No.

IN THE

Supreme Court of the United States

AGUSTO NIZ-CHAVEZ,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 9, 2020

QUESTION PRESENTED

The Attorney General can cancel removal of certain immigrants under 8 U.S.C. § 1229b(a) and (b). To be eligible for cancellation of removal, a non-permanent resident must have ten years of continuous presence in the United States, and a permanent resident must have seven years of continuous residence. *Id.* § 1229b(a)(2), (b)(1)(A). Under the "stop-time rule," the government can end those periods of continuous residence by serving "a notice to appear under section 1229(a)," which, in turn, defines "a 'notice to appear'" as "written notice . . . specifying" specific information related to the initiation of a removal proceeding. *Id.* §§ 1229b(d)(1), 1229(a)(1). In *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018), this Court held that only notice "in accordance with" section 1229(a)'s definition triggers the stop-time rule.

The question presented in this case is:

Whether, to serve notice in accordance with section 1229(a) and trigger the stop-time rule, the government must serve a specific document that includes all the information identified in section 1229(a), or whether the government can serve that information over the course of as many documents and as much time as it chooses.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit:

Niz-Chavez v. Barr, No. 18-4264 (Oct. 24, 2019)

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Petitioner Agusto Niz-Chavez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-15a) is reported at __ Fed. Appx. __, 2019 WL 5446002. The decisions of the Board of Immigration Appeals (Pet. App. 16a-25a) and the immigration judge (Pet. App. 26a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1229b(b)(1) provides in relevant part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> > (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application * * * * .

8 U.S.C. § 1229b(d)(1) provides in relevant part:

> For purposes of this section, any period of continuous residence or continuous physical pres-

ence in the United States shall be deemed to end * * * when the alien is served a notice to appear under section 1229(a) of this title * * *.

8 U.S.C. § 1229(a)(1) provides:

> In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:
>
> (A) The nature of the proceedings against the alien.
>
> (B) The legal authority under which the proceedings are conducted.
>
> (C) The acts or conduct alleged to be in violation of law.
>
> (D) The charges against the alien and the statutory provisions alleged to have been violated.
>
> (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).
>
> (F)
>
> (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting

proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)

(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

The full text of Sections 1229 and 1229b, together with other relevant statutes and regulations, are reproduced in the Appendix, *infra*, at 43a-64a.

INTRODUCTION

This case concerns an acknowledged circuit conflict concerning the immigration stop-time rule. Particularly deserving immigrants who have been in the United States for specified periods of time can pursue cancellation of removal, a vital form of discretionary relief. The stop-time rule allows the government to stop immigrants from accruing additional time in the United States for purposes of eligibility for cancellation of removal, and potentially to cut them off from even asking for discretionary relief.

To stop the time, the statute requires the government to take a specific action: the government must "serve[] a notice to appear under section 1229(a)." 8 U.S.C. § 1229b(d)(1). That section, which governs the initiation of removal proceedings, defines the term "a 'notice to appear'": It is "written notice … specifying" a particular set of information related to the removal proceeding, including the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1). The government resisted the notion that this statutory language defined a "notice to appear," but two Terms ago, this Court disagreed, calling it "quintessential definitional language." *Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018).

The circuit conflict at issue arose because the government has consistently refused to do what section 1229(a) requires—but still seeks to invoke the stop-time rule to render immigrants ineligible for discretionary relief. Both the text and history of section 1229(a) show that section 1229(a) defines and requires a specific notice *document* that provides a noncitizen being placed in removal proceedings with *all* of the required information in one place. Indeed, in enacting section 1229(a), Congress explicitly *rejected* a prior statutory provision that allowed service of some of the required information—the time and place of proceedings—in a separate document. Thus, shortly after Congress enacted section 1229(a), the government recognized that section 1229(a) requires service of a specific *form* that provides *all* the specified information, including the time-and-place information. 62 Fed. Reg. 449 (Jan. 3, 1997). Inexplicably, however, the government has refused to do what it conceded the statute required, and almost never

includes the time and place of proceedings in serving notices to appear. *See Pereira*, 138 S. Ct. at 2111.

The government first attempted to avoid the stop-time consequences of this extra-statutory practice by arguing that it can trigger the stop-time rule by serving a document it *labels* a "notice to appear," regardless whether that document actually satisfies section 1229(a)'s definition of that term. The Board of Immigration Appeals ("BIA") accepted the government's position, and a majority of the courts of appeals deferred to the BIA's decision. *See Pereira*, 138 S. Ct. at 2112-13, 2114 n.4. This Court, however, granted certiorari and rejected the government's position, holding that the stop-time rule unambiguously requires notice "in accordance with" section 1229(a)'s substantive, definitional requirements. 138 S. Ct. at 2117.

After *Pereira*, the government came up with a new theory as to why its extra-statutory notice practice triggers the stop-time rule. It now claims—contrary to both its own and the BIA's prior position—that "a 'notice to appear'" in section 1229(a) is not actually a specific notice *document*, but is merely a collection of information that the government can provide in as many notices, and over as much time, as the government chooses.

That argument has led to an entrenched conflict in the courts of appeals. A closely divided BIA, in its first en banc opinion in a decade, accepted the government's position over a vigorous dissent. Three courts of appeals have since rejected that decision and held that section 1229(a) requires a specific notice *document*. Two courts of appeals, by contrast,

have accepted the government's and BIA majority's position.

This Court should grant certiorari to resolve this circuit conflict. Not only is the conflict entrenched, and not only does it involve deep-seated disagreement that cannot be resolved without this Court's intervention, but the question on which the courts are divided is incredibly important, as it could determine the fate of thousands of immigrant families—families like that of petitioner Agusto Niz-Chavez, who seeks to remain in the country to care for his three young, U.S.-citizen children, two of whom have significant medical issues. A question that arises with such frequency, and that has such dramatic implications, should not turn on the happenstance of the immigration court in which removal proceedings were brought.

STATEMENT

A. The government must serve notice "in accordance with" section 1229(a) to trigger the stop-time rule.

1. For more than a century, the immigration laws have given the Attorney General (or another official) discretion to allow deserving immigrants with U.S. family connections to remain as lawful permanent residents, even if they were otherwise inadmissible or removable. *See, e.g.*, Immigration Act of 1917, § 3, proviso 7, ch. 29, 39 Stat. 874, 878. As one Congressional report explained, such provisions are intended to protect "aliens of long residence and family ties in the United States," whose removal "would result in a serious economic detriment to the[ir] family." S. Rep. No. 81-1515, at 600 (1950).

The current statute gives the Attorney General the power to grant "cancellation of removal," and a green card, to eligible non-permanent residents when their removal would cause "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a United States citizen or lawful permanent resident. 8 U.S.C. § 1229b(b). This discretionary relief is only available to those with "good moral character" who have not been convicted of specified criminal offenses. *Id.* The Attorney General can also cancel removal for permanent residents who have not been convicted of an aggravated felony when the equities favor allowing them to remain in the country. *Id.* § 1229b(a); *Matter of Sotelo-Sotelo*, 23 I. & N. Dec. 201, 203 (BIA 2001). Cancellation is one of the most important tools for keeping immigrant families united and allowing immigrants who have made positive contributions to their communities to remain in the country.

To be eligible, an applicant for cancellation of removal as a non-permanent resident must have "been physically present in the United States for a continuous period of not less than 10 years[.]" 8 U.S.C. § 1229b(b)(1). If the applicant is a lawful permanent resident, the required period is 7 years of continuous residence. *Id.* § 1229b(a)(2).[1]

2. Congress enacted the stop-time rule at issue in this case to address a very specific problem with earlier forms of discretionary relief. Before 1996, when eligibility for relief turned on a specified period of U.S. residence, that period continued to run during

[1] For simplicity, the term "continuous residence" is at times used in this petition to encompass both durational requirements.

the pendency of removal proceedings. *See Matter of Cisneros-Gonzalez*, 23 I. & N. Dec. 668, 671 (BIA 2004). Congress grew concerned that immigrants had an incentive to obstruct and slow removal proceedings to satisfy the residence requirement. *Id.*

In response, Congress enacted the "stop-time" rule as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, Div. C, 110 Stat. 3009-546. Under this rule, "any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title." 8 U.S.C. § 1229b(d)(1). In other words, Congress gave the government the power to end a non-citizen's accrual of continuous residence, but required that the government "serve[]" a specific document—"a notice to appear under section 1229(a)"—in order to do so. *See Pereira*, 138 S. Ct. at 2119 ("once a proper notice to appear is served, the stop-time rule is triggered").

3. The "notice to appear" was also created as part of IIRIRA. Prior to 1996, what were then called deportation proceedings were initiated with "an 'order to show cause.'" *See* 8 U.S.C. § 1252b(a)(1) (1994). The statute defined that document as "written notice … specifying" particular information about the proceeding, including information like the "acts or conduct alleged to be in violation of law," the "charges against the alien and the statutory provisions alleged to have been violated," and the fact that the "alien may be represented by counsel." *Id.* Notably, however, the "order to show cause" did *not* need to identify "the time and place at which the proceedings will be held"; that information could be provided "in the

order to show cause or otherwise." *Id.* § 1252b(a)(2)(A). This led to a two-step notice process, in which the government first served a noncitizen with an "order to show cause," and the immigration court subsequently sent the time and place of proceedings. *See* 8 C.F.R. § 242.1(b), 3.18 (1996).

In creating the "notice to appear" in IIRIRA, however, Congress rejected this flexibility and jettisoned the two-step notice process. Concerned that existing notice procedures led to unnecessary disputes about whether noncitizens received certain notices, *see* H.R. Rep. No. 104-469, pt. I, at 122, 159 (1996), IIRIRA abandoned the option of sending a hearing notice after the initial notice document, and *required* that the "time and place at which the proceedings will be held" be included in the "notice to appear" *itself*. *See* 8 U.S.C. § 1229(a)(1)(G)(i). The "notice to appear" definition was otherwise practically identical to the prior "order to show cause" definition. *Compare* 8 U.S.C. § 1252b(a)(1) (1994) *with* 8 U.S.C. § 1229(a)(1)(A)-(F).

The government initially recognized Congress's rejection of the two-step notice process. Shortly after IIRIRA was enacted, the Immigration and Naturalization Service ("INS") and the Executive Office for Immigration Review ("EOIR") jointly issued a proposed rule to implement the new "notice to appear" provision. A preamble to the regulations explained, in a section entitled "The Notice to Appear (Form I-862)," that the rule "implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear," and recognized that the government would need "automated scheduling" to issue notices to appear with the

required time-and-place information. 62 Fed. Reg. 449. Consistent with that recognition, multiple BIA decisions subsequently explained that a "notice to appear" is a "single instrument," *Matter of Ordaz*, 26 I. & N. Dec. 637, 640 n.3 (BIA 2015), and that subsequent notices, like "notice[s] of hearing," are not "a constituent part of a notice to appear," *Matter of Camarillo*, 25 I. & N. Dec. 644, 648 (BIA 2011).

The government, however, explicitly refused to do what it conceded that section 1229(a) required. The regulations that INS and EOIR ultimately adopted—now codified at 8 C.F.R. § 1003.18—specifically *authorized* the very two-step process that IIRIRA *rejected*, stating that the "notice to appear" only needed to include "the time, place and date of the initial removal hearing[] *where practicable*" (emphasis added).[2]

This regulatory exception ultimately swallowed the statutory rule. Though the regulatory preambles show that the exception was only *intended* to apply in unusual circumstances like "power outages" or "computer crashes/downtime," *see* 62 Fed. Reg. 449, by 2017 the government had begun omitting the time-and-place information from "almost 100 percent" of its putative notices to appear. *See Pereira*, 138 S. Ct. at 2111.

4. Unwilling to accept the stop-time consequences of its conceded failure to comply with section

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[2] Notably, even this extra-statutory regulation suggests that the government viewed a "notice to appear" as a single document. After all, if it were not, this regulation would be unnecessary, as the time-and-place information would be "in the Notice to Appear," 8 C.F.R. § 1003.18(b), regardless when, and in what document, it was served.

1229(a)'s requirements, the government claimed that it could serve "a notice to appear under section 1229(a)," and hence trigger the stop-time rule, *see* 8 U.S.C. § 1229b(d)(1), even if the notice it served did *not* comply with section 1229(a). The BIA agreed with the government in *Camarillo*, concluding that the phrase "notice to appear" "merely specifies the document the DHS must serve on the alien to trigger the 'stop-time' rule," but does not impose any "substantive requirements" as to what must be in that document. 25 I. & N. Dec. at 647. The BIA thus concluded that a document *labeled* as a "notice to appear" triggered the stop-time rule regardless whether it included the time and place of proceedings. Seven of the eight courts of appeals to consider the question deferred to the BIA. *See Pereira*, 138 S. Ct. at 2113 & n.4.

In *Pereira*, however, this Court rejected the BIA's decision and held that the government must serve a notice to appear "in accordance with" section 1229(a)'s requirements in order to trigger the stop-time rule. 138 S. Ct. at 2117. Section 1229(a), this Court explained, uses "quintessential definitional language" to define what a notice to appear is—*i.e.*, "'written notice' that, as relevant here, 'specif[ies] … [t]he time and place at which the [removal] proceedings will be held.'" *Pereira*, 138 S. Ct. at 2116 (quoting 8 U.S.C. § 1229(a)(1)(G)(i)). Notice that does not meet those definitional requirements is not "a proper notice to appear," and does not trigger the stop-time rule. 138 S. Ct. at 2119-20. This Court therefore held that the only relevant notice the government had served on Mr. Pereira did not trigger the stop-time rule because it lacked the required time-and-place information.

Because the government did not serve a hearing notice on Mr. Pereira until after he accrued the U.S. presence required for cancellation, *Pereira* did not explicitly address whether the government triggers the stop-time rule when it *completes* its two-step notice process—in other words, when it serves *both* a putative "notice to appear" that lacks the time-and-place information and a subsequent hearing notice. But what *Pereira* definitively establishes is that such a two-step notice process only triggers the stop-time rule *if* it is "in accordance with" section 1229(a)'s definitional requirements. *Id.* at 2117.

B. The courts of appeals are divided concerning section 1229(a)'s requirements.

After *Pereira* established that the government must comply with section 1229(a) to trigger the stop-time rule, the government abruptly abandoned its post-IIRIRA recognition that section 1229(a) defines a specific notice document that must include the time and place of proceedings. The government now claims that section 1229(a) merely identifies information that the government must serve over the course of as many documents, and as much time, as the government chooses.

A sharply divided BIA, in its first en banc decision in a decade, endorsed the government's position, reversing its own prior position that a "notice to appear" is a "single instrument," *Ordaz*, 26 I. & N. Dec. at 640 n.3. *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019). Unsurprisingly given the sharp dissent within the BIA, the courts of appeals are again divided. The Seventh, Ninth, and Eleventh Circuits have refused to defer to the BIA's position

and held that section 1229(a) does not permit a multi-step notice process. *Lopez v. Barr*, 925 F.3d 396, 402-05 (9th Cir. 2019); *Perez-Sanchez v. U.S. Attorney General*, 935 F.3d 1148, 1153-54 (11th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961-62 (7th Cir. 2019). The Fifth and Sixth Circuits have accepted the BIA's position. *Pierre-Paul v. Barr*, 930 F.3d 684, 690-91 (5th Cir. 2019); *Garcia-Romo v. Barr*, 940 F.3d 192, 199-205 (6th Cir. 2019).

1. The BIA's first post-*Pereira* discussion of section 1229(a) was in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018). That decision concerned a different issue raised by *Pereira*: whether a putative notice to appear that lacks time-and-place information could vest subject matter jurisdiction in the immigration court. The BIA held that nothing in the statute makes compliance with section 1229(a) a prerequisite for the immigration court's jurisdiction—a holding that is not at issue here. But the BIA also concluded in the alternative, with little analysis, that section 1229(a) does *not* define a specific form of notice, and that "a two-step notice process is [thus] sufficient to meet the statutory notice requirements in section [1229(a)]." *Id.* at 447.

The BIA reconsidered section 1229(a)'s requirements in its nine-to-six en banc decision in *Mendoza-Hernandez*, which addressed section 1229(a)'s requirements in the context of the stop-time rule. A slight majority of the BIA interpreted section 1229(a) to allow the government to serve *multiple* notices that, pieced together, provide all of the information required by section 1229(a)'s definition of "a 'notice to appear.'" *Id.* at 531. The BIA concluded that although the statute's reference to "a" notice to appear

"is in the singular," the statute nevertheless does not require that the notice come "in a single document." *Id.* Instead, "it may be provided in one or more documents—in a single or multiple mailings." *Id.* The BIA recognized that it had previously reached the opposite conclusion, but reversed course with the almost entirely unexplained statement that its previous analysis was "flawed." *Id.* at 525 & n.8.

Six Board Members dissented, concluding that the majority's position is irreconcilable with the statute's text and history. *Id.* at 536 (Guendelsberger, Board Member, dissenting). The dissent explained that "the statute contains no ambiguity or gap that would permit a 'combination' approach to trigger the stop time rule," as the "statute refers to a single document, 'a notice to appear[.]'" *Id.* Thus the plain language, even on its own, "leaves no room for the majority's conclusion that a subsequent notice of hearing can cure a notice to appear that fails to specify the time and place of the initial removal hearing." *Id.* at 545. Moreover, the majority's position flies in the face of IIRIRA, which explicitly *rejected* the two-step process, mandating instead "a one-step 'notice to appear.'" *Id.* at 539. The two-step process therefore cannot be "in accordance with" section 1229(a), and does not trigger the stop-time rule.

2. Three courts of appeals have already rejected the BIA majority's position as conflicting with section 1229(a)'s unambiguous command.

The Ninth Circuit, in *Lopez*, rejected the BIA's decision because section 1229(a) "speaks clearly" and requires "service of a single document—not multiple." 925 F.3d at 402. Section 1229(a) "*defines* what a notice to appear is," and that definition explicitly

"use[s] the singular" in referring to the notice required. *Id.* at 402-03. The court concluded that the BIA majority reached a contrary decision only by "ignor[ing] the plain text of the statute." *Id.* at 403. Moreover, as the court noted, nothing stopped the government from "issu[ing] a Notice that complies with the statute"—thus, any stop-time issues with this interpretation of section 1229(a) lie squarely with the government's refusal to adhere to the statute's commands. *Id.* at 404 (citing *Pereira*, 138 S. Ct. at 2111). Judge Callahan dissented. She argued primarily that, under the Dictionary Act, 1 U.S.C. § 1, the singular reference to "a" notice to appear can encompass several notices. *Id.* at 407 (Callahan, J., dissenting).[3]

The Eleventh Circuit reached the same conclusion in *Perez-Sanchez*, albeit in a slightly different context. The question in that case, like the BIA's decision in *Bermudez-Cota*, was whether the two-step notice process gives the immigration court jurisdiction over removal proceedings. *Perez-Sanchez*, 935 F.3d at 1152-53. The case therefore first raised the question of whether the two-step process complies with section 1229(a)—the precise question at issue in this case. And it also raised the question of whether, even if the two-step process does not comply with section 1229(a), that lack of compliance has jurisdictional implications.

In answering that first question, the Eleventh Circuit explicitly rejected the government's claim that a

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[3] The government's petition for rehearing en banc in *Lopez* has been pending since August 7, 2019. On November 12, 2019, the panel called for supplemental briefing, which has been completed.

hearing notice can cure an otherwise-defective notice to appear. *Id.* at 1153. Like the Ninth Circuit, the Eleventh Circuit held that, under the statute's plain text, the relevant inquiry focuses on a single notice document. Thus, "a notice of hearing sent" after a defective "notice to appear" "does not render the original NTA non-deficient."[4] 935 F.3d at 1153-54.

In *Ortiz-Santiago*, the Seventh Circuit confronted the same question in the same posture and reached the same conclusion. The court refused to accept the government's argument that "the two-step procedure that the Board followed" was "compatible with the statute." 924 F.3d at 962. The court rejected the BIA majority's argument that the two-step process "achieves substantial compliance with" section 1229(a), explaining that the BIA majority's analysis "tracked the dissenting opinion [in *Pereira*] rather than that of the majority." *Id.* The court also found it "telling that Congress itself appears to have rejected the two-step approach when it passed IIRIRA." *Id.* The court noted that the BIA "took no note of this statutory evolution … nor did it explain how its decision complied with the present statutory language." *Id.*[5]

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[4] The Eleventh Circuit ultimately held that section 1229(a) establishes a "claim-processing rule" rather than a prerequisite to jurisdiction, and hence that the government's failure to follow section 1229(a) does not deprive the immigration court of jurisdiction. *Id.* at 1154-57.

[5] The Seventh Circuit rejected the argument that the government's "failure to comply was an error of jurisdictional significance," concluding, like the Eleventh Circuit, that section 1229(a) establishes a claim-processing, not jurisdictional, rule. *Id.* at 963-64.

3. Two courts of appeals have accepted the BIA's position that section 1229(a) merely establishes a list of information that the government can serve over as many notices, and as much time, as it chooses.

The Fifth Circuit's decision in *Pierre-Paul* was the first to accept the BIA's position.[6] That case, like the Seventh and Eleventh Circuit decisions, involved a challenge to the immigration court's jurisdiction. But like the Seventh and Eleventh Circuit decisions, the Fifth Circuit's decision squarely addressed section 1229(a)'s requirements. Unlike those decisions, however, the Fifth Circuit concluded that "[t]he two-step process comports with relevant statutory language." 930 F.3d at 691. Largely adopting the reasoning of Judge Callahan's dissent in *Lopez*, the court concluded that the singular nature of the statutory language nevertheless encompassed the concept of multiple notices. *Id.* The court also adopted the BIA majority's conception of the statute's purpose of "ensuring that aliens receive notice of the time and place of the proceedings."[7] *Id.*

The Sixth Circuit reached the same conclusion, in the cancellation context, in *Garcia-Romo*. The court found the Ninth Circuit's decision in *Lopez* "unpersuasive," adopting instead the BIA majority's decision in *Mendoza-Hernandez*. 940 F.3d at 203-05. The court rejected the argument that the statute "mandates service of *a* singular, compliant docu-

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[6] A petition for certiorari from the Fifth Circuit's decision is currently pending. *Pierre-Paul v. Barr*, No. 19-779 (filed Dec. 16, 2019).

[7] The court also concluded that, even if section 1229(a) requires a single notice document, the government's failure to comply with that requirement is not jurisdictional. *Id.* at 691-93.

ment," concluding that this gives too "cramped" a reading to "the indefinite article 'a.'" *Id.* at 201. Based on two colloquial examples—a teacher requiring "a paper" and a book editor asking an author for "a book"—the court concluded that "[w]hen the word 'a' precedes a noun such as 'notice,' describing a written communication, the customary meaning does not necessarily require that the notice be given in a single document." *Id.* Thus, section 1229(a) allows the government to provide the required information "in multiple components or installments."[8] *Id.*

Notably, a subsequent Sixth Circuit panel has already criticized *Garcia-Romo* for its "scant textual analysis," and noted that, "given the conflicts among the circuits, the time may be ripe for Supreme Court review." *Dable v. Barr*, __ Fed. Appx. __, 2019 WL 6824856, at *4 n.6 (6th Cir. Dec. 13, 2019).

C. Mr. Niz-Chavez's eligibility for cancellation of removal turns on this circuit conflict.

1. Petitioner Agusto Niz-Chavez is a native and citizen of Guatemala. Mr. Niz-Chavez and his family lived on land that they owned until around 2002. A that time, a land dispute arose between Mr. Niz-Chavez's family and villagers from Ixchiguan, a neighboring village. Pet. App. 2a. The Ixchiguan villagers first murdered Mr. Niz-Chavez's brother-in-law. Pet. App. 2a. Then fifty armed villagers arrived and threatened to kill Mr. Niz-Chavez and his family if they did not leave. Pet. App. 2a-3a. Mr. Niz-Chavez and his family fled and have not returned.

[8] A petition for rehearing en banc is currently pending in *Garcia-Romo*.

Pet. App. 3a. Nevertheless, Mr. Niz-Chavez's family continued to receive threats. Pet. App. 3a.

Mr. Niz-Chavez came to the United States in 2005. Pet. App. 3a. In 2007, he moved to Detroit, where he has lived ever since. Pet. App. 3a. He currently lives with and is the primary breadwinner for his long-time partner and their three young U.S.-citizen children, two of whom have significant health issues. Pet. App. 3a; A.R. 34-35. Since coming to the United States fourteen years ago, Mr. Niz-Chavez has no criminal history other than two misdemeanor convictions for driving without a license.

2. On March 26, 2013, DHS served Mr. Niz-Chavez with a document labeled "Notice to Appear." Pet. App. 3a; A.R. 425. That document, however, did not specify the time and place at which Mr. Niz-Chavez was required to appear, stating instead that the hearing would be held on "a date to be set at a time to be set." A.R. 425; Pet. App. 3a. On May 29, 2013, the immigration court sent Mr. Niz-Chavez a hearing notice scheduling his case for June 25, 2013. Pet. App. 3a. Mr. Niz-Chavez conceded removability but sought to apply for withholding of removal and relief under the Convention Against Torture. Pet. App. 3a. A merits hearing was ultimately held on September 13, 2017.

At his merits hearing, Mr. Niz-Chavez sought to apply for cancellation of removal given that he had been present in the United States for approximately twelve years. Pet. App. 42a. However, the immigration judge ("IJ") concluded, and Mr. Niz-Chavez was forced to concede, that under then-governing law, Mr. Niz-Chavez's continuous presence ended when he received the putative "Notice to Appear" in March

2013, even though that document did not comply with section 1229(a) because it lacked the required time-and-place information. *See Camarillo*, 25 I. & N. Dec. at 647; *Gonzales-Garcia v. Holder*, 770 F.3d 431 (6th Cir. 2014) (deferring to *Camarillo*).

The IJ ultimately denied Mr. Niz-Chavez's applications for relief, and Mr. Niz-Chavez appealed to the BIA. While his case was pending before the BIA, this Court decided *Pereira*. Mr. Niz-Chavez promptly filed a motion to remand to the IJ to consider his application for cancellation of removal in light of *Pereira*. Pet. App. 4a. The BIA affirmed the IJ's decision and denied the motion to remand, concluding that Mr. Niz-Chavez was not eligible for cancellation under *Pereira* because the combination of the putative notice to appear with the subsequent hearing notice triggered the stop-time rule in June 2013. Pet. App. 4a, 22a.

3. The Sixth Circuit denied the petition for review. As relevant here, the court acknowledged the conflict between the courts of appeals concerning whether "multiple documents [can] collectively satisfy the requirements of a notice to appear." Pet. App. 13a-14a. The court recognized, however, that the Sixth Circuit had "resolved the dispute" in *Garcia-Romo*. Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve the circuit conflict concerning whether section 1229(a)'s definition of "a 'notice to appear'" identifies a specific notice document or merely a collection of information that the government can provide over the course of as many documents, and as much time, as it chooses.

Given that, under *Pereira*, notice "in accordance with" section 1229(a) is necessary to trigger the stop-time rule, the proper interpretation of section 1229(a) is vitally important, as it determines whether thousands of immigrants are eligible for cancellation of removal and will have the chance to remain in the country with their U.S.-citizen families. Moreover, given the deep disagreement about the proper interpretation of section 1229(a)—including a three-to-two circuit conflict and sharp disagreement within circuits and within the en banc BIA—this Court's intervention is necessary to ensure uniform eligibility requirements for this vital form of relief.

Certiorari is particularly important because the BIA's reading of the statute conflicts so clearly with the statute's text and history. Not only does the statute's singular definitional language plainly require "a" specific notice document—not a collection of notice documents dispersed over time—but Congress amended the statute to *reject* the previously-authorized multi-step notice process the government now seeks to defend.

This case is an ideal vehicle to resolve the circuit conflict. Mr. Niz-Chavez has preserved the question presented throughout his proceedings. As the Sixth Circuit's decision makes clear, Mr. Niz-Chavez is otherwise eligible to apply for cancellation of removal. And Mr. Niz-Chavez has a strong case for cancellation on the merits: He is the primary breadwinner for his three young, U.S.-citizen children, two of whom rely on the U.S. health-care and educational systems to assist with significant medical and developmental issues.

I. The Court should grant certiorari to resolve a circuit conflict on an important and recurring issue concerning eligibility for cancellation of removal.

The acknowledged circuit conflict concerning the question presented in this case cannot be resolved without this Court's intervention—indeed, one court has explicitly called for this Court's review. *Dable*, 2019 WL 6824856, at *4 n.6. Given how frequently the question presented arises, the confusion it is currently causing across the country, and how important it is when it does arise, this Court should grant certiorari now to resolve the conflict.

1. There is a clear circuit conflict concerning whether section 1229(a) defines a specific notice document or a collection of information the government can serve whenever and in as many pieces as it wants. The Seventh, Ninth, and Eleventh Circuits have agreed with the six-Member BIA dissent and held that section 1229(a) defines a specific notice document, and hence that a two-step notice process does not comply with section 1229(a)'s requirements. Pp. 14-16, *supra*. The Fifth and Sixth Circuits, by contrast, have accepted the nine-Member BIA majority's view that section 1229(a) permits a multi-step notice process. Pp. 17-18, *supra*. The five circuits that have addressed this issue handle the vast majority—approximately 75%[9]—of petitions for review from the BIA.

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[9] *See* U.S. Courts, Judicial Business, Table B-3 (2018), available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2018.pdf.

The fact that some of these courts interpreted section 1229(a) in the context of a jurisdictional rather than stop-time challenge does not minimize the circuit conflict. Under *Pereira*, the government must serve notice "in accordance with" section 1229(a) to trigger the stop-time rule. 138 S. Ct. at 2117. Thus, the question of whether section 1229(a) permits the government's multi-step notice process is determinative of the stop-time question *regardless* of the context in which that interpretive question arose. Moreover, the conflicting Sixth and Ninth Circuit opinions both interpreted section 1229(a) in the context of the stop-time rule.

This circuit conflict inevitably leads to deeply unfair results. If Mr. Niz-Chavez lived in California or Illinois, he could have applied for cancellation of removal and sought to stay in the United States to continue to care for his U.S.-citizen children. Indeed, given that venue in immigration cases depends on where the government initiates removal proceedings, 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 1003.14(a), Mr. Niz-Chavez may have been able to apply for cancellation if he had been detained by DHS while on a road trip in Chicago, rather than at home in Detroit. Only this Court can alleviate the inevitable inequities caused by the disparate interpretations of the stop-time rule across the circuits.

2. This circuit conflict will not resolve without this Court's intervention. The Ninth Circuit rejected the BIA's position shortly after *Mendoza-Hernandez* was decided. *Lopez*, 925 F.3d at 402. The Seventh and Eleventh Circuits then reached the same conclusion. Pp. 14-16, *supra*. The Sixth Circuit's contrary decision expressly considered, and rejected, the

Ninth Circuit's reasoning, *Garcia-Romo*, 940 F.3d at 203-04, joining the Fifth Circuit in accepting the BIA's decision. Pp. 17-18, *supra*. Thus, in order for this circuit conflict to resolve, at least two courts of appeals would have to reverse their own, published decisions.

The likelihood that the circuit conflict would resolve is particularly unlikely given the depth of the disagreement on the question presented. The proper interpretation of section 1229(a) so deeply divided the agency that it led to the first en banc BIA decision in a decade—a decision that ultimately turned on the votes of two of its fifteen Members. There has also been disagreement within both the Ninth and Sixth Circuits, with Judge Callahan dissenting from the Ninth Circuit's decision in *Lopez*, *see* 925 F.3d at 405-10, and a subsequent Sixth Circuit panel criticizing *Garcia-Romo* and explicitly calling for this Court's review, *Dable*, 2019 WL 6824856, at *4 n.6. Given this disagreement, it is practically inevitable that this Court will, at some point, have to resolve the question presented in this case.

3. Prompt review of the question presented is vital given the frequency with which it arises and its importance when it does arise. In *any* case in which the government follows its multi-step notice practice, the question presented will determine cancellation eligibility so long as the cancellation applicant has no disqualifying criminal convictions and, absent the stop-time rule, satisfies the applicable ten- or seven-year presence or residence requirement. And, in recent years, the government has almost *never* provided any notice document that itself complies with section 1229(a). *Pereira*, 138 S. Ct. at 2111. Thus, even

the government has recognized that the question presented in this case "has profound ramifications for thousands of immigration cases." Pet. For Reh'g at 1, *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019) (No. 15-72406). Prompt resolution of a circuit conflict that impacts so many cases is vital to prevent deep unfairness and prevent significant confusion concerning individuals' cancellation eligibility.

Moreover, when the question presented does determine cancellation eligibility, it will often determine whether families with U.S.-citizen spouses and children can remain intact. The immigrants affected by this rule are those who could obtain cancellation on the merits, if only they were found eligible—permanent residents who have made positive contributions to their community, and longtime non-permanent residents with good records, good character, and a spouse, parent, or child who is a citizen or lawful permanent resident. 8 U.S.C. § 1229b(a), (b)(1). By definition, rendering ineligible a non-permanent resident who would otherwise qualify would work "exceptional and extremely unusual hardship"—on children separated from a parent, on a husband or wife separated from a spouse. *Id.* § 1229b(b)(1)(D).

Only this Court can resolve the conflict on this frequently-recurring issue and prevent the conflicting circuit decisions from separating families arbitrarily—and erroneously.

4. The question this Court is currently considering in *Barton v. Barr*, No. 18-725, is unrelated to the question presented in this case, and provides no reason to delay review of the independent and vitally important question presented here. *Barton* concerns

a criminal bar to cancellation of removal, not its durational requirements. The question presented here warrants prompt review regardless how this Court decides *Barton*.

II. Certiorari is particularly important because the BIA majority's interpretation is wrong.

The circuit conflict at issue in this case is particularly pernicious because section 1229(a)'s text and history so plainly require a specific notice *document*. Moreover, the agency's decision was not a reasonable one—among other things, the BIA departed from its own prior recognition that section 1229(a) *does* require a single notice document without *any* meaningful explanation.

A. Section 1229(a)'s text and history unambiguously require a specific notice document, not service of the listed information however and whenever the government chooses.

The BIA majority's conclusion that the government's multi-step notice process is "in accordance with" section 1229(a)'s requirements is not a permissible interpretation of the statute, read using "traditional tools of statutory construction," *Chevron USA, Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984), such as the statute's "text, structure, history, and purpose," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). The BIA's decision ignores the statute's text and flies in the face of Congressional amendments explicitly rejecting the very multi-step notice process the BIA endorsed.

1. As this Court held in *Pereira*, section 1229(a) uses "quintessential definitional language" to define what "a 'notice to appear'" *is*. *Pereira*, 138 S. Ct. at 2116. "[*A*] 'notice to appear'" is "written notice … specifying" the seven pieces of information listed in the statute, including, for instance, the "charges against the alien," the "acts or conduct alleged to be in violation of law," the "time and place at which" to appear to defend against those charges, and the right to be represented by counsel. 8 U.S.C. § 1229(a)(1) (emphasis added). Notice that does not provide the required information does not meet section 1229(a)'s definition, is not "in accordance with" section 1229(a), and does not trigger the stop-time rule.

Nothing in the statute suggests that different notices, served at different times, and even by different government agencies, can combine to create "*a* 'notice to appear.'" The statute does not simply state that the government shall provide written notice of the specified information. Nor does it state that "a 'notice to appear' is 'complete' when it specifies" the last piece of required information. *Pereira*, 138 S. Ct. at 2116. Instead, the statute uses "quintessential definitional language" to create a specific, singular statutory term—"*a* 'notice to appear'"—and *defines* that term as "written notice … specifying" the required information. Because "the use of the singular indicates that service of a single document—not multiple—triggers the stop-time rule," *Lopez*, 925 F.3d at 402, the "statute contains no ambiguity or gap that would permit a 'combination' approach to trigger the stop time rule," *Mendoza-Hernandez*, 27 I. & N. Dec. at 539 (Guendelsberger, Board Member, dissenting).

2. The history of section 1229(a) removes any possible doubt that the singular nature of the phrase "a 'notice to appear'" was intentional, identifying a specific notice document not a collection of information that the government can provide over as many documents, and as much time, as it chooses.

As discussed, pp. 8-10, *supra*, prior to 1996, what were then called deportation proceedings were initiated with "an 'order to show cause.'" 8 U.S.C. § 1252b(a)(1) (1994). The pre-1996 statute defined "an 'order to show cause'" in almost the exact same way that section 1229(a) currently defines "a 'notice to appear.'" The difference, however, was that the definition of "an 'order to show cause'" did *not* require notice of the "time and place" of proceedings; that information could be provided "in the order to show cause *or otherwise*." 8 U.S.C. § 1252b(a)(2)(A) (1994) (emphasis added).

The fact that the pre-1996 statute specified that the time-and-place information could be provided *either* "in the order to show cause" itself "or otherwise" plainly demonstrates that the "order to show cause" was a *single document*. After all, if the information in the "order to show cause" definition could be provided in as many different notices as the government chose, then the distinction between providing the time-and-place information "in the order to show cause" and providing that information in an "other[]" document would have been meaningless. The pre-1996 statute therefore plainly authorized *either* a one- or two-step notice process, but it did *not* authorize dividing "an 'order to show cause'" itself into multiple pieces.

Congress's 1996 amendments to the statute in IIRIRA—which moved the time-and-place information from an *optional* part of the "order to show cause" to a *required* part of the "notice to appear"—plainly rejected the two-step process and required a one-step process. First, given that "an 'order to show cause'" was a single document, and that section 1229(a) uses the same definitional structure as the pre-IIRIRA provision, a "notice to appear" must necessarily be a single notice document as well. Second, interpreting "a 'notice to appear'" to mean simply a collection of information would render meaningless IIRIRA's amendments making time-and-place information a required, not optional, part of the "notice to appear"—under the BIA's interpretation, that amendment did not change the government's service requirements *at all*. Unsurprisingly, then, in post-IIRIRA regulatory preambles, the government itself recognized that IIRIRA changed the statute to require a single notice document. Pp. 9-10, *supra*.

Notably, the *only* decisions to actually engage with this history have correctly understood it to require interpreting section 1229(a) as defining a single notice document. *Ortiz-Santiago*, 924 F.3d at 962; *Mendoza-Hernandez*, 27 I. & N. Dec. at 539 (Guendelsberger, Board Member, dissenting). Despite the prominent role this history played in the BIA dissent and Seventh Circuit decisions, *not one* of the opinions that have interpreted "a 'notice to appear'" to allow for a multi-step notice process—including even the BIA majority in *Mendoza-Hernandez*—has *even tried* to reconcile its interpretation with this history.

3. Rather than acknowledge section 1229(a)'s origins or engage with its text, the BIA majority in

Mendoza-Hernandez focused almost entirely on what it conceived to be section 1229(a)'s "fundamental purpose": to "create[] a reasonable expectation of the alien's appearance at the removal proceeding." *Mendoza-Hernandez*, 27 I. & N. Dec. at 531. But if *Pereira* stands for anything, it is that the agency cannot ignore Congress's instructions in favor of the agency's own conception of the statute's purpose—*i.e.*, the agency cannot substitute its own belief as to how the statute *should* work for how the statute *does* work.

Moreover, the BIA's conception of section 1229(a)'s "fundamental purpose" is transparently incomplete. Ensuring appearance is certainly *one* "essential function" of a "notice to appear." *Pereira*, 138 S. Ct. at 2115. But if that were its *only* purpose then its requirements would begin and end with telling an immigrant when and where to appear. The fact that the statute *also* requires information about the charges being brought and the nature of the proceeding shows that the purpose of "a 'notice to appear'" is not just to ensure *any* appearance, but a *meaningful* appearance in which a noncitizen can defend herself.

As to *that* purpose, the BIA majority's multi-step approach is deeply flawed. Because the information required by section 1229(a) all relates to the institution of a single removal proceeding, it only makes sense when it is received *together*. Allowing the government to serve that information in different notices, at vastly different times, will frustrate, not promote, noncitizens' appearance at and the efficiency of removal proceedings.

Concern about notices separated over time is not merely hypothetical. In both *Camarillo* and *Pereira*, the government initially served a putative notice to

appear that lacked time-and-place information, and then did *nothing* for *more than a year* (more than two years in *Camarillo*). *Pereira*, 138 S. Ct. at 2112; *Camarillo*, 25 I. & N. Dec. at 644-45 & n.1. The government then sent a notice document that provided *only* the time and place of a required appearance, without tying the required appearance to the prior charges. A noncitizen receiving a notice instructing her to appear in immigration court at a specific place and time would not necessarily connect that instruction to charges served more than a year earlier.

Indeed, the BIA's decision would allow for notice processes that are far more confusing even than that. For instance, it would allow the government to provide every noncitizen entering the country with a written overview of removal proceedings—including the fact that those in removal proceedings have a right to counsel, must provide the Attorney General with their address and telephone number, and suffer certain consequences if they do not appear at their proceedings, *see* 8 U.S.C. § 1229(a)(1)(E), (F)(i), (G)(ii)—and then omit that critical information from the notice it provides years later at the outset of an actual removal proceeding. That is plainly not what section 1229(a) envisions.

The multi-step notice practice also conflicts with the precise concern Congress identified when rejecting the two-step notice process in IIRIRA: avoiding disputes about proper service of multiple notice documents. H.R. Rep. No. 104-469, pt. I, at 122, 159; *see also Mendoza-Hernandez*, 27 I. & N. Dec. at 539 (Guendelsberger, Board Member, dissenting). This, too, is no hypothetical. In *Pereira*, for instance, though the government properly served the initial

notice (which lacked the time-and-place information), it mailed the subsequent hearing notice to the wrong address. 138 S. Ct. at 2112.

4. Unlike the BIA majority, the Sixth Circuit in *Garcia-Romo* did engage with the statute's text—though not its history. But, as a subsequent Sixth Circuit panel recognized, the court's "scant textual analysis" was deeply flawed. *Dable*, 2019 WL 6824856, at *4 n.6.

The Court's analysis turned almost entirely on two colloquial examples: a student submitting "a paper" by sending the introduction and body of the paper first, and sending a conclusion later; and a writer providing a publisher with "a book" by sending chapters sequentially. 940 F.3d at 201. According to the court, these examples show that "the use of the indefinite article 'a' before a word that describes written communication does not necessarily mean that delivery of the message must be in one transmission." *Id.*

Even on its own, colloquial terms, this analysis is questionable at best. No student required to submit "a paper"—where that phrase is defined to require an introduction, a body, and a conclusion—would think that the professor envisioned students submitting three separate documents, at different times, each with a different section of his or her paper. The Sixth Circuit effectively admitted as much, describing a student who "neglects" to submit a conclusion and only later "discovers" that it was missing. *Id.* A professor confronting such a neglectful student might not penalize the student for failing to submit the paper "in accordance with" her requirements. But, under *Pereira*, the statute is not so forgiving. If a pur-

ported "notice to appear" is not "in accordance with" section 1229(a), it does not trigger the stop time rule; there is no provision for curing defects. 138 S. Ct. at 2117. Congress's instruction that the government serve "*a* 'notice to appear'" plainly envisions service of a single notice, just as a professor's assignment of "a paper" plainly envisions students submitting a single document.

Moreover, even if the Sixth Circuit were right that in certain, colloquial contexts the word "a" before a written document could actually encompass multiple documents, that does not mean that such a reading would be permissible in this context. *Pereira*, 138 S. Ct. at 2117. There are numerous examples, even just in court rules, of documents that must contain certain information that plainly cannot be provided seriatim. For instance, this Court's Rule 24 requires that "[a] brief" include the information specified in paragraphs (a) through (j). No party could reasonably read this rule to allow the submission of each piece of required information in a separate document filed at a different time. The singular nature of the notice required by section 1229(a) is even clearer given the "quintessential definitional language" Congress used to define the singular term "a 'notice to appear.'" *Pereira*, 138 S. Ct. at 2116.

B. The agency's interpretation is not a reasonable one.

1. The BIA's decision in *Mendoza-Hernandez* also departs from the agency's prior position without adequate explanation. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (agency position is "unlawful and receives no *Chevron* deference"

if it rests on an "unexplained inconsistency in agency policy").

Before *Pereira*, the BIA had rejected the argument that multiple documents could be considered together in analyzing whether the government had served "a 'notice to appear.'" For instance, in *Camarillo*, the BIA wrote that "[n]o authority … supports the contention that a notice of hearing issued by the Immigration Court is a constituent part of a notice to appear[.]" 25 I. & N. Dec. at 648. The BIA made the same point in *Ordaz*, concluding that "[t]he statute affords 'stop-time' effect to a *single instrument*—the notice to appear that is the subject of proceedings in which cancellation of removal is sought." 26 I. & N. Dec. at 640 n.3 (emphasis added).

The BIA majority in *Mendoza-Hernandez* recognized these holdings, but barely tried to justify its reversal. In a footnote, it characterized its prior decisions as "flawed" because, while a "*notice of hearing is not part of the notice to appear*," it is a "separate notice, served in conjunction with the notice to appear, that satisfies the requirements of section [1229(a)(1)(G)]." 27 I. & N. Dec. at 525 n.8 (emphasis added). If anything, this statement *undermines* the BIA's position, as it recognizes that a notice of hearing is *not* part of the notice to appear. Such an unjustified about-face is inherently unreasonable. *Encino Motorcars*, 136 S. Ct. at 2126.

2. The BIA's position is also not reasonable even putting aside its change of position. Not only does it conflict with the statute's text and history, pp. 26-33, *supra*, it is, like its prior decision in *Camarillo*, a barely-disguised attempt to find a way for the government to avoid the stop-time consequences of its

refusal to adhere to Congress's decision to jettison the two-step notice process. Rather than engage with the statute's text or history, the BIA majority—like the *Camarillo* panel—simply made up a statutory "purpose" that allowed the government to follow its extra-statutory regulation requiring time-and-place information in a "notice to appear" only "when practicable," 8 C.F.R. § 1003.18(b), without suffering any stop-time consequences. *Mendoza-Hernandez*, 27 I. & N. Dec. at 532; *Camarillo*, 25 I. & N. Dec. at 648. It is plainly not reasonable for an agency to twist the *statute's* language to allow the government to comply with a *regulation* that conflicts with the statute itself—making optional what the statute makes mandatory.

III. This case is an ideal vehicle to resolve the circuit conflict.

1. Throughout his removal proceedings, Mr. Niz-Chavez has preserved his argument that he is eligible for cancellation of removal. He tried to apply for cancellation before the IJ, but was forced to recognize, based on then-governing BIA and Sixth Circuit precedent, that the putative "Notice to Appear" he received in March 2013 triggered the stop-time rule even though it did not include the time and place at which he was required to appear. Pet. App. 42a; *Camarillo*, 25 I. & N. Dec. at 647; *Gonzales-Garcia*, 770 F.3d at 435.

This Court decided *Pereira* while Mr. Niz-Chavez's appeal was pending before the BIA. After this Court's decision, Mr. Niz-Chavez asked the BIA to remand to the IJ, arguing that he is, in fact, eligible for cancellation of removal under this Court's deci-

sion. Pet. App. 4a. The BIA denied that motion based on its conclusion that the combination of the putative "Notice to Appear" and subsequent hearing notice together constitute "a 'notice to appear'" in accordance with section 1229(a). Pet. App. 22a.[10] Mr. Niz-Chavez challenged this decision before the Sixth Circuit, which denied his petition for review on this issue entirely because the Sixth Circuit had adopted the BIA's approach in *Garcia-Romo*. Pet. App. 14a-15a.

2. The question whether the combination of the putative "Notice to Appear" and a subsequent hearing notice collectively constitute "a 'notice to appear'" that is in accordance with section 1229(a) is dispositive of Mr. Niz-Chavez's eligibility for cancellation of removal. It is undisputed that Mr. Niz-Chavez never received any single notice document that complies with section 1229(a)'s requirements. It is similarly undisputed that Mr. Niz-Chavez has three U.S. citizen children. *See id.* § 1229b(b)(1)(D); Pet. App. 3a. Mr. Niz-Chavez is a devoted father, and his removal would undoubtedly cause his children "exceptional and unusual hardship." *Id.* Mr. Niz-Chavez has no disqualifying criminal convictions under § 1229b(b)(1)(C)—indeed, he has no meaningful criminal history at all—and can demonstrate "good moral character," *see id.* § 1229(b)(1)(B).

3. Mr. Niz-Chavez has a strong case that the Attorney General should cancel his removal. Mr. Niz-

[10] The BIA also wrote that Mr. Niz-Chavez "did not seek cancellation of removal before the Immigration Judge." Pet. App. 22a. That is simply not true—Mr. Niz-Chavez *did* seek to apply for cancellation, but was forced to recognize that his application was barred by then-controlling precedent. Pet. App. 42a.

Chavez is the breadwinner for his family, including his three U.S.-citizen children, who are one, five and six years old. Pet. App. 3a. His one-year-old daughter was born two months prematurely, spent months in the neonatal intensive care unit, and still requires significant respiratory support and regular medical attention.[11] His five-year-old daughter suffers from an eye muscle problem called Brown's Syndrome, as well as speech and language delays, for which she is receiving assistance through the Matrix Head Start program in Detroit. A.R. 36-37. Mr. Niz-Chavez could introduce significantly more evidence if granted the opportunity to apply for cancellation.

* * * * *

Had Mr. Niz-Chavez been brought into immigration court in Chicago, rather than Detroit, he could apply for cancellation of removal, and likely remain in the United States with his family. This Court should not allow such geographic happenstance to determine the fate of his family and families across the country.

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[11] Mr. Niz-Chavez's youngest daughter was born after the agency proceedings were complete, but evidence of her birth and medical issues are in the Sixth Circuit record. Niz-Chavez C.A. Mot. for Stay of Removal 4-5 & Ex. B.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 18-4264

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AGUSTO NIZ-CHAVEZ,

Petitioner,

v.

WILLIAM P. BARR, Attorney General,

Respondent

ON PETITION FOR REVIEW FROM THE UNITED STATES BOARD OF IMMIGRATION APPEALS

OPINION

FILED: Oct. 24, 2019
DEBORAH S. HUNT, Clerk

BEFORE: COLE, Chief Judge; MERRITT and LARSEN, Circuit Judges

COLE, Chief Judge. Agusto Niz-Chavez, a Guatemalan native and citizen, arrived in the United States without inspection in 2005. Immigration proceedings concerning Niz-Chavez commenced in 2013. Niz-Chavez applied for withholding of removal under the Immigration and Nationality Act and for

relief under the Convention Against Torture. After the immigration judge ("IJ") denied those applications, Niz-Chavez appealed the IJ's decision to the Board of Immigration Appeals ("BIA") and asked the BIA to remand the case to the IJ to consider Niz- Chavez's application for cancellation of removal in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The BIA denied Niz-Chavez's motion to remand and affirmed the IJ's determination that Niz-Chavez was not entitled to withholding of removal or relief under the Convention Against Torture. Niz-Chavez then appealed.

For the reasons stated below, we deny Niz-Chavez's petition for review of each of the challenged BIA decisions.

I. BACKGROUND

A. Factual Background

Niz-Chavez was born in Tajumulco, San Marcos, Guatemala in 1990. Prior to his arrival in the United States, he lived in Tajumulco with his family. He is the sixth of eight children in his family. Niz-Chavez and his family lived together on land that they owned without issue until around 2002. Around that time, a land dispute arose between Niz-Chavez's family and villagers from Ixchiguan, a neighboring village.

Niz-Chavez testified that Ixchiguan villagers murdered his brother-in-law during this dispute. Two years later, the dispute escalated again when fifty armed Ixchiguan villagers arrived at the land and took possession of the land by threatening Niz-Chavez's family, advising them that "if they found a member of [his] family [on the land], they were going

to kill him or her." (September 13, 2017 Hearing Transcript, A.R. 197.) His family has not returned to the disputed land, and his parents now live on a piece of land about an hour from the land that the Ixchiguan villagers forcibly took. Some of Niz-Chavez's siblings also remain in Guatemala. Niz-Chavez testified that his family still receives threats from the Ixchiguan villagers, but he is not aware of any further acts of violence attempted or carried out against his family.

Niz-Chavez left Guatemala and arrived in the United States in 2005. After residing in Harrison, Virginia, for two years, Niz-Chavez moved to Detroit, Michigan, in 2007, where he has lived ever since. He is now the father of three children, who are United States citizens. Regarding a potential return to Guatemala, Niz-Chavez testified that he was concerned that the Ixchiguan villagers would learn of his return and, believing that he was in the country to reclaim the stolen land, kidnap or kill him. He also expressed concern that the village of Tajumulco would force him to fight in a land war against the Ixchiguan villagers.

B. Procedural Background

On March 26, 2013, Niz-Chavez was served with a notice to appear before an IJ in Detroit at a date and time to be determined later. On May 29, 2013, he received a notice of hearing in removal proceedings, which stated that the hearing in his case was scheduled on June 25, 2013, at the immigration court in Detroit. Niz-Chavez appeared at the hearing, conceded removability, and stated his intent to seek both withholding of removal and protection under the Convention Against Torture. Eventually, a hearing on

the merits of his case was held before an IJ on September 13, 2017, with an oral decision issued by the IJ on November 8, 2017.

The IJ denied Niz-Chavez's application for withholding of removal and his application for relief under the Convention Against Torture. The IJ granted Niz-Chavez thirty days to voluntarily depart the country and advised him of his right to appeal to the BIA. The IJ found that Niz-Chavez failed to establish that he was subject to past persecution or that he could not avoid future persecution in Guatemala by relocating within the country, findings which are fatal to a claim for withholding of removal. The IJ also found that Niz-Chavez had not established that government officials in Guatemala acquiesce to any sort of torture, as is required for a claim under the Convention Against Torture.

Niz-Chavez timely appealed to the BIA, challenging the IJ's conclusions on both issues. He also filed a motion to remand to the IJ for consideration of Niz-Chavez's application for cancellation of removal in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105, which interpreted the statutory requirements governing eligibility for cancellation of removal. Niz-Chavez argued that under the *Pereira* decision, he was now eligible for cancellation of removal under 8 U.S.C. § 1229b(b), whereas he was not eligible under the BIA's interpretation of that statute at the time of his proceedings before the IJ. The BIA affirmed the IJ's decision and denied the motion to remand, finding that Niz-Chavez was not eligible for cancellation of removal under the *Pereira* decision.

Niz-Chavez filed a timely petition with this court.

II. ANALYSIS

A. Standard of Review

"Where . . . the BIA reviewed the IJ's decision de novo and issued its own separate opinion, we review the BIA's decision as the final agency determination." *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007) (internal citation omitted). "To the extent the BIA adopted the [IJ's] reasoning, however, this Court also reviews the [IJ's] decision." *Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009) (internal citation omitted). The IJ and the BIA's factual findings are reviewed under the substantial-evidence standard, meaning that the court will not reverse such findings simply because it would have decided them differently. *Id.* (internal citation omitted). Rather, "[t]hese findings are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* (quoting *Gishta v. Gonzales*, 404 F.3d 972, 978 (6th Cir. 2005)). Purely legal questions are reviewed de novo. *Sansusi v. Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007) (internal citation omitted).

B. Withholding of Removal

The Immigration and Nationality Act provides that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). To be eligible for withholding of removal under this provision, an applicant must demonstrate "a clear

probability that he will be subject to persecution if forced to return to the country of removal." *Umana-Ramos v. Holder*, 724 F.3d 667, 674 (6th Cir. 2013) (internal citation and quotation omitted). To demonstrate persecution, an individual must show "more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty." *Singh v. Ashcroft*, 398 F.3d 396, 401 (6th Cir. 2005) (quoting *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998)).

In determining whether an applicant will be subject to persecution upon returning to the country of removal, we have held that "[a]pplicants who establish that they have suffered past persecution are presumed to have a well-founded fear of future persecution," although the government can rebut this presumption by demonstrating that conditions in the country have fundamentally changed from the time the persecution occurred such that the applicant no longer has a well-founded fear of future persecution. *Id.* (internal citation omitted). Additionally, the ability to safely relocate within the country of removal to avoid future persecution typically means that the applicant is not entitled to relief. *INS v. Orlando Ventura*, 537 U.S. 12, 18 (2002). Indeed, we have held that a finding that an applicant can avoid persecution by relocating within the country of removal is a sufficient basis to deny an application for withholding of removal. *See Cruz- Samayoa v. Holder,* 607 F.3d 1145, 1154-55 (6th Cir. 2010).

Here, the BIA found that Niz-Chavez had not established a presumption of future persecution because he had failed to show that he had been

subjected to persecution when he was previously in Guatemala and that, to the extent there is a risk of future persecution, Niz-Chavez can avoid that risk by relocating within Guatemala. Specifically, the BIA agreed with the IJ that Niz-Chavez had not been persecuted in the past because he had never been subjected to physical harm in Guatemala and could not demonstrate more than isolated instances of verbal harassment. The BIA also agreed with the IJ that Niz-Chavez could relocate within Guatemala to avoid any potential future persecution, pointing to the fact that the basis for Niz-Chavez's claim of persecution was a land dispute occurring on a specific piece of land and that his family members in Guatemala relocated within the country more than a decade ago and have not experienced further issues related to the land dispute. These findings are dispositive to Niz-Chavez's application for withholding of removal.

In challenging the findings, Niz-Chavez urges the court to consider the cumulative effect of the harms against his family perpetrated by the Ixchiguan villagers. He asserts that the murder of his brother-in-law, combined with the threats that his family received and the ultimate ceding of their land to the invading villagers is enough to establish that Niz-Chavez experienced persecution in the past. He cites our holding in *Gilaj v. Gonzales*, which requires the BIA to consider the aggregate abuses suffered by the individual in question in determining whether persecution has occurred. 408 F.3d 275, 287 (6th Cir. 2005). Regarding his ability to relocate, Niz-Chavez asserts that the BIA should have considered ongoing civil strife across Guatemala in making the

determination as to whether Niz-Chavez had the ability to relocate to a different part of the country. Per Niz-Chavez, evidence of general lawlessness resulting from a lack of government control and poor judicial infrastructure compels the conclusion that he cannot safely relocate within Guatemala.

When it comes to both the issue of persecution suffered by Niz-Chavez and his ability to relocate within Guatemala, this court's role is not to issue a decision based on how it would independently assess the evidence. Rather, under substantial-evidence review, the court will only reverse the BIA's determination if "any reasonable adjudicator would be compelled to conclude to the contrary." *Kahili*, 557 F.3d at 435 (internal citation and quotation omitted). Thus, our review is only to determine whether any reasonable adjudicator could reach the same conclusion on the merits of Niz-Chavez's claims as the BIA. Here, the BIA's conclusion survives this deferential review.

On this record, a reasonable adjudicator could reach the same conclusion as the BIA regarding both the question of whether Niz-Chavez suffered past persecution and whether he was able to relocate within Guatemala. The record does not reflect that Niz-Chavez was ever personally harmed, or that any of his family members who live in Guatemala have been harmed as a result of the land dispute since 2004. From this, the BIA could reasonably conclude that Niz- Chavez did not suffer abuses amounting to persecution when he previously lived in Guatemala and would not likely be subject to persecution were he forced to return. Moreover, the BIA could reasonably conclude that Niz-Chavez had the ability to safely

relocate within Guatemala to avoid any potential persecution because his parents and siblings had been able to do so.

Accordingly, we deny Niz-Chavez's petition for review of the BIA's denial of his application for withholding of removal.

C. Convention Against Torture

Under this court's precedent, an applicant who seeks relief under the Convention Against Torture must show that it is "more likely than not that he would be tortured if removed to the proposed country of removal." *Zhao v. Holder*, 569 F.3d 238, 241 (6th Cir. 2009); *see also* 8 C.F.R. § 1208.16(c). Torture "must entail the intentional infliction of severe mental or physical pain upon an individual by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Alhaj v. Holder*, 576 F.3d 533, 539 (6th Cir. 2009) (internal citation and quotation omitted). Acquiescence by a public official occurs when the public official has "awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). "Willful blindness" is also considered to be acquiescence. *See Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (internal citation omitted). Finally, this court has also held that the Convention Against Torture "does not afford protection to torturous acts inflicted by wholly private actors." *Zaldana Menijar v. Lynch*, 812 F.3d 491, 501 (6th Cir. 2015) (internal citation omitted).

Here, the BIA found that it was not more likely than not that Niz-Chavez would be tortured with official

acquiescence were he to return to Guatemala. The BIA found that even if the land feud violence were to occur and be considered severe enough to constitute torture, Niz-Chavez failed to show that it would occur with government acquiescence.

Niz-Chavez contends that the Guatemalan government's inability to adequately address land feud violence is the equivalent of acquiescence. He states that the fact that the Ixchiguan villagers were able to kill his brother-in-law and drive his family from their land without consequences shows that the Guatemalan government has breached its legal responsibility to prevent this sort of behavior.

This court requires more to show government acquiescence. Specifically, we have held that without testimony that establishes that government actors participated in, consented to, or willfully ignored the violence, the record does not compel a conclusion that the government acquiesced to torture. *Id.* at 502. Here, no testimony establishes that the government was willfully ignoring the land feud violence that occurs in Guatemala. As the government notes, record evidence demonstrates that the occurrence of land feud violence is actually decreasing in Guatemala, and there is no testimony that the government has ignored the problem. Moreover, as discussed above, the record also does not compel the conclusion that Niz-Chavez would be subjected to violence at all, let alone violence amounting to torture that occurs with government acquiescence.

Thus, a reasonable adjudicator would not be compelled to conclude that it is more likely than not that Niz-Chavez would be subjected to torture upon

his return to Guatemala. As such, we deny Niz-Chavez's petition for review of the BIA's denial of relief under the Convention Against Torture.

D. Motion to Remand

Niz-Chavez also appeals the denial of his motion to remand to the IJ for consideration of an application for cancellation of removal following the Supreme Court's decision in *Pereira*. Niz-Chavez sought remand to apply for cancellation of removal under 8 U.S.C. § 1229b(b)(1), which gives the Attorney General discretion to cancel removal of a person who is subject to deportation when the person applies for cancellation and meets certain qualifications. *See* 8 U.S.C. § 1229b(b)(1).

Under 8 U.S.C. § 1229a(c)(7)(A), a person is entitled to file one motion to reopen immigration proceedings. The motion must "state the new facts that will be proven at a hearing to be held if the motion is granted" and "be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(B). The Supreme Court has held that there are "at least three independent grounds on which the BIA may deny a motion to reopen." *INS v. Abudu*, 485 U.S. 94, 104 (1988). The BIA may deny such a motion when (1) the movant has not established a prima facie case for the underlying substantive relief sought; (2) when the movant has not introduced new or previously unavailable evidence; or (3) the relief sought is discretionary and the movant is not entitled to a discretionary grant of relief. *Id.* at 104-05. The denial of a motion to reopen is reviewed for abuse of discretion. *Pilica v. Ashcroft*, 388 F.3d 941, 948 (6th Cir. 2004). We note that the fact that Niz-Chavez filed

his pleading as a "motion to remand" and not a "motion to reopen" does not change our analysis. This court typically treats motions to remand and motions to reopen "in a similar fashion," finding that "[t]he difference in title is not significant[.]" *See Fieran v. INS*, 268 F.3d 340, 344 n.2 (6th Cir. 2001).

For Niz-Chavez to be eligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1), he must have been "physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application[.]" 8 U.S.C. § 1229b(b)(1)(A). Any period of continuous presence, however, is deemed to end when the person is "served a notice to appear under section 1229(a) of this title[.]" *Id.* § 1229b(d)(1). This is referred to as the "stop-time rule." *See Pereira*, 138 S. Ct. at 2109.

8 U.S.C. § 1229(a)(1) sets forth the requirements for what information must be included in a notice to appear. It states that, among other requirements, a notice to appear must include the time and place at which the proceedings concerning the recipient of the notice will be held. 8 U.S.C. § 1229(a)(1)(G)(i). For many years, it was common practice for the Department of Homeland Security to send notices to appear that did not contain information specifying the time and place at which proceedings against the recipient would be held. *Pereira*, 138 S. Ct. at 2111. In *Pereira*, the Supreme Court held that a document that does not specify the time and place of proceedings does not trigger the stop-time rule because it is not a notice to appear under 8 U.S.C. § 1229(a)(1). *Id.* at 2110.

Neither party contends that the notice to appear that Niz-Chavez received on March 26, 2013, which

did not contain the requisite time and place information, triggered the stop-time rule. Niz-Chavez did, however, later receive information concerning the time and place of his hearing through a subsequent notice of hearing. The parties dispute whether this subsequent notice of hearing can cure the defective notice to appear and, by extension, whether the two documents collectively triggered the stop-time rule. Niz-Chavez contends that they do not because he never received a singular document that would qualify as a notice to appear under 8 U.S.C. § 1229(a)(1). He argues that the *Pereira* decision constitutes previously unavailable evidence because, under his interpretation of *Pereira* and the operating statute, he has now accrued more than ten years of continuous presence in the United States, which would not have been the case under the BIA's precedent at the time of his proceedings before the IJ. Thus, he contends that the BIA erred in not remanding his case to the IJ so that he could pursue an application for cancellation of removal.

The government asserts that by providing Niz-Chavez all of the required information for a notice to appear under the statute across the two documents, it successfully triggered the stop-time rule. As a result, the government advances, Niz-Chavez is not eligible for cancellation of removal and the BIA did not err in denying him what would be a fruitless attempt to seek such relief.

At the time that the parties filed their briefs, this question was unresolved by this circuit and was in dispute around the country. The Ninth Circuit, for example, had adopted the approach that Niz-Chavez advances here, holding that the law does not permit

multiple documents to collectively satisfy the requirements of a notice to appear. *See Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019). Meanwhile, the Fifth Circuit reached the opposite conclusion, finding that a notice of hearing with time and place information can cure a defective notice to appear for purposes of triggering the stop-time rule. *See Pierre-Paul v. Barr*, 930 F.3d 684, 690 (5th Cir. 2019).

This court, however, has now resolved the dispute. *See Garcia-Romo v. Barr*, ___ F.3d _____, 2019 WL 4894346 (6th Cir. 2019 Oct. 4, 2019). In *Garcia-Romo*, this court was presented with this exact question of statutory interpretation: whether the government can trigger the stop-time rule by satisfying the requirements of a notice to appear through multiple documents. *Id.* at *4. The court answered that question in the affirmative, finding that the stop-time rule is triggered when the government provides a person with all the information required under 8 U.S.C. 1229(a)(1) through more than one document. *Id.* at *6.

Under *Garcia-Romo*, the stop-time rule was triggered for Niz-Chavez on May 29, 2013, when he received information concerning the time and place of the immigration proceedings against him, which occurred prior to him accruing ten years of continuous physical presence in the United States. Without ten years of continuous physical presence in the United States, Niz-Chavez is not eligible for cancellation of removal under the governing statute. *See* 8 U.S.C. § 1229b(b)(1). He cannot, therefore, establish a prima facie case for the relief that he would seek on remand to the IJ. Accordingly, the BIA was justified in denying the motion to remand. *See Abudu*, 485 U.S.

at 104. As the BIA had a valid basis to deny the motion to remand, it did not abuse its discretion in doing so. We, in turn, deny Niz-Chavez's petition for review of that decision.

III. CONCLUSION

For the foregoing reasons, we DENY Niz-Chavez's petition for review and AFFIRM the decision of the BIA.

APPENDIX B

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

Falls Church, Virginia 22041

File: A205-000-967 — Detroit, MI

Date: Nov. 29, 2018

In re: Agusto NIZ-CHAVEZ a.k.a. Dionis Felix Ti Suarez-Pagan

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sufen Hilf, Esquire

ON BEHALF OF DHS: Michael El-Zein
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Guatemala, appeals from the Immigration Judge's November 8, 2017, decision denying his application for withholding of removal and protection under the Convention Against Torture.[1] Section 241 (b)(3)(A) of the

[1] Since the respondent does not meaningfully challenge the denial of his asylum application based on the Immigration Judge's determination that the application is statutorily time-

Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 1208.16(c) and 1208.18. The respondent has also submitted a motion to remand. The Department of Homeland Security (DHS) has filed a brief opposing the respondent's appeal and motion. The appeal will be dismissed.

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

On appeal, the respondent argues, inter alia, that the Immigration Judge erred in finding that that it was not more likely than not that he would be subjected to future persecution in Guatemala based on his membership in a particular social group, which was identified as a family member who has suffered the consequences of Guatemala land use disputes (Respondent's Br. at 3-17). We disagree.

We affirm the Immigration Judge's determination that the respondent has not established past persecution or a clear probability of future persecution on account of a statutorily protected ground (IJ at 7-10). *See* section 241(b)(3)(A) of the Act (stating that an alien seeking withholding of removal under the Act must show that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political

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barred, we deem this issue waived on appeal. *See Matter of R-A-M-,* 25 I&N Dec. 657,658 n.2 (BIA 2012) (stating that when a respondent fails to appeal an issue addressed in an Immigration Judge's decision, that issue is waived before the Board).

opinion); 8 C.F.R. §§ 1208.16(a), (b); *see also* section 101(a)(42) of the Act, 8 U.S.C. § 1101 (a)(42). At the hearing below, the respondent testified that he fears harm in Guatemala because in 2005, his family was threatened and their land was taken by the neighboring village of Ixchiguan (IJ at 2-3; Tr. at 33-34). The respondent further testified that his brother-in-law was killed by people from Ixchiguan in 2004 (IJ at 3; Tr. at 36-37, 43).

Upon our de novo review, we affirm the Immigration Judge's ruling that the respondent did not meet his burden of establishing his eligibility for withholding of removal (IJ at 7-10). *See* section 241(b)(3)(A) of the Act; *see Khalili v. Holder,* 557 F.3d 429, 435-36 (6th Cir. 2009) (stating that to qualify for withholding of removal, an alien must demonstrate "that there is a clear probability that he will be subject to persecution if forced to return to the country of removal") (internal citation and quotation omitted); *see also Litt* v. *Gonzales,* 411 F.3d 631, 640 (6th Cir. 2005) (holding that an applicant seeking withholding of removal faces "a more stringent burden than what is required on a claim for asylum"). Specifically, we agree with the Immigration Judge's ruling that the respondent has not established that he experienced harm rising to the level of persecution in Guatemala on account of a protected ground under the Act (U at 7-9). 8 C.F.R. § 1208.16(b)(1). As noted by the Immigration Judge, the respondent has never been physically harmed in Guatemala and his family members have not been harmed or threatened by anyone since 2004 (U at 7-8;

Tr. at 45-46, 53).[2] *See Mikhailevitch v. INS,* 146 F.3d 384, 390 (6th Cir. 1998) (holding that, to establish past persecution, an applicant must show that she has been subjected to "more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty") (citation omitted).

Likewise, for the reasons discussed by the Immigration Judge, we discern no clear error in the Immigration Judge's finding that the respondent did not establish that he is unable to internally relocate safely within Guatemala (IJ at 9-10). 8 C.F.R. § 1208.16(b)(2), (3)(i) (explaining that where an applicant has not established cognizable past persecution, he bears the burden of establishing by a preponderance of the evidence that it would not be reasonable for him to internally relocate); *see Matter of Z-Z-O-,* 26 I&N Dec. 586, 591-92 (BIA 2015); *Matter of D-1-M-,* 24 I&N Dec. 448,450 (BIA 2008). Specifically, as noted by the Immigration Judge, the respondent testified that he fears harm as a result of a land dispute between his municipality, Tajumulco, and the neighboring municipality of Ixchiguan; thus, the prospective harm he fears is not countrywide (U at 9-10; Tr. at 33-34). Notably, while the respondent claims that he would be unable to relocate within

[2] We are not persuaded by the respondent's appellate arguments that, inter alia, his "family in Guatemala continues to receive threats" and that "the villagers of Ixchiguan have repeatedly made death threats against" him (Respondent's Br. at 4-6), to the extent that he does not cite to any record evidence to support his arguments. We note that unsupported statements by counsel are not evidence and thus are not entitled to any evidentiary weight. *See Matter of Ramirez-Sanchez,* 17 I&N Dec. 503,506 (BIA 1980).

Guatemala because he would have "no job, no home, no support system" (Respondent's Br. at 14), he has not provided any reasonable explanation as to how the people of Ixchiguan would find him if he were to relocate to another part of Guatemala nor has he pointed to any evidence to demonstrate that his internal relocation within the country would not be reasonable (U at 9-10). *See* 8 C.F.R. § 1208.16(b)(3)(i). Moreover, as noted by the Immigration Judge, the respondent's family members, including his parents and siblings, have remained unharmed in Guatemala (IJ at 4-5; Tr. at 44, 46, 54). *See Almuhtaseb* v. *Gonzales,* 453 F.3d 743 (6th Cir. 2006); *see also Mullai v. Ashcroft,* 385 F.3d 635, 638 (6th Cir. 2004).

Thus, contrary to the respondent's appellate arguments, the Immigration Judge's conclusion that the respondent has not established that he would be unable to internally relocate safely within Guatemala is not clearly erroneous (U at 9-10). *See* 8 C.F.R. § 1208.16(b)(3)(i). Consequently, we affirm the Immigration Judge's determination that the respondent is not eligible for withholding of removal because he has not established that it is more likely than not that he would be subject to persecution on account of a protected ground if he returns to Guatemala (U at 7-10). *See* section 241(b)(3)(A) of the Act.

The record also supports the Immigration Judge's finding that the respondent has not met his burden of establishing eligibility for protection under the Convention Against Torture by demonstrating that it is more likely than not that he will be tortured "by or at the instigation of or with the consent or acquiescence [to include willful blindness] of a public

official or other person acting in an official capacity" in Guatemala (IJ at 10). 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *see Matter of Z-Z-O-,* 26 I&N Dec. at 586 (explaining that an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are reviewed under the "clear error" standard). As noted by the Immigration Judge, although reports on country conditions in Guatemala confirm the occurrence of land disputes, the evidence does not establish that Guatemalan government officials acquiesce to land feud violence (U at 10). Thus, we discern no clear error in the Immigration Judge's determination that the respondent has not proven that it is more likely than not that he will be tortured with the requisite official acquiescence if he returns to Guatemala (U at 10). *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *Amir* v. *Gonzales,* 467 F.3d 921,926-27 (6th Cir. 2006) (discussing Convention Against Torture standards).

We turn next to the respondent's motion to remand. A motion to remand must generally state new facts to be considered at a subsequent hearing and must be supported by affidavits or other evidentiary materials demonstrating the respondent's prima facie eligibility for the relief sought. *See* 8 C.F.R. § 1003.2(c)(1); *see also INS v. Abudu,* 485 U.S. 94 (1988); *Matter of Singh,* 24 I&N Dec. 331,334 (BIA 2007); *Matter of Coelho,* 20 I&N Dec. 464,471 (BIA 1992). Such a motion will not be granted unless the evidence offered is material, was not available, and could not have been discovered or presented at the former hearing. *See* 8 C.F.R. § 1003.2(c)(1). An alien must make a prima facie showing both that he is statutorily eligible for the relief sought and that he warrants relief in the

exercise of discretion. *See, e.g., INS* v. *Doherty,* 502 U.S. 314 (1992); *INS* v. *Abudu,* 485 U.S. 94 (1988); *Matter of Coelho,* 20 I&N Dec. at 472.

In his motion, the respondent argues that he is eligible for cancellation of removal and further argues that the notice to appear, dated March 26, 2013, is invalid *(see* Respondent's "Motion to Remand for Consideration of Relief Under INA § 240A(b) in Light of *Pereira* v. *Sessions").* We find the respondent's reliance on *Pereira* v. *Sessions,* 138 S. Ct. 2105, 2108 (2018), to be misplaced. In *Pereira,* the United States Supreme Court held that a putative notice to appear that fails to designate the specific time or place of an alien's removal proceedings is not a notice to appear under section 239(a) of the Act, 8 U.S.C. § 1229(a), and thus, it does not trigger the stop-time rule for cancellation of removal purposes. *Pereira* v. *Sessions,* 138 S. Ct. at 2108. Moreover, this Board has recently 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, which was the case here. *Matter of Bermudez-Cota,* 27 I&N Dec. 441 (BIA 2018).

Here, unlike in *Pereira,* the respondent did not seek cancellation of removal before the Immigration Judge. Significantly, although the respondent claims that he is now eligible for cancellation of removal, he has not proffered any material evidence that was previously unavailable at his prior hearing or evidence which establishes his prima facie eligibility for the relief

requested.[3] *See* 8 C.F.R. § 1003.2(c)(1). Consequently, we conclude that remand is unwarranted.

The record reflects that the respondent has submitted timely proof of having paid the required bond in accordance with the Immigration Judge's grant of voluntary departure (IJ at 11-12). *See* 8 C.F.R. § 1240.26(c)(3); *see also Matter of Gamero,* 25 I&N Dec. 164 (BIA 2010). Therefore, the voluntary departure period will be reinstated.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period

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[3] We further note that the respondent first entered the United States in February of 2005, he was placed in removal proceedings on or about March 26,2013, and received the notice of hearing for his June 25, 2013, hearing *(see* Exh. 2; Tr. at 1-4). Thus, contrary to his claims, the respondent has not established that he has been physically present in the United States for a continuous period of 10 years as required under section 240A(b)(l) of the Act, 8 U.S.C. § 1229b(b).

specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245,248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d)of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for

review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

Patricia A. Cole
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File: A205-000-967 November 8, 2017

In the Matter of

AGUSTO NIZ-CHAVEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: JEFFREY MCCARROLL

ON BEHALF OF DHS: MICHAEL EL-ZEIN

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Guatemala who was issued a Notice to Appear by the Department of Homeland Security on March 26, 2013, charging him with inadmissibility pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act as an alien present in the United States without being admitted or paroled.

On May 24, 2013, the Notice to Appear was filed with the Court commencing removal proceedings and vesting jurisdiction with this Court.

At a master calendar, respondent admitted all the factual allegations in the Notice to Appear, and conceded inadmissibility as charged. He declined to designate a country of removal. The Court directed Guatemala as the country of removal, if necessary.

On June 14, 2017, the respondent submitted an application for withholding of removal and relief under the Convention Against Torture, form I-589. The respondent filed, with the Court, documents in support of his claim. They go from Exhibit 2 to Exhibit 4. The Court also considered the testimony of the respondent. The totality of the evidence presented has been considered by the Court regardless of whether specifically mentioned in this decision.

SUMMARY OF THE RESPONDENT'S TESTIMONY

The respondent testified that he was born in Tajumulco, San Marcos, Guatemala, on August 31, 1990. He entered the United States on or about February 2005, without inspection. Respondent claims he has three children. The oldest daughter was born in August 2005 in Guatemala. The two younger children are U.S. citizens. Respondent claimed he lived in Tajumulco before coming to the United States. Respondent stated he has four siblings in the United States, and three siblings and his parents in Tajumulco, Guatemala. Respondent claims he left Guatemala because problems between two municipalities; Tajumulco, which is his municipality,

and Ixchiguan, that started a long time ago, sometime in 2004. Respondent claims that in 2005, the village of Ixchiguan took all the land and threatened respondent's family and neighbors, so they had to leave the land. Ixchiguan claimed that the land belonged to them. They said that they had proof, but there was no law. Respondent claims the land belonged to his parents since they were young and respondent was born in that land. Respondent claims his father told him he purchased the land and that he has the evidence. Respondent believes his father has evidence of ownership; however, respondent did not ask his father for the evidence of ownership, because it did not occur to the respondent to ask his father for that evidence of corroboration. At least, that was the testimony of the respondent in court when he was asked regarding evidence that he claims his father has that the land that they had to abandon belonged-to his father.

Respondent claims he fears harm or mistreatment by the people of Ixchiguan. Respondent claims that many years ago respondent's brother-in-law, Roberto Chavez, was killed. He was married to Natalia, respondent's sister. Roberto Chavez was working in the fields when people from Ixchiguan arrived and sequestered him and asked him why he had not left the land. So he was kidnapped and killed. According to the respondent, nothing happened to his sister, Natalia. According to the I-589, Natalia was with Mr. Chavez working the land. In the I-589, page 5, part B, question 1A, the respondent indicates that in the year 2004, while his sister and brother-in-law were working, cultivating their land, the citizens of

Ixchiguan took them by surprise and kidnapped the brother-in-law.

In court, respondent described the incident by saying that many years ago respondent's brother-in-law, Roberto Chavez, was killed. He was married to Natalia. Roberto Chavez was working in the fields when people from Ixchiguan arrived and sequestered him and asked him why he had not left the land. So he was kidnapped and he was killed. According to the respondent, nothing happened to his sister, Natalia, even though she was with him in the field. Respondent claimed that when this happened, he was in school, and he was about 8 years old. Respondent is now 27 years old. The incident respondent described occurred almost 20 years ago. Respondent claims he left school and went into hiding, because the war had started. According to the respondent, the kidnappers left a letter that the family had to leave, because what happened to Roberto Chavez would happen to respondent's family. Respondent has not provided corroboration of this event, because it did not occur to respondent, according to his answers to why he has not provided corroboration from his sister, his father, or anyone in his family, respondent indicated that it did not occur to him to ask his sister or his parents for a letter or corroboration. Respondent claims that documents to corroborate do not exist in Guatemala or the documents were stolen. Respondent claims he left everything in the house in 2004. Respondent also claimed that in 2004, the government of Guatemala kept no records of deaths or marriages. Things were written in pencil. Respondent claims it was not possible for him to obtain documents from San Marcos. It would have taken a day, and his parents

would have had to request them as they did with what the respondent has provided to the Court and was admitted as Exhibit 4, page 15.

So, even though the respondent did request some documents from his parents, he failed to produce any corroboration of the death of his brother-in-law, Roberto Chavez according to the respondent, and according to his testimony, that was killed by the people of Ixchiguan.

According to the respondent's testimony, since he came to the United States, nothing has happened to his family. The respondent, according to the I-589, came to the United States on or about February 2005. Respondent claims he is aware of the violence in the area where he lived, because they want to take over the land. Respondent claims that the people from Ixchiguan have said that if they were to find a member of respondent's family in the land, they would kill him or her. Respondent claims that since his family left the land in 2004, nothing has happened to them, but there is hatred. Respondent claims he has no home to return to, because his parents only have a small piece of land where they live. They now live in a piece of land respondent's grandmother gave them. It is further from where they used to live. They sell vegetables, and their neighbors lend them land to raise corn without paying them. Respondent claims if he were to return to Guatemala, he would have no place to live, and the people from Ixchiguan would know he arrived, and they would not be happy, because they would think that he is there to try to recover the land they used to have in 2004. Respondent claims they may kidnap or kill him.

During cross-examination, respondent testified that when his brother-in-law was killed, the family remained in their house, meaning respondent's family. Then, respondent testified that his brother-in-law was killed in the year 2002. Respondent said he was about 12 years old, where initially he had said he was about 8 years old when it happened. Respondent testified that his brother-in-law was the only member of the family that had problems with the land in Guatemala. Respondent testified that between 2002, when his brother-in-law was killed, and 2004, nothing happened to his family, but they continued to receive threats. However, no one was actually harmed. Between 2002 and 2004, no one in respondent's family worked the land. And, since 2004, they left the land, and no one has returned to that land to work it from respondent's family. Respondent does not have the intention to return to that land or to work it. Respondent's parents have a new home away from that land, about an hour away. Since 2002, respondent's siblings have come to the United States and returned to Guatemala without any problems. Respondent indicated that Fernando, Natalia, and Anastasia have not left Guatemala since 2002, and nothing has happened to them.

Anastasia is married and has a husband and family in Guatemala. Fernando and Natalia live with respondent's parents. No one has been to that land in over one decade. No one has persecuted respondent's siblings in Guatemala. Respondent has no intention to go back to that place. Respondent claims that in Guatemala there is a lot of delinquency, and that is the only thing preventing respondent from living

anywhere else in Guatemala. Respondent fears general delinquency in Guatemala.

Respondent was also qualified for voluntary departure. He indicated he is willing and able to depart when ordered, and he accepted the condition of having to post a voluntary departure bond, minimum $500, within five days of the Court's order.

That is the summary of the respondent's testimony in court.

The Court finds respondent was generally credible. There were some discrepancies as to when his brother-in-law, Roberto Chavez, was killed, whether the respondent was 8 years old, or whether he was 12 years old. So it is not clear when Roberto Chavez was killed. But, according to the respondent, it was sometime in, maybe, 2002. His application says 2004. And the respondent's testimony in court said that he and his family left the land in the year 2004, and nothing else has happened to any of his family since then. Also, in court, the respondent had testified that it was only his brother-in-law who worked the land in Guatemala during that time that he described as having the problem.

ASYLUM

As respondent has filed his application for asylum more than one year after the date of his last arrival in the United States, and he has not shown that any of the exceptions to the one year bar apply he is statutorily barred from asylum relief. INA Section 208(a)(2)(B).

WITHHOLDING OF REMOVAL

The Court will analyze whether respondent has established statutory eligibility for withholding of removal under the INA and under the Convention Against Torture.

For withholding, the applicant must demonstrate that, if returned to his country, his life or freedom would be threatened because of one of the protected grounds. INA Section 241(b)(3). To make this showing, the respondent must establish a clear probability of persecution, meaning that it is more likely than not that he will be subject to persecution on account of a protected ground if returned to the country from which he is seeking withholding of removal; that being Guatemala. INS v. Cardoza-Fonseca, 280 U.S. 421,423 (1997).

Furthermore, like an asylum applicant, a withholding applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for the persecution. Matter of C-T-L-, 25 I&N Dec. 341,348 (BIA 2010). There is no discretionary element for withholding of removal. Therefore, if the applicant establishes eligibility for withholding of removal, it must be granted. INS v. Ventura, 537 U.S. 12, 13 (2002).

If an alien demonstrates past persecution in the proposed country of removal, it is presumed that his life or freedom will be threatened in the future on the basis of his or her original claim. If the applicant fear future threats to life or freedom is unrelated to the past persecution. The applicant bears the burden of

establishing that it is more likely than not that he would suffer such harm.

PAST PERSECUTION

First, the respondent has failed to demonstrate that he had been subject to past persecution based on the respondent's testimony and evidence in the Court. The Court finds that what happened to the respondent in Guatemala in 2004 does not rise to the level of persecution. Persecution in an extreme concept, and based on the testimony and the evidence presented, the Court finds that the respondent has not been subjected to persecution in Guatemala based on any statutory ground. Even considering the respondent's claim that his brother-in-law was killed, the respondent has failed to corroborate that he had a brother-in-law by that name or that that person was killed in Guatemala, or was related to the respondent in any way.

As to whether respondent has established that it is more likely than not that he will suffer future persecution, the Court finds respondent has not met his burden of establishing that any hypothetical future harm he would suffer would be because of one the five protected grounds. 8 C.F.R. 1208.16(b)(1)(iii).

To show persecution because of membership in a particular social group, an applicant must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question. Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2013). Respondent claims to fear persecution on account of his particular social group as a family

member who has suffered the consequences of Guatemala constant land use. That is the group that respondent claims to belong to. The respondent claims his father's land was taken by the people of Ixchiguan, Chuapequez, the Court finds respondent has not met his burden of proof in establishing that his father owned the land he claims was taken or that any such action by the people of the neighboring municipality where respondent resided in Guatemala raises to the level of persecution. The incident respondent described in his testimony where his brother-in-law was killed because of the land feud is inconsistent with some information provided in his I-589 application. Respondent testified that the incident occurred. Initially, he said 1998, 1999. Then, he said it was 2002. Whereas the I-589 state it happened in 2004. In addition, respondent has failed to corroborate said incident. He has failed to provide corroboration as to any family relationship to this individual that was killed, or as to when, why, or how the death happened other than respondent's own self-serving testimony. Claims of land dispute by family members without more does not support the respondent's claim that he was persecuted on account of his membership in a particular social group. The Court finds that respondent has not met his burden to show past persecution based on any statutorily protected ground-or has established that it is more likely than not that he will suffer future harm in Guatemala based on any statutory ground.

Because respondent has not shown past persecution, he is not entitled to a presumption of a well-founded fear of future persecution.

If the applicant's fear of persecution is unrelated to past persecution, the applicant bears the burden of establishing that the fear is well-founded. An applicant has a well-founded fear of future persecution if the applicant has a fear of persecution in his country of nationality on account of one of the five protected grounds, if there is a reasonable possibility of suffering such persecution if he were to return to that country, and if he is unable to unwilling to return or to avail himself of the protection of that country because of such fear. 8 C.F.R. 1208.13(b)(2)(i).

A well-founded fear of persecution does not exist where the applicant could avoid persecution by relocating to another part of the country and such relocation would be reasonable. The applicant's fear of persecution must be countrywide. Mohamed v. Ashcroft, 396 F.3d 999 (8th Cir. 2005); Matter of Acosta, 19 I&N Dec. 235.

In this particular case, the respondent has not established a reasonable possibility of suffering persecution based on any statutory ground if he were to return to his country. In addition, a well-founded fear of persecution does not exist where the applicant could avoid persecution by relocating to another part of the country and such relocation would be reasonable.

The Court finds that, based on the record and the respondent's testimony, the respondent could relocate to another part of Guatemala since the claimed fear of persecution in this case is not countrywide but based on a land feud between two municipalities; Ixchiguan, Chuapoequez, and Tajumulco. The respondent could relocate to a safe place in Guatemala. With respect to

the people of Ixchiguan or Tajumulco, respondent has not produced evidence-showing his fear of them is based on anything other than a land dispute that he claims occurred many, many years ago.

Respondent contends that the government will not protect him from these people. The record does show that there are many land disputes in Guatemala, and that the mechanisms to resolve them are sometimes inadequate. See Exhibits 3 and 4. However, a land dispute alone does not rise to the level of persecution. See Arillas v. Mendez, 790 F.3d at 790 stating persecution is an extreme concept The record, the respondent's testimony, does not establish that the respondent suffered past persecution or has a well-founded fear of future persecution in Guatemala.

Furthermore, respondent has not shown the government would turn a blind eye to harm inflicted on him by the people of Ixchiguan, or Tajumulco, or anyone in Guatemala. Respondent has not offered sufficient evidence to show the government acquiesces to criminal activity. The record does not establish that the state actors in the Guatemala government acquiesce to land feud violence.

Respondent has also not met his burden of demonstrating eligibility for relief under the Convention Against Torture. Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. 8 C.F.R. 1208.18(a)(1). The regulations further instruct torture is an extreme form of cruel and inhuman treatment which does not include less forms of inhuman or degrading treatment or punishment.

Based on the preceding discussion, the Court concludes respondent has not met his burden to show he would more likely than not be tortured by or with the acquiescence of the Guatemalan government if removed to Guatemala.

Accordingly, respondent's application for withholding of removal and withholding of removal under the Convention Against Torture are denied.

ORDERS

WHEREFORE IT IS ORDERED that the charge that appears in the Notice to Appear is sustained, and respondent's inadmissibility established.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under Section 241 (b)(3) of the Act be denied;

IT IS FURTHER ORDERED that respondent's application for protection under the Convention Against Torture be denied.

IT IS FURTHER ORDERED that respondent's request for voluntary departure be and is hereby granted pursuant to Section 240B(d) of the Act for a period not to exceed 30 days from the date of this order. That is, the respondent must voluntarily depart the United States on or before December 8, 2017. Once again, December 8, 2017, without expense to the Government and under such conditions as the Department of Homeland Security may impose.

The Court hereby notifies the respondent, pursuant to Section 240B(d) of the Act that failure to voluntarily depart the United States within the time period specified by the Court shall subject the respondent to

a civil penalty that the Court is setting at $3,000, and the respondent will be ineligible for a period of 10 years to receive relief under Sections 240A, 240B, 245, 248, and 249 of the Act.

IT IS FURTHER ORDERED that the respondent must post a $500 voluntary departure bond within five business days of this order with the Department of Homeland Security. The respondent's voluntary departure bond must be posted on or before November 15, 2017. If the bond is not posted within this time period, the voluntary departure order shall vacate automatically, and an alternate order of removal set forth below will take effect immediately.

The Court hereby notifies the respondent that he must within 30 days of filing an appeal with the Board of Immigration Appeals submit proof of having posted the required voluntary departure bond. If respondent does not provide timely proof to the Board that the required bond has been posted, the Board will not reinstate the period of voluntary departure in its final order.

The Court further notifies the respondent that if he files a post-order motion to re-open or motion to reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically, and alternate order of removal set forth below will take effect immediately, and the penalties for failure to depart voluntarily will not apply.

If respondent fails to voluntarily depart within the specified time or to comply with the above conditions, the order granting voluntary departure shall vacate automatically, and without further notice, the

following alternate orders shall become immediately effective:

Respondent shall be removed from the United States to Guatemala on the charge in the Notice to Appear.

Please see the next page for electronic signature

CRIMILDA
GUILLOTY
Immigration
Judge

//s//

Immigration Judge CRIMILDA GUILLOTY

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APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of		File: A205-000-967
AGUSTO NIZ-CHAVEZ RESPONDENT	)))))	IN REMOVAL PROCEEDINGS Transcript of Hearing

Before CRIMILDA GUILLOTY, Immigration Judge

Date: September 13, 2017

Place: DETROIT, MICHIGAN

Transcribed by DEPOSITION SERVICES, Inc.-2

Official Interpreter: MS. SUNOM

Language: SPANISH

Appearances:

For the Respondent: MAYA HOLLEMAN

For the DHS: Michael El-ZEIN

* * *

JUDGE FOR THE RECORD

Now, also, on the record, we've been back and forth regarding the respondent's eligibility, perhaps, for cancellation of removal because he has United States citizen children, and he's been in the United States, it seems, for more than 10 years. However, Government pointed out that he, according to the application, entered the United States in February 2005. His NTA was issued March 26, 2013. So he would not have the physical presence. And I agree with the Government. I think we all agree with the Government. It's just that since counsel was not sure, we weren't focusing on that specifically, because there is some evidence in the record to indicate that the respondent has been in the United States for more than 10 years. Nevertheless, I think that is settled. Well, that was the discussion that we went, basically, off the record.

* * *

APPENDIX E

1. The current version of 8 U.S.C. § 1229 provides:

§ 1229. Initiation of removal proceedings

(a) Notice to appear

(1) In general

In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an

address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G) (i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except

under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general

In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

(3) Rule of construction

Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

(c) Service by mail

Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

(d) Prompt initiation of removal

(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Certification of compliance with restrictions on disclosure

(1) In general

In cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the

provisions of section 1367 of this title have been complied with.

(2) Locations

The locations specified in this paragraph are as follows:

(A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization.

(B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 1101 (a)(15) of this title.

2. The current version of 8 U.S.C. § 1229b provides:

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) Special rule for battered spouse or child

(A) Authority

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident (or is the parent of a child of an alien who is or was a lawful permanent resident and the child has

been battered or subjected to extreme cruelty by such permanent resident parent); or

(III) the alien has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy;

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, subject to paragraph (5), and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

(B) Physical presence

Notwithstanding subsection (d)(2), for purposes of subparagraph (A)(ii) or for purposes of section 1254(a)(3) of this title (as in effect before the title 111-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), an alien shall not be considered to have failed to maintain continuous physical presence by reason of an absence if the alien demonstrates a connection between the absence and the battering or extreme cruelty perpetrated against the alien. No absence or portion of an absence connected to the battering or extreme cruelty shall count toward the 90-day or 180-day limits established in subsection (d)(2). If any absence or aggregate absences exceed 180 days, the absences or portions of the absences will not be considered to break the period of continuous presence. Any such period of time excluded from the 180-day limit shall be excluded in computing the time during which the alien has been physically present for purposes of the 3-year requirement set forth in this subparagraph, subparagraph (A)(ii), and section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(C) Good moral character

Notwithstanding section 1101(f) of this title, an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of

subparagraph (A)(iv) shall not bar the Attorney General from finding the alien to be of good moral character under subparagraph (A)(iii) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996), if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

(D) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(3) Recordation of date

With respect to aliens who the Attorney General adjusts to the status of an alien lawfully admitted for permanent residence under paragraph (1) or (2), the Attorney General shall record the alien's lawful admission for permanent residence as of the date of the Attorney General's cancellation of removal under paragraph (1) or (2).

(4) Children of battered aliens and parents of battered alien children

(A) In general

The Attorney General shall grant parole under section 1182(d)(5) of this title to any alien who is a—

(i) child of an alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); or

(ii) parent of a child alien granted relief under section 1229b(b)(2) or 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

(B) Duration of parole

The grant of parole shall extend from the time of the grant of relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to the time the application for adjustment of status filed by aliens covered under this paragraph has been finally adjudicated. Applications for adjustment of status filed by aliens covered under this paragraph shall be treated as if the applicants were VAWA self-petitioners. Failure by the alien granted relief under subsection (b)(2) or section 1254(a)(3) of this title (as in effect before the title III-A effective date in section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) to

exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) may result in revocation of parole.

(5) Application of domestic violence waiver authority

The authority provided under section 1227(a)(7) of this title may apply under paragraphs (1)(B), (1)(C), and (2)(A) (iv) in a cancellation of removal and adjustment of status proceeding.

(6) Relatives of trafficking victims

(A) In general

Upon written request by a law enforcement official, the Secretary of Homeland Security may parole under section 1182(d)(5) of this title any alien who is a relative of an alien granted continued presence under section 7105(c)(3)(A) of title 22, if the relative—

(i) was, on the date on which law enforcement applied for such continued presence—

(I) in the case of an alien granted continued presence who is under 21 years of age, the spouse, child, parent, or unmarried sibling under 18 years of age, of the alien; or

(II) in the case of an alien granted continued presence who is 21 years of age or older, the spouse or child of the alien; or

(ii) is a parent or sibling of the alien who the requesting law enforcement official, in consultation with the Secretary of Homeland

Security, as appropriate, determines to be in present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement, irrespective of age.

(B) Duration of parole

(i) In general

The Secretary may extend the parole granted under subparagraph (A) until the final adjudication of the application filed by the principal alien under section 1101(a)(15)(T)(ii) of this title.

(ii) Other limits on duration

If an application described in clause (i) is not filed, the parole granted under subparagraph (A) may extend until the later of—

(I) the date on which the principal alien's authority to remain in the United States under section 7105(c)(3) (A) of title 22 is terminated; or

(II) the date on which a civil action filed by the principal alien under section 1595 of title 18 is concluded.

(iii) Due diligence

Failure by the principal alien to exercise due diligence in filing a visa petition on behalf of an alien described in clause (i) or (ii) of subparagraph (A), or in pursuing the civil action described in clause (ii)(II) (as determined by the Secretary of Homeland

Security in consultation with the Attorney General), may result in revocation of parole.

(C) Other limitations

A relative may not be granted parole under this paragraph if—

(i) the Secretary of Homeland Security or the Attorney General has reason to believe that the relative was knowingly complicit in the trafficking of an alien permitted to remain in the United States under section 7105(c)(3)(A) of title 22; or

(ii) the relative is an alien described in paragraph (2) or (3) of section 1182(a) of this title or paragraph (2) or (4) of section 1227(a) of this title.

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens:

(1) An alien who entered the United States as a crewman subsequent to June 30, 1964.

(2) An alien who was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101(a)(15)(J) of this title, or has acquired the status of such a nonimmigrant exchange alien after admission, in order to receive graduate medical education or training, regardless of whether or not the alien is subject to or has fulfilled the two-year foreign residence requirement of section 1182(e) of this title.

(3) An alien who—

(A) was admitted to the United States as a nonimmigrant exchange alien as defined in section 1101 (a)(15)(J) of this title or has acquired the status of such a nonimmigrant exchange alien after admission other than to receive graduate medical education or training,

(B) is subject to the two-year foreign residence requirement of section 1182(e) of this title, and

(C) has not fulfilled that requirement or received a waiver thereof.

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

(5) An alien who is described in section 1231(b)(3)(B)(i) of this title.

(6) An alien whose removal has previously been cancelled under this section or whose deportation was suspended under section 1254(a) of this title or who has been granted relief under section 1182(c) of this title, as such sections were in effect before September 30, 1996.

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien

has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

(3) Continuity not required because of honorable service in Armed Forces and presence upon entry into service

The requirements of continuous residence or continuous physical presence in the United States under subsections (a) and (b) shall not apply to an alien who—

(A) has served for a minimum period of 24 months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and

(B) at the time of the alien's enlistment or induction was in the United States.

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, under this section or such section 1254(a) of this title.

(2) Fiscal year 1997

For fiscal year 1997, paragraph (1) shall only apply to decisions to cancel the removal of an alien, or suspend the deportation of an alien, made after April 1, 1997. Notwithstanding any other provision of law, the Attorney General may cancel the removal or suspend the deportation, in addition to the normal allotment for fiscal year 1998, of a number of aliens equal to 4,000 less the number of such cancellations of removal and suspensions of deportation granted in fiscal year 1997 after April 1, 1997.

(3) Exception for certain aliens

Paragraph (1) shall not apply to the following:

(A) Aliens described in section 309(c)(5)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (as amended by the Nicaraguan Adjustment and Central American Relief Act).

(B) Aliens in deportation proceedings prior to April 1, 1997, who applied for suspension of deportation under section 1254(a)(3) of this title (as in effect before September 30, 1996).

3. The current version of 8 C.F.R. § 1003.18 provides:

§ 1003.18 Scheduling of cases.

(a) The Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings.

(b) In removal proceedings pursuant to section 240 of the Act, the Service shall provide in the Notice to Appear, the time, place and date of the initial removal hearing, where practicable. If that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing. In the case of any change or postponement in the time and place of such proceeding, the Immigration Court shall provide written notice to the alien specifying the new time and place of the proceeding and the consequences under section 240(b)(5) of the Act of failing, except under exceptional circumstances as defined in section 240(e)(1) of the Act, to attend such proceeding. No such notice shall be required for an alien not in detention if the alien has failed to provide the address required in section 239(a)(1)(F) of the Act.

4. The 1994 version of 8 U.S.C. § 1252b provided in pertinent part:

§ 1252b. Deportation procedures

(a) Notices

(1) Order to show cause

In deportation proceedings under section 1252 of this title, written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided a list of counsel prepared under subsection (b)(2) of this section.

(F) (i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1252 of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under subsection (c)(2) of this section of failure to provide address and telephone information pursuant to this subparagraph.

(2) Notice of time and place of proceedings

In deportation proceedings under section 1252 of this title—

(A) written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any), in the order to show cause or otherwise, of –

(i) the time and place at which the proceedings will be held, and

(ii) the consequences under subsection (c) of this section of the failure, except under exceptional circumstances, to appear at such proceedings; and

(B) in the case of any change or postponement in the time and place of such proceedings, written notice shall be given in person to the alien (or, if personal service is not practicable, written notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) of—

(i) the new time or place of the proceedings, and

(ii) the consequences under subsection (c) of this section of failing, except under exceptional circumstances, to attend such proceedings.

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under subsection(a)(1)(F) of this section.

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