.18(b) (allowing DHS to include the date and place and date of the initial hearing only "when

practicable") has been put to rest by the decision in *Niz-Chavez*, which clearly nullifies the regulatory language as *ultra vires*.

Should the Board determine that the issue is not jurisdictional in spite of the clear language of 8 C.F.R. § 1003.14(a) concerning jurisdiction vesting when an NTA is filed, it should at the very least adopt in the alternative the requirement that proceedings "commenced" through the filing of a defective putative NTA will be dismissed upon a party's timely motion under the reading in *Ortiz-Santiago*.[1]

Application to *In Absentia* Orders

However, *Niz-Chavez* has a clear impact in the *in absentia* context. Section 240(b)(5)(A) of the Act states that an *in absentia* order of removal shall be entered when the respondent did not attend a hearing after receiving the written notice required under section 239(a)(1) or (2) of the Act. But as *Pereira* and *Niz-Chavez* make clear, section 239(a) sets forth the requirement that an NTA contain the time and place of the hearing. As under *Pereira*, no respondent who received a document lacking a time and date of hearing received the proper written notice required under section 239(a)(1) of the Act, the statutory requisite for the entry of an *in absentia* order of removal under section 240(b)(5)(A) of the Act has not been met, irrespective of whether the defective document was properly mailed and delivered. As *Niz-Chavez* has clarified that all of the required information must be

[1] We endorse the position stated in the *amicus* brief of Tahirih Justice Center that because section 239(a) of the Act represents a mandatory rule, it must be enforced when properly raised without the need for the moving party to establish prejudice.

contained in a single document, and that a subsequent notice will not cure a defective NTA, an *in absentia* order based on a defective charging document cannot stand.

In absentia orders of removal must therefore be rescinded upon motion of a party regardless of the passage of time since the entry of the order. *See* section 240(b)(5)(C)(ii) of the Act (allowing for the rescission of an *in absentia* order upon a motion filed *at any time* demonstrating that the respondent did not receive proper notice under section 239(a) of the Act); *Matter of J-G-*, 26 I&N Dec. 161, 164 (BIA 2013).

In absentia orders do not lend themselves to the claim-processing approach, as one who did not appear for their hearing had no opportunity to raise a timely objection under the standard announced in *Ortiz-Santiago v. Barr*, *supra*. Should the Board nevertheless apply that analysis in this context, it is argued that a respondent who did not appear because DHS failed to provide the notice required by the statute did not waive the right to raise objections to any violation of claim-processing rules.

The Supreme Court in *Niz-Chavez* provided an explanation for the need to include all required information (including the date and place of the hearing) in a single document. Otherwise, the Court explained 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. All of which the individual [noncitizen] would have to save and compile in order to prepare for a removal hearing.[2]

Niz-Chavez, *supra* at 1485-86.

From our cumulative experience on the bench, this precise scenario envisioned by the Court is commonly cited as a basis for non-appearances at initial removal hearings. Noncitizens may not understand the relationship between the subsequent hearing notice sent by the Immigration Court and the NTA previously issued to them by DHS, or distinguish the court notice from the separate requirement to report to DHS for scheduled check-ins.[3] Legal service providers have also found that respondents may be unaware that change of address information properly reported to ICE will not be shared by that agency with the Immigration Court.[4]

It is important to realize that the class of respondents expected to understand the combinations of notice and to distinguish between the various federal agencies includes children, individuals with little or no formal education, and asylum-

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[2] *Amici* substitute the term "noncitizen" for "alien" due to the latter's derogatory connotations.

[3] *See* Catholic Legal Immigration Services, Inc., and the Asylum Seeker Advocacy Project at the Urban Justice Center, "Denied a Day in Court" (2018) https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court.pdf at 16.

[4] *Ibid*. at 20.

seekers who may be suffering from the effects of PTSD or other psychological issues related to prior persecution or torture.

The confusion may be greater where there is a significant period of time between service of the NTA on the noncitizen and the subsequent filing of that document on the Immigration Court. For example, a recent report by TRAC Immigration indicated that "about 40 percent of NTAs filed during September 2020 had been issued by the DHS over a year earlier."[5] During that gap in time, a noncitizen may change their address, sometimes multiple times. As during that gap, the Immigration Court has no record of the respondent in its system, it lacks the ability to register a change of address; to the Immigration Court, the case does not yet exist.

The COVID-19 pandemic and the resulting closures of Immigration Courts and DHS offices has further complicated the task of understanding the need to appear for hearings. Respondents were routinely sent multiple hearing notices during the pandemic, delaying their proceedings repeatedly, and leading to confusion about their obligation to attend hearings. This is consistent with the findings of a recent study concluding that respondents have a higher likelihood of

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[5] TRAC Immigration (Syracuse Univ.), "Immigration Court Cases Jump in June 2021; Delays Double This Year," (July 28, 2021) https://trac.syr.edu/immigration/reports/654/.

non-appearance at their initial Master Calendar hearing than at subsequent hearings.[6]

The challenge of deciphering the scattered information has been complicated by the fact that only 59 percent of the more than 1.3 million respondents presently in proceedings are represented by legal counsel (according to EOIR's own statistics).[7] The sheer volume of cases has overwhelmed the legal community, resulting in well over half a million *pro se* respondents in the present Immigration Court backlog. The same recent study by Eagly and Shafer referenced above found that having counsel greatly increased the rate of appearance in Immigration Court, with represented respondents failing to appear only 8 percent of the time.[8]

For the above reasons, *in absentia* orders of removal should be vacated in cases in which the initiating document did not constitute a valid NTA due to its lacking information concerning the time and place of the initial hearing.

Conclusion

For the reasons provided above, *in absentia* orders involving proceedings commenced through a defective NTA are rendered invalid by *Niz-Chavez*. This is

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[6] Ingrid Eagly and Steven Shafer, Measuring *In Absentia* Removal in Immigration Court (American Immigration Council, Jan. 2021) https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf at 11.

[7] EOIR Adjudication Statistics (July 8, 2021) https://www.justice.gov/eoir/page/file/1062991/download.

[8] Eagly and Shafer, *supra* at fn. 2.

true whether the Board ultimately determines that the decision impacts the Immigration Courts' jurisdiction, or is in the alternative a claim-processing rule.

Respectfully submitted,

Dated: August 10, 2021

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Jeffrey S. Chase, Esq.