No. 17-459

In the Supreme Court of the United States

WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

To be eligible for cancellation of removal under the Immigration and Nationality Act (INA), 8 U.S.C. 1101, *et seq.*, an alien who has not been admitted for permanent residence must establish, among other things, that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his cancellation] application." 8 U.S.C. 1229b(b)(1)(A). Under the INA's stop-time rule, an applicant's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)" of the INA, notifying him that removal proceedings are being initiated against him. 8 U.S.C. 1229b(d)(1). The question presented is:

Whether a notice to appear issued under 8 U.S.C. 1229(a) must include a date and time certain for the alien's initial removal hearing to stop an alien's period of continuous physical presence for purposes of 8 U.S.C. 1229b(b)(1)(A).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

In the Supreme Court of the United States

No. 17-459

WESCLEY FONSECA PEREIRA, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 866 F.3d 1. The opinions of the Board of Immigration Appeals (Pet. App. 17a-19a) and the immigration judge (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2017. The petition for a writ of certiorari was filed on September 27, 2017. The petition was granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-94a.

STATEMENT

In May 2006, after having remained in the United States for nearly six years on a six-month nonimmigrant visa, petitioner was arrested for operating a vehicle while under the influence. While petitioner was detained, he was personally served with a notice to appear in removal proceedings under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which stated that the date and time of his removal hearing were "to be set." J.A. 9 (Administrative Record (A.R.) 217) (emphasis omitted). In the ensuing proceedings, petitioner conceded he was removable but sought cancellation of removal, a form of discretionary relief that a nonpermanent-resident alien may seek only if (*inter alia*) he has maintained continuous physical presence in the United States for at least ten years. 8 U.S.C. 1229b(b)(1)(A). An immigration judge (IJ) found petitioner ineligible for cancellation of removal under the INA's stop-time rule—which provides that an alien's period of continuous physical presence ends "when the alien is served a notice to appear under section 1229(a) of [Title 8]," 8 U.S.C. 1229b(d)(1)—because petitioner had been personally served with a notice to appear within ten years of entering the country in 2000. The Board of Immigration Appeals (Board) affirmed. Pet. App. 17a-19a (A.R. 2-3). The court of appeals denied petitioner's petition for review. *Id.* at 1a-16a.

1. a. Under the INA, an alien who is admitted to the United States temporarily as a nonimmigrant—such as for tourism, 8 U.S.C. 1101(a)(15)(B)—but who remains longer than permitted is removable. See 8 U.S.C. 1227(a)(1)(B) and (C)(i). To effectuate such a removal,

the Department of Homeland Security (DHS) commences removal proceedings against the alien before an IJ. See 8 U.S.C. 1229a.[1]

To apprise the alien of the government's initiation of removal proceedings, the INA provides that "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)." 8 U.S.C. 1229(a)(1). A notice to appear must specify, among other things: (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 their statutory basis; (E) that the "alien may be represented by counsel" and "will be provided * * * a period of time to secure counsel"[2]; (F) that "the alien must immediately provide * * * a written record of an address * * * at which the alien may be contacted," and "of any change of the alien's address," to the "Attorney General," and the consequences of failing to do so; and (G) the "time and place at which the proceedings will be held," and the consequences for failure to appear. *Ibid.* Much of the required information that is not specific to

---

[1] Some functions relating to immigration that were formerly vested in the Attorney General have been transferred to officials of DHS. Accordingly, some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security, either exclusively or in addition to the Attorney General. See 6 U.S.C. 251 (2012 & Supp. IV 2016), 6 U.S.C. 271(b), 542 note, 557; 8 U.S.C. 1551 note.

[2] The alien also must be given a list, maintained by the Attorney General and updated quarterly, of counsel who are available to represent aliens pro bono. 8 U.S.C. 1229(a)(1)(E) and (b)(2).

a particular alien is incorporated into DHS's standardized notice-to-appear form (Form I-862). See J.A. 7-13 (A.R. 217-218).

To ensure that the alien is "permitted the opportunity to secure counsel before the first hearing date," the INA provides that "the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear" unless the alien requests an earlier date. 8 U.S.C. 1229(b)(1). It does not otherwise constrain the timing of the initial hearing. And it expressly contemplates that the date and time (or place) of the hearing may be changed upon "written notice" to the alien of "the new time or place." 8 U.S.C. 1229(a)(2)(A). Such notice of a change is unnecessary, however, if "the alien has failed to provide [his] address" as required. 8 U.S.C. 1229(a)(2)(B); see 8 U.S.C. 1229(a)(3) (requiring Attorney General to "create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes)" aliens "provide[]").

If an alien who has been served with the "written notice required under paragraph (1) or (2) of section 1229(a)" fails to appear, the alien "shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless DHS "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded in certain limited circumstances, including (*inter alia*) "if the alien demonstrates that [he] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii). In addition, if an in absentia removal order has been entered and the alien was orally notified "at the time of the notice described in paragraph (1) or

(2) of section 1229(a) * * * of the time and place of the proceedings and of the consequences * * * of failing" to appear, then (absent "exceptional circumstances") he is ineligible for certain discretionary relief for ten years. 8 U.S.C. 1229a(b)(7).

b. i. The INA has long granted the Attorney General discretion to grant relief from removal in certain circumstances. As relevant here, prior to 1996, it provided that "the Attorney General m[ight], in his discretion, suspend deportation" of an alien if (1) the alien showed he "ha[d] been physically present in the United States for a continuous period of not less than seven years" before seeking suspension of deportation; (2) he "prove[d] that during all of such period he was and [remained] a person of good moral character"; and (3) he "[was] a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1) (1994); see *INS* v. *Chadha*, 462 U.S. 919, 923-924 (1983).[3] This Court described suspension of deportation as "'an act of grace'" that "cannot be demanded as a right" and instead lay within the "unfettered discretion of the Attorney General," akin to "'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *Jay* v. *Boyd*, 351 U.S. 345, 354 & n.16 (1956) (citations omitted).

---

[3] Special rules applied to aliens who were deportable based on criminal-offense, document-fraud, or security grounds or who had "been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident." 8 U.S.C. 1254(a)(2) and (3) (1994).

Congress became concerned, however, that suspension of deportation and other forms of discretionary relief were being exploited inappropriately and impeding the expeditious removal of aliens unlawfully present—including aliens who had committed crimes or had entered lawfully but stayed longer than authorized. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 114-115, 118-125 (1996) (House Report). For example, "[t]he 'extreme hardship' standard" for suspension of deportation "ha[d] been weakened by recent administrative decisions" that deemed routine consequences of removal sufficient. H.R. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Conf. Report).

Members of Congress also were concerned that aliens were "abus[ing]" suspension of deportation by exploiting delays in deportation proceedings to evade the continuous-physical-presence requirement. House Report 122. Before 1996, the statute did not contain a mechanism to terminate an alien's period of continuous physical presence once deportation proceedings began, and "some Federal courts permit[ted] aliens to continue to accrue time toward the seven year threshold even after they ha[d] been placed in deportation proceedings." *Ibid.* Aliens exploited this gap to circumvent the continuous-physical-presence requirement in various ways. See *ibid.* For example, "aliens in deportation proceedings" often either "knowingly filed meritless applications for relief or otherwise exploited administrative delays in the hearing and appeal processes in order to 'buy time,' during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *In re Cisneros*, 23 I. & N. Dec. 668, 670 (B.I.A. 2004) (discussing legislative history); see *INS* v. *Rios-Pineda*,

471 U.S. 444, 450 (1985) (describing aliens' "incentive" to "stall[] physical departure in the hope of eventually satisfying" the seven-year requirement). Similarly, "aliens who failed to appear for their deportation proceedings and were ordered deported in absentia" could "then seek to re-open proceedings once the requisite time ha[d] passed." House Report 122.

ii. In 1996, to address these and other concerns, Congress "replace[d]" suspension of deportation with a new form of relief—cancellation of removal under 8 U.S.C. 1229b(b)—which "limit[ed] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted." Conf. Report 213; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, sec. 304(a)(3), § 240A, 110 Stat. 3009-594 to 3009-596; see also House Report 108. To address concerns that discretionary relief had become too widely available, IIRIRA raised the threshold showing of hardship for nonpermanent-resident aliens—permitting cancellation of removal only if the alien demonstrates "exceptional and extremely unusual hardship"—and extended the required period of continuous physical presence from seven years to ten. 8 U.S.C. 1229b(b)(1)(D); see Conf. Report 213-214. Congress also prohibited cancellation of removal for (among others) aliens who have been convicted of certain criminal offenses or are removable on certain security-related grounds. 8 U.S.C. 1229b(b)(1)(C) and (c)(4).[4]

---

[4] Different criteria apply to aliens admitted as lawful permanent residents who seek cancellation of removal. 8 U.S.C. 1229b(a). Among other things, such aliens must demonstrate seven years of "continuous residence" after admission "in any status" to be eligible for relief. 8 U.S.C. 1229b(a)(2).

Thus, to be eligible for cancellation of removal after IIRIRA, a nonpermanent-resident alien must (1) have been physically present in the United States for a continuous period of at least ten years; (2) have been a person of good moral character during that period; (3) have not been convicted of certain designated crimes; and (4) establish that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D). If the applicant meets those threshold eligibility criteria, whether a favorable exercise of discretion is warranted depends on a balancing of "the favorable and adverse factors" of the alien's particular case. *In re A-M-*, 25 I. & N. Dec. 66, 76 (B.I.A. 2009). In addition, IIRIRA set an annual cap barring the Attorney General from cancelling the removal of more than 4000 aliens in a single fiscal year. 8 U.S.C. 1229b(e)(1).

To address concerns that aliens continued to accrue continuous-physical-presence time even while removal proceedings were ongoing, IIRIRA adopted the provision at issue here, often referred to as the stop-time rule. 8 U.S.C. 1229b(d)(1). The stop-time rule states that a nonpermanent-resident alien's period of continuous physical presence is "deemed to end" upon the occurrence of the earlier of two events: (A) "when the alien is served a notice to appear under section 1229(a)"; or (B) the alien's commission of one of certain criminal offenses that would render the alien either inadmissible or deportable. *Ibid.* Thus, once an alien is served with a

notice to appear, he no longer accrues continuous-physical-presence time.[5]

2. a. Petitioner is a native and citizen of Brazil. Pet. App. 3a. In June 2000, he was admitted to the United States as a temporary nonimmigrant visitor for six months. *Ibid.* When the six months ended in December 2000, however, petitioner did not honor the terms and conditions of his visa and admission by departing; instead, he remained for years. *Ibid.*

In May 2006—nearly five-and-a-half years later—petitioner was arrested in Massachusetts (for the second time) for operating a vehicle while under the influence. A.R. 39-42, 195; see Pet. App. 22a; J.A. 21. On May 31, 2006, while petitioner was detained, DHS personally served him with a notice to appear. See Pet. App. 3a, 18a; J.A. 7-13 (A.R. 217-218); A.R. 199. Petitioner signed the notice to appear confirming that it was personally served. J.A. 12-13 (A.R. 218); see J.A. 49 (A.R. 136).

The notice to appear informed petitioner that "removal proceedings under [8 U.S.C. 1229a]" were being initiated against him because he had been admitted to the United States but had stayed longer than authorized in violation of 8 U.S.C. 1227(a)(1)(B). J.A. 7-8 (A.R. 217). The notice recited the dates of petitioner's entry, relevant terms of his visa and admission, and other facts regarding his removability. *Ibid.* It stated that petitioner was "ordered to appear" for removal proceedings in the Boston immigration court "on a date to be set at a time to be set to show why [he] should not be removed." J.A. 9 (A.R. 217)

---

[5] The same stop-time rule applies to end a lawful permanent resident's period of continuous residence. 8 U.S.C. 1229b(d)(1). Service of a notice to appear does not trigger the stop-time rule for aliens subject to special rules in Section 1229b(b)(2) (inapplicable here) for certain victims of domestic abuse. 8 U.S.C. 1229b(d)(1)(A).

(capitalization and emphasis omitted). The notice provided information about the conduct of the hearing and the consequences of failing to appear. J.A. 10 (A.R. 218). It also informed petitioner that, if he chose, he could be represented by counsel, and that a list of qualified attorneys who might be available to represent him pro bono would be provided. J.A. 10, 12 (A.R. 218).

The notice to appear listed petitioner's street address in Oak Bluffs, Massachusetts. J.A. 7 (A.R. 217). In accordance with Section 1229(a), it instructed petitioner that he was "required to provide the [Immigration and Naturalization Service (INS)]"—some of whose functions have been transferred to DHS—"in writing, with [his] full mailing address and telephone number," and that he also "must notify the Immigration Court immediately by using Form EOIR-33 whenever [he] change[d] [his] address or telephone number during the course of this proceeding." J.A. 11 (A.R. 218).

b. On August 9, 2007, DHS filed the notice to appear with the Boston immigration court, Gov't C.A. Br. 3; see J.A. 7-13 (A.R. 217), which formally commenced removal proceedings, see 8 C.F.R. 1003.14(a), 1239.1(a). On September 21, 2007, the immigration court mailed a notice of hearing to the street address listed for petitioner on his May 2006 notice to appear, informing him that a hearing would be held in his case on October 31, 2007, at the Boston immigration court. J.A. 14-16 (A.R. 216). Petitioner failed to appear at that hearing and was ordered removed in absentia. Pet. App. 3a; see J.A. 17 (A.R. 209). The immigration court mailed the in absentia removal order to the same address. A.R. 208.

c. In March 2013, five and-a-half years after he was ordered removed, petitioner was arrested again for a motor-vehicle violation and detained by DHS. Pet. App.

3a; see A.R. 43-45. Upon being informed of the removal order, petitioner retained counsel and moved to reopen the proceedings. Pet. App. 3a. Petitioner asserted that he never received the notice of hearing indicating the date of the 2007 hearing because it had been mailed to his "physical residential address," not his "mailing address"—a post-office box in a different town—and that the notice and removal order sent by the immigration court had been returned as undeliverable. J.A. 19, 21 (A.R. 194-195); Pet. App. 3a. The IJ granted petitioner's motion and reopened the proceedings, Pet. App. 3a, and a new hearing date was set, J.A. 33 (A.R. 215).[6]

During the reopened proceedings, petitioner "concede[d] proper service of the Notice to Appear, dated 05/31/06," and he further "concede[d]" all of the allegations and the charge of removability set forth in that notice. J.A. 38-39 (A.R. 147); Pet. App. 3a-4a. Petitioner, represented by counsel, requested cancellation of removal (and other discretionary relief). *Ibid.* He contended that he satisfied the ten-year continuous-physical-presence requirement because he had been present in the United States since June 2000. A.R. 116. Petitioner argued that the notice to appear served on him in 2006 "had not 'stopped' the continuous residency clock" because it "did not include the date and time of his hearing." Pet. App. 4a; see A.R. 116-118, 125-126, 142. According to petitioner, his continuous physical presence did not end under the stop-time rule until he received notice of the specific hearing date and time after his removal proceedings were reopened in 2013. Pet. App. 4a.

---

[6] This Office has been informed by DHS that petitioner had previously provided the post-office box address to DHS, but it does not appear that that address was supplied to the immigration court.

Following a hearing, the IJ denied petitioner's cancellation application and ordered him removed. Pet. App. 20a-24a (A.R. 79-83). The IJ rejected petitioner's contention that the May 2006 notice to appear had not triggered the stop-time rule, opining that "the law is quite settled that DHS need not put a date certain on the Notice to Appear in order to make that document effective," and therefore the omission of a date and time certain did not "somehow * * * negate the service of the Notice to Appear insofar as it would cut off [petitioner's] continuous physical presence." *Id.* at 23a (A.R. 81). The IJ accordingly concluded that petitioner was "statutorily ineligible to submit [a cancellation-of-removal] application." *Ibid.* (A.R. 82).[7]

3. The Board affirmed. Pet. App. 17a-19a (A.R. 7-8). It agreed with the IJ that petitioner was ineligible for cancellation of removal because he did not satisfy the ten-year continuous-physical-presence requirement. *Id.* at 18a (A.R. 7). The Board rejected petitioner's contention that the May 2006 notice to appear was insufficient to trigger the stop-time rule, relying on its precedential decision in *In re Camarillo*, 25 I. & N. Dec. 644 (2011), in which it had held that "an alien's period of continuous physical presence for cancellation of removal is deemed to end upon service of the Notice to Appear even if the Notice to Appear does not include the date and time of the hearing." Pet. App. 18a (A.R. 7).

---

[7] Petitioner also requested voluntary departure, but he withdrew that request. Pet. App. 4a n.2; see *id.* at 24a (A.R. 82); A.R. 66, 124, 143, 147. In addition, petitioner had requested that DHS exercise its prosecutorial discretion to allow petitioner to remain, and the IJ postponed the proceedings to allow petitioner to request such an exercise of discretion (and to allow petitioner to benefit from potential intervening legislation), but DHS denied that request. Pet. App. 4a, 22a.

In *Camarillo*, the Board conducted a detailed analysis of the "language and design of the statute, the applicable regulations, and the congressional intent behind the provisions of section [1229b(d)(1)]" and "conclude[d] that the DHS's service of a notice to appear triggers the 'stop-time' rule, regardless of whether the date and time of the hearing have been included in the document." 25 I. & N. Dec. at 651. The Board acknowledged that Section 1229b(d)(1)'s language standing alone could bear more than one interpretation, but it determined that "the best reading of the statute as a whole is that Congress intended the phrase 'under section [1229(a)]' after 'notice to appear' to specify the document the DHS must serve on the alien to trigger the 'stop-time' rule." *Id.* at 647; see *id.* at 647-651.

Applying *Camarillo*, the Board concluded here that personal service on petitioner of the May 2006 notice to appear ended his period of continuous physical presence, rendering him ineligible for cancellation of removal. See Pet. App. 18a (A.R. 7). It declined petitioner's request to reconsider *Camarillo* and accordingly dismissed petitioner's appeal. *Ibid.*

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-16a. The court joined six other circuits that had addressed the issue since *Camarillo* in sustaining the Board's position that service of a notice to appear is effective to stop the accrual of continuous physical presence, even if that notice lacks a date and time certain for the initial hearing. *Id.* at 2a, 15a & n.8.

Consistent with petitioner's argument below, the court of appeals considered the Board's interpretation of the INA under the framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 5a; see Pet. C.A. Br. 10, 12. The

court rejected petitioner's contention that the text of Section 1229b(d)(1) "unambiguously requires that the notice include all of the information specified in § 1229(a)(1)" to "trigger the stop-time rule." Pet. App. 7a; see *id.* at 7a-9a. Section 1229b(d)(1), it reasoned, "does not explicitly state that the date and time of the hearing must be included in a notice to appear in order to cut off an alien's period of continuous physical presence." *Id.* at 9a. It also reasoned that Section 1229b(d)(1)'s "reference to a notice to appear 'under' § 1229(a) does not clearly indicate whether the rule incorporates the requirements of that section." *Ibid.*

The court of appeals found unpersuasive petitioner's argument—adopted by the only circuit that has disagreed with the Board's position—that "§ 1229(a)(1)'s commandment that a notice to appear specifying the ten pieces of information listed '*shall* be given in person to the alien'" compelled a contrary result. Pet. App. 8a (quoting *Orozco-Velasquez* v. *Attorney Gen. U.S.*, 817 F.3d 78, 83 (3d Cir. 2016)). "The word 'shall,'" the court explained, "appears in § 1229(a)(1), not in the stop-time rule itself." *Ibid.* "It is undisputed," the court observed, "that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision." *Ibid.* "But whether a notice to appear that omits some of this information nonetheless triggers the stop-time rule," it explained, "is a different question." *Ibid.* The court concluded that, "even if such an omission renders a notice to appear defective" for purposes of Section 1229(a), it does not follow that service of the notice is insufficient to trigger the stop-time rule. *Ibid.* The court analogized this circumstance to *Becker* v. *Montgomery*, 532 U.S. 757 (2001), in which this Court "held that an unsigned notice of appeal could qualify as

timely filed, even if the missing signature was not provided within the filing period." Pet. App. 8a. "Here, just as there," the court of appeals held, "the missing item may be a 'curable' defect that does not prevent the notice from serving its purpose." *Ibid.*

The court of appeals further concluded that the Board's interpretation reflects a "permissible construction of the stop-time rule." Pet. App. 10a; see *id.* at 9a-15a. The court agreed with the Board's reasoning in *Camarillo* that the statutory structure supported its interpretation. *Id.* at 10a-11a. Given that Section 1229(a) is the "'primary reference in the INA to the notice to appear,'" it is "logical" to construe the phrase "'under section 1229(a)'" in the stop-time rule as merely "specif[ying] the document the DHS must serve on the alien to trigger the 'stop-time' rule." *Ibid.* (quoting *Camarillo*, 25 I. & N. Dec. at 647) (brackets omitted). In contrast, the court explained, "[i]t would make little sense for the stop-time rule's reference to 'a notice to appear under section 1229(a)' to condition the triggering of the rule on the fulfillment of all of the requirements of § 1229(a), which include not just notification of the initial date and time of the removal hearing" but also subsequent changes to the hearing date. *Id.* at 11a.

The court of appeals also found that the statutory history and purpose supported the Board's interpretation. Pet. App. 12a-14a. The rule was enacted, the court observed, to close a "legal loophole" that had permitted an alien's continuous physical presence for purposes of cancellation of removal to be calculated without regard to "'whether or when the [INS] had initiated deportation proceedings against the person.'" *Id.* at 12a-13a (quoting *Camarillo*, 25 I. & N. Dec. at 650). "Given Congress's intent in enacting IIRIRA to prevent notice

problems from dragging out the deportation process," the court concluded, "it would make little sense for Congress to have created the potential for further delays by conditioning the activation of the stop-time rule on the receipt of a hearing notice that may come months, or even years, after the initiation of deportation proceedings by DHS." *Id.* at 14a. The court also found reasonable the Board's consideration of the practical realities of the administrative context, including the facts that the hearing date is determined not by DHS, but by the immigration court (housed in the Department of Justice), and that information about the hearing date is often unavailable to DHS when it serves the notice. *Ibid.*

The court of appeals accordingly agreed with the Board's conclusion that petitioner's period of continuous physical presence ended when he was served with a notice to appear in 2006. Pet. App. 15a-16a. It held that petitioner was ineligible for cancellation of removal. *Ibid.*

SUMMARY OF ARGUMENT

The INA's stop-time rule provides that an alien's period of continuous physical presence ends when the alien is "served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1). The Board has construed that provision to mean that a notice to appear that contains all of the information called for by Section 1229(a) except the date and time certain of the alien's initial hearing triggers the stop-time rule. That interpretation reflects the best reading of the statute, and at least a reasonable reading that warrants deference.

A. The Board's interpretation reflects the best understanding of the statutory text in light of its context and the statute's structure, history, and purpose.

1. This Court's decisions make clear that an act "under" a statute is most naturally read to mean an act

subject to or governed by that statute—not necessarily an act that conforms perfectly to all of the statute's requirements. The context here strongly supports that reading. When Congress intended in IIRIRA to refer to compliance with Section 1229(a) and to attach consequences to noncompliance, it did so expressly. The phrase "under section 1229(a)," 8 U.S.C. 1229b(d)(1), would also be an unlikely way to condition triggering of the stop-time rule on issuance of a notice to appear containing all of the information specified for such a notice, which is set forth only in Section 1229(a)(1). It is especially unlikely that Congress intended omission of a specific hearing date in the initial notice to be fatal because Congress provided in Section 1229(a)(2) that a hearing date may later be changed upon further written notice.

Petitioner's contrary arguments lack merit. He asserts (Br. 26) that Section 1229(a) "defines" a notice to appear as a document that meets all of that provision's requirements. That is not what the statute says, and petitioner's reasoning is inconsistent with this Court's precedent. The Court has held, for example, that a notice of appeal that omits a required signature is still sufficient to satisfy a jurisdictional appeal deadline, even if that defect is corrected only after the deadline. *Becker* v. *Montgomery*, 532 U.S. 757, 762-768 (2001). Petitioner's fear that the Board's reading would invite DHS to serve notices that omit all of the specified information is unfounded. The Board has held that only a notice to appear that is actually filed, thus commencing removal proceedings, triggers the stop-time rule.

2. The statute's history and purpose reinforce the Board's reading of the text and context. Congress enacted the stop-time rule as part of a broader overhaul

of discretionary-relief proceedings in which it emphatically expressed its intent to restrict the availability of such relief. And it adopted the stop-time rule to prevent scenarios, like this case, where an alien who is removable and ineligible for discretionary relief can evade the eligibility requirements by continuing to accrue continuous-physical-presence time while his removal proceeding is ongoing. It is especially unlikely that Congress viewed inclusion of a date and time certain for an initial hearing as essential to the stop-time rule. The initial hearing date—which can be changed—has nothing to do with the stop-time rule's application or its purposes.

Petitioner's contention that Congress was concerned solely with preventing aliens from delaying already-commenced proceedings is incorrect. The history shows that Congress's concerns were broader. In any event, petitioner's reading may also create incentives for delay. His reliance on the history of IIRIRA's replacement of the prior regime is also misplaced. The history reflects that Congress viewed the changes petitioner cites as insignificant. Indeed, an amendment to IIRIRA adopted a year later—applying the stop-time rule to pre-IIRIRA orders to show cause—shows that Congress intended the stop-time rule to function the same way in the old and new regimes alike. Petitioner's observation that the stop-time rule concerns only eligibility for discretionary relief does not help him. Cancellation of removal is indeed a form of administrative grace, not an entitlement. But IIRIRA was designed to narrow the availability of that relief and prevent exploitation of technical loopholes by aliens not eligible for relief.

B. The Board's reading reflects at least a reasonable interpretation entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*,

467 U.S. 837 (1984). *Chevron* applies to the Board's interpretation of the INA. And its interpretation here is at a minimum "permissible." *Id.* at 843. In addition to the statutory text, context, structure, history, and purpose, practical realities of removal proceedings support its position. Under federal regulations in force when the stop-time rule was enacted and today, hearing dates are determined not by DHS, but by the immigration court that conducts the hearings. Often it is impracticable, for reasons beyond DHS's control, to provide a hearing date when serving the notice to appear; in those cases, the immigration court provides the hearing date later. The Board sensibly determined that Congress did not intend aliens' eligibility for relief offered as a matter of grace to turn on that happenstance of administrative procedure.

Petitioner's contrary arguments are incorrect. He contends that any ambiguity in statutes governing removal should be resolved in the alien's favor. That position contradicts this Court's decisions deferring to the Board's reading of the INA and misreads the decisions on which petitioner relies. He also argues that the Board's reading of the stop-time rule is inconsistent with its holding in *In re Ordaz*, 26 I. & N. Dec. 637 (B.I.A. 2015), that only a notice to appear that is actually filed to commence a proceeding triggers the stop-time rule. But as the Board explained, the two statutory questions are distinct, and the Board's determination that the stop-time rule is not nullified by the omission of a specific hearing date does not implicate the same concerns as the issue it addressed in *Ordaz*.

ARGUMENT

SERVICE ON AN ALIEN OF A NOTICE TO APPEAR STOPS HIS ACCRUAL OF CONTINUOUS PHYSICAL PRESENCE IRRESPECTIVE OF WHETHER THE NOTICE STATES A DATE AND TIME CERTAIN FOR THE INITIAL HEARING

The INA permits certain nonpermanent-resident aliens who are unlawfully present in the United States to be considered for cancellation of removal only if the alien can establish (*inter alia*) that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of" the application. 8 U.S.C. 1229b(b)(1)(A). The INA provides that an alien's period of continuous physical presence is "deemed to end * * * when the alien is served a notice to appear under section 1229(a)." 8 U.S.C. 1229b(d)(1). The Board has interpreted Section 1229b(d)(1)'s stop-time rule to apply when a notice to appear is served if the notice either specifies a date and time certain for the alien's initial hearing, or instead indicates that the date and time remain to be determined. See *In re Camarillo*, 25 I. & N. Dec. 644, 646-651 (2011). Under this Court's precedents, that interpretation controls so long as it reflects "a permissible construction of the statute." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

The Board's position in fact embodies the best reading of the INA's text in light of the statutory context, structure, history, and purpose. At a minimum, as all of the courts of appeals to address the issue save one have held, it reflects a reasonable interpretation of the statute that is entitled to deference. Petitioner falls far short of carrying his burden of showing either that the

statute unambiguously compels his contrary reading or that the Board's interpretation is unreasonable.

A. The Board's Conclusion That The Omission In A Notice To Appear Of A Date And Time Certain For A Hearing Does Not Nullify The Stop-Time Rule Reflects The Best Reading Of The Statute

In construing any statute, "[t]he beginning point is the relevant statutory text." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (citation omitted). "All those tools"—"not to mention common sense," *ibid.*—support the Board's interpretation of the INA here.

1. The statutory text, context, and structure support the Board's interpretation of the stop-time rule

a. The Board's holding that service of a notice to appear triggers Section 1229b(d)(1)'s stop-time rule even if the notice does not contain a date and time certain for the initial hearing reflects the best reading of the statutory text in light of its context and structure. Section 1229b(d)(1) provides that, "[f]or purposes of [Section 1229b], any period of * * * continuous physical presence in the United States shall be deemed to end" when the "earliest" of two events occurs: (A) "when the alien is served a notice to appear under section 1229(a) of [Title 8]," with an exception not relevant here; or (B) "when the alien has committed an offense referred to in section 1182(a)(2) of [Title 8]" that renders the alien either inadmissible or removable under certain INA provisions. 8 U.S.C. 1229b(d)(1). The most natural reading of "when the alien is served a notice to appear under section

1229(a)" is that it identifies the kind of document that must be served to trigger the stop-time rule—not that the notice must include a not-yet-determined hearing date as a condition precedent to stopping the accrual of the alien's continuous-physical-presence time.

i. Section 1229b(d)(1)'s text "identifies a form that must be served on the immigrant" to stop his accrual of continuous physical presence: "a 'notice to appear under section 1229(a),'" *i.e.*, "an I-862 notice-to-appear form." *Gonzalez-Garcia* v. *Holder*, 770 F.3d 431, 434 (6th Cir. 2014) (Sutton, J.) (citation omitted). But "[i]t does not say that only a form that contains every item" listed in Section 1229(a)(1), "including yet-to-be-determined dates for a hearing, stops the ten-year clock." *Ibid.*; accord *Yi Di Wang* v. *Holder*, 759 F.3d 670, 674 (7th Cir. 2014) (Wood, C.J.) ("[Section 1229b(d)(1)] says nothing about whether a Notice to Appear, in order to function for the stop-time rule, must include the date and time of a hearing."). Although it refers to a notice "under section 1229(a)," the best reading of that phrase—and certainly a permissible one—is that the notice must be one subject to or governed by Section 1229(a), not that the notice must be flawless to trigger the stop-time rule.

"The word 'under,'" this Court has explained, is a "chameleon" that "'has many dictionary definitions and must draw its meaning from its context.'" *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) (quoting *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991)); see *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 531 (2013) (word "'under'" "evades a uniform, consistent meaning"). Among other things, in some settings it can mean "subject to" or "suffering restriction, restraint, or control by," while in others it can signify "in accordance with." *Kirtsaeng*, 568 U.S. at 530-531 (citations omitted); see

id. at 562-563 (Ginsburg, J., dissenting); *e.g.*, *Webster's Third New International Dictionary* 2487 (2002); 18 *Oxford English Dictionary* 947-951 (2d ed. 1989); *Webster's New International Dictionary* 2765 (2d ed. 1949).

As this Court has further explained, however, to say "that a thing that is 'under' a statute is most naturally read as being 'subject to' or 'governed by' the statute," or close equivalents. *Florida Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) (citation omitted); see *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.) ("When an action is said to be taken 'under' a provision of law or a document having legal effect, what is generally meant is that the action is 'authorized' by the provision of law or legal document."). Earlier this Term, for example, the Court concluded that a statute addressing judicial review of an agency's "action * * * in approving or promulgating any effluent limitation or other limitation under section 1311" of the Clean Water Act, 33 U.S.C. 1369(b)(1)(E), "is most naturally read to mean that the effluent limitation or other limitation must be approved or promulgated 'pursuant to' or 'by reason of the authority of' § 1311," *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 630 (2018) (citing *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 450 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("'under'" in 5 U.S.C. 504(b)(1)(C) "means 'subject or pursuant to' or 'by reason of the authority of'" (brackets omitted)); see *Hechinger*, 335 F.3d at 252 ("[I]f a claim is asserted 'under' 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made 'under' [Federal Rule of Civil Procedure] 12(b)(6), that rule provides the authority for the motion.").

Action "under" a statute or rule in this sense does not ordinarily refer only to action that in fact satisfies every requirement imposed by the statute or rule. Rather, it more naturally means simply that the statute or rule establishes the requirements that apply. For example, Federal Rule of Civil Procedure 26(e) requires "[a] party who has made a disclosure under Rule 26(a)" to "supplement or correct its disclosure * * * if the party learns that in some material respect" its disclosure was "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). A disclosure that needs to be supplemented or corrected because it was "incomplete or incorrect" necessarily did not comply with Rule 26(a) in the first instance, yet Rule 26(e) refers to it as a "disclosure under Rule 26(a)." *Ibid.* Similarly, provisions that address judicial review of action "under" particular statutes, like the Clean Water Act provision the Court addressed in *National Association of Manufacturers*, *supra*, do not presuppose that the action complies with the relevant statute in every respect. 33 U.S.C. 1369(b)(1)(E); see also, *e.g.*, 28 U.S.C. 2342(2) and (6); 42 U.S.C. 7607(b)(1); 47 U.S.C. 402(a). Indeed, often a party seeks judicial review of agency action on the ground that the action allegedly did *not* comply with the governing law.

So, too, the phrase "served a notice to appear under section 1229(a)" in Section 1229d(b)(1) is best read to mean service of a notice that is subject to or governed by, or issued under the authority of, Section 1229(a). In context, "under section 1229(a)" does not naturally signify that only service of a notice that satisfies Section 1229(a) in every respect stops the clock, or that any defect or omission in the notice, however technical or trivial, allows the alien's continuous-physical-presence time to continue accruing.

ii. Three aspects of the particular context of Section 1229b(d)(1) reinforce this most natural reading of its text and strongly indicate that Congress did not intend the absence of a yet-to-be-determined date and time certain for a hearing to prevent the stop-time rule from being triggered.

First, the immediately preceding section of IIRIRA shows that, when Congress wished to refer to satisfaction of Section 1229(a)'s requirements—and wished to attach consequences to compliance or noncompliance with them—it did so expressly. Section 1229a provides that an alien may be removed in absentia only "if [DHS] establishes by clear, unequivocal, and convincing evidence" that "written notice *required under* paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided to the alien or the alien's counsel" but the alien "does not attend a proceeding." 8 U.S.C. 1229a(b)(5)(A) (emphasis added). It further provides that, once an in absentia removal order is entered, the alien may seek to reopen the proceeding if (*inter alia*) "the alien demonstrates that the alien did not receive notice *in accordance with* paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii) (emphasis added).

Congress's use of that different text in Section 1229a is a powerful indication that "notice to appear under section 1229(a)" in Section 1229b(d)(1) is not oblique shorthand for a notice that satisfies all of Section 1229(a)(1)'s requirements. Courts presume that Congress's choice of different language in provisions of the same statute is deliberate. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion." (brackets and citation omitted)). Courts accordingly should "refrain from concluding" that "differing language" in a statute's "subsections has the same meaning in each" and should "not presume to ascribe [such a] difference to a simple mistake in draftsmanship." *Ibid.*; see, *e.g.*, *DHS* v. *MacLean*, 135 S. Ct. 913, 919 (2015); *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002). The fact that Congress referred expressly in Section 1229a to written notices "in accordance with" and "required under" Section 1229(a)(1) and (2)—and imposed consequences for complying (or not complying) with those provisions' requirements—strongly indicates that "under section 1229(a)" in Section 1229b(d)(1) does not mean the same thing.[8]

Section 1229a further illustrates that, when Congress desired to attach significance to whether an alien was actually informed of a specific hearing date, it could and did say so expressly. Section 1229a(b)(7) states that an alien ordered removed in absentia is ineligible for various forms of discretionary relief (including cancellation of removal) for ten years after entry of the final order of removal if the alien, "at the time of the notice described in paragraph (1) or (2) of section 1229(a) of [Title 8], was

---

[8] Another nearby provision, 8 U.S.C. 1229c(b)(1)(A), also refers to service of a notice to appear "under section 1229(a)" in the same way as Section 1229b(d)(1), for the same purpose. Section 1229c(b)(1)(A) provides that, at the conclusion of a removal proceeding, an alien may request "voluntary departure in lieu of removal" if the alien shows (*inter alia*) that he was "physically present in the United States" for at least one year before "the date the notice to appear was served under section 1229(a)." *Ibid.* Congress's repeated use of this different phrasing in establishing threshold requirements for discretionary relief confirms that its choice of words in Section 1229b(d)(1) was intentional.

provided oral notice * * * of the time and place of the proceedings and of the consequences" of failing to appear. 8 U.S.C. 1229a(b)(7). That provision's express reference to, and its imposition of an additional consequence upon, an alien's receipt of oral notice of a hearing date makes it even less likely that Congress implicitly intended omission of a date certain for a hearing to nullify the stop-time rule.

Second, Section 1229b(d)(1)'s broad cross-reference to "section 1229(a)" in its entirety further weakens any inference that "notice to appear under section 1229(a)" means only a notice that contains all required information. See *Camarillo*, 25 I. & N. Dec. at 647-648. Only one part of Section 1229(a), paragraph (a)(1), addresses the information a notice is to contain. The other portions address different issues: paragraph (a)(2) addresses changes in the date and time of the hearing in already-commenced proceedings, and paragraph (a)(3) provides for a system to record aliens' addresses and phone numbers. 8 U.S.C. 1229(a)(2) and (3). Section 1229b(d)(1)'s reference to all of Section 1229(a)—two-thirds of which does not address notices to appear—would be an unusual way to convey that the stop-time rule is triggered only by perfect satisfaction of Section 1229(a)(1). See *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, No. 15-1439 (Mar. 20, 2018), slip op. 9 (applying presumption that, "when Congress wants to refer only to a particular subsection or paragraph, it says so" (brackets and citation omitted)). Nor can Congress's reference to all of Section 1229(a) be dismissed as inadvertent: it elsewhere referred to Section 1229(a)(1) (and (a)(2)) specifically, a choice courts should presume Congress made "intentionally and purposely." *Russello*, 464 U.S. at 23 (citation omitted); see 8 U.S.C. 1229a(b)(5)(A), (C)(ii), and

(7).[9] See also 8 U.S.C. 1774(a) (requiring annual report on the "number of aliens" who failed to attend a removal hearing "after having been arrested outside a port of entry, served a notice to appear *under section 1229(a)(1)* of this title, and released on the alien's own recognizance" (emphasis added)).

Petitioner observes (Br. 34) that overbroad cross-references within federal statutes are not uncommon. But petitioner does not explain why Congress would have chosen a different, more expansive cross-reference in Section 1229b than it used repeatedly elsewhere if it intended them to mean the same thing. The most logical explanation is that, whereas Section 1229a is concerned with whether the alien receives all the information Section 1229(a)(1) specifies, Section 1229b(d)(1) is not. Section 1229b(d)(1) refers to service of a notice to appear merely to mark a point in time when an alien's period of continuous physical presence ends. Its generic reference to Section 1229(a) simply clarifies which kind of notice stops the clock.

Third, Section 1229(a)(2)—which Section 1229b(d)(1)'s broad cross-reference encompasses—shows that it is highly unlikely Congress intended the omission of a date and time certain for an initial hearing in a notice to appear to be pivotal for stop-time purposes. Section 1229(a)(2) expressly contemplates that the hearing date (or location) may be "change[d]" after the alien is served with the notice to appear. 8 U.S.C. 1229(a)(2)(A). The only restriction on such changes is that the alien

---

[9] The fact that Section 1229a(b)(5) refers to both paragraphs (a)(1) and (a)(2) reflects that an alien's receipt of either the original notice to appear or a subsequent notice modifying the hearing date or location suffices for purposes of Section 1229a.

must be served—personally, or by mail "if personal service is not practicable"—with written notice of "the new time or place of the proceedings" and a reminder of the consequences of failing to appear. *Ibid.* Even that notice is not "required" if the alien has failed to keep his address on file with the Attorney General current. 8 U.S.C. 1229(a)(2)(B).

Given that the statute specifically permits the date of an alien's hearing to be changed, it is improbable that Congress viewed the inclusion of a date and time certain in the initial notice to appear as essential to the stop-time rule. Under Section 1229(a)(2)(B)'s plain terms, any hearing date provided initially can be superseded at any time by a new one, rendering the date given in the original notice irrelevant. Petitioner observes (Br. 35) that the statute's reference to a "change" in the hearing date presupposes that a date had already been set. That misses the critical point: there is no reason why Congress would have insisted on providing a specific hearing date as a prerequisite to triggering the stop-time rule when any date supplied could become defunct.

To be sure, the fact that a hearing date can be changed does not mean DHS need never provide one. Unless DHS can demonstrate through "clear, unequivocal, and convincing evidence" that the alien was apprised of an original or modified hearing date, it cannot obtain his removal in absentia based on the alien's failure to appear. 8 U.S.C. 1229a(b)(5)(A). And if an in absentia removal order is entered, the case can be reopened if the alien shows he did not receive notice of the original or modified hearing date "in accordance with" Section 1229(a)(1) or (2). 8 U.S.C. 1229a(b)(5)(C)(ii). Congress thus anticipated that failure to provide notice of a specific hearing date could prejudice the alien, and it

adopted those provisions to address that possibility. But given that Congress expressly provided for a hearing date to be changed after service of the notice that triggers the stop-time rule, there is no reason to assume that Congress intended the omission of a date certain in the original notice to be fatal.

The implications of a contrary interpretation illustrate its illogic. Under federal regulations in force both before IIRIRA and today, it is not DHS, but the immigration court—a component of a different agency, the Executive Office for Immigration Review (EOIR) in the Department of Justice—that "is responsible for scheduling cases" in removal proceedings, including "the initial removal hearing." 8 C.F.R. 1003.18(a) and (b); see 8 C.F.R. 242.1(b) (1995) (hearing date to be "specified by the Immigration Court").[10] The immigration court does not acquire jurisdiction until the notice to appear (or other "charging document") is "filed with the Immigration Court." 8 C.F.R. 1003.14(a); see 8 C.F.R. 1003.13, 1003.15. As Judge Sutton explained in *Gonzalez-Garcia*, interpreting Section 1229b(d)(1) to require the notice to include a hearing date to trigger the stop-time rule thus "would require [DHS] investigators to place hearing dates on all notices to appear whether [EOIR] was prepared to schedule them or not—an approach that might do more to confuse than inform immigrants about the process triggered by the notice." 770 F.3d at 434-435. It is difficult to imagine why Congress would have contemplated resort to that procedure—*i.e.*, supplying an aspirational future hearing date in the notice to appear,

---

[10] Immigration judges (previously known as special inquiry officers) were once part of DHS's predecessor (INS), but since 1983 they have been a component of EOIR. See 8 C.F.R. 1003.0 *et seq.*; 48 Fed. Reg. 8038 (Feb. 25, 1983).

to be replaced later by the immigration court once it determines the actual hearing date—but not permitted DHS to inform the alien transparently (as it did here) that the hearing date is still "to be set." J.A. 9 (A.R. 17) (emphasis omitted).

b. Petitioner nevertheless contends (Br. 25-26) that the "statutory language is crystal clear" and "unambiguously" requires inclusion of a date and time certain to stop an alien's period of continuous physical presence. See *id.* at 24-30. Yet at the same time, petitioner acknowledges that the word "under" is susceptible of multiple meanings and must "draw[] its meaning from context." *Id.* at 28 (quoting *Ardestani*, 502 U.S. at 135). And the "most natural[] read[ing]" of "'under' a statute" in general, *Piccadilly Cafeterias*, 554 U.S. at 39, and by far the better reading in the specific context of Section 1229b(d)(1), contradicts petitioner's contention. See pp. 21-31, *supra*. Petitioner's claim that the text is pellucid in his favor thus cannot be correct. The most he might show is that a different reading of the statute is also possible and that it is therefore ambiguous. But even that would not help petitioner, because "to acknowledge ambiguity is not to conclude that all interpretations are equally plausible," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987), and petitioner has not shown that his contrary reading of the stop-time rule is equally (let alone more) persuasive.

i. Petitioner principally argues (Br. 26, 28-29) that Section 1229(a) "defines the term 'notice to appear' as only a document that includes written notice of *all* the information required by the statute," and that the word "under" in Section 1229b(d)(1) "connects the stop-time rule's reference to a 'notice to appear'" to "§ 1229(a)'s

definition." See *id.* at 25-27, 29-30, 32, 34-35. That is incorrect. Section 1229(a) is not worded in the form of a definition, and in any event it does not "define" a notice to appear as only a document that fully recites all of the information that section sets forth. It simply prescribes that "written notice * * * shall be given" to the alien "specifying" certain information. 8 U.S.C. 1229(a)(1). Nor does 1229(a)(1)'s parenthetical phrase providing a shorthand label for the written notice to be given define a "notice to appear" as only a document that satisfies Section 1229(a)(1) in all respects.

Petitioner's position that "notice to appear" means only a notice that complies perfectly with all applicable statutory requirements—and that any defect or omission in a notice transforms it into some other document—is also at odds with this Court's precedents. In *Becker* v. *Montgomery*, 532 U.S. 757 (2001), for example, the Court unanimously held that a notice of appeal that was filed but not signed—as the applicable rules required—before the deadline established by Federal Rules of Appellate Procedure 3 and 4 for filing the notice was sufficient to commence an appeal. *Id.* at 762-768. The Court accepted that the rules required a signature and that the deadline for filing the notice was jurisdictional. *Id.* at 764-765. It nevertheless concluded that the notice was valid. *Id.* at 764-768.

Becker reasoned that, although Federal Rule of Civil Procedure 11(a) required a signature, it also spelled out the consequences of failing to sign a document and indicated that the omission could be cured. 532 U.S. at 764; see Fed. R. Civ. P. 11(a) (2000) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."). The appellant's failure to sign

the notice thus was not fatal because the appellant corrected the defect, even though he did so after the filing deadline. 532 U.S. at 765, 768. As the Court observed, it had previously deemed similar technical defects immaterial to the effectiveness of a filing "where no genuine doubt exist[ed] about who [was] appealing, from what judgment, to which appellate court," and the appellee in *Becker* conceded that it had adequate notice of those facts. *Id.* at 767; see *id.* at 762, 767-768 (citing *Smith* v. *Barry*, 502 U.S. 244, 248-249 (1992) (document intended as appellate brief may qualify as a notice of appeal), and *Foman* v. *Davis*, 371 U.S. 178, 181 (1962) (appeal improperly dismissed where notice of appeal was incomplete but record indicated which orders appellant sought to appeal)). Indeed, the Court noted that its own rules expressly contemplate that a petition for a writ of certiorari that does not comply with applicable requirements can nevertheless suffice to invoke the Court's jurisdiction if corrected within a prescribed time, even if the correction is made after the original deadline for filing the petition. *Id.* at 767 (citing Sup. Ct. R. 14.5).

Becker's commonsense reasoning and result support the Board's interpretation of the stop-time rule. Like the applicable rules in *Becker*, IIRIRA spells out specific consequences for failure to serve a notice that complies with Section 1229(a)(1), 8 U.S.C. 1229a(b)(5)(A) and (C)(ii), strongly indicating that omission of certain specific information does not negate the stop-time rule, see pp. 25-26, *supra*. And a notice to appear containing all required information besides a date and time certain for the hearing is more than sufficient to apprise an alien of the basis and nature of the proceedings. The alien does not need to know the specific hearing date to appreciate

that the government intends to seek her removal. Moreover, Congress specifically provided that any hearing date provided can be changed. 8 U.S.C. 1229(a)(2).

Petitioner's view, in contrast, cannot be squared with *Becker*'s logic. If petitioner's view were correct, the Court should have concluded that the rules imposing the signature and other requirements defined a notice of appeal as one that met all those requirements and that the document the appellant filed was therefore not a notice of appeal at all. Far from concluding that the notice of appeal filed was a nullity, however, the Court deemed it sufficient to satisfy a jurisdictional deadline.

This Court's decisions since *Becker* have applied the same sensible understanding in other settings. In *Edelman* v. *Lynchburg*, 535 U.S. 106 (2002), the Court upheld an Equal Employment Opportunity Commission regulation that permitted amendment of a timely filed Title VII discrimination charge to include a required—but previously omitted—verification, even if that amendment occurred outside the statutory charge-filing period. *Id.* at 115-118. In *Scarborough* v. *Principi*, 541 U.S. 401 (2004), the Court applied *Becker* and *Edelman* to hold that a timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412, could be amended after the statutory filing period to include the necessary allegation that the government's position in the underlying litigation was "not substantially justified." 541 U.S. at 413-419. And in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012), the Court concluded that the failure of a certificate of appealability to "indicate the issue on which [a defendant] had made a substantial showing of the denial of a constitutional right, as required by [28 U.S.C.] 2253(c)(3)," did not deprive the court of appeals of jurisdiction. *Id.* at 141; see *id.* at 140-145.

ii. Petitioner's remaining arguments lack merit. He asserts (Br. 33-34) that DHS and the Board cannot "pick and choose which" of Section 1229(a)(1)'s requirements to disregard. But that assertion assumes his conclusion that a notice to appear must contain all of the identified information to trigger the stop-time rule.

Petitioner also argues (Br. 29-30) that treating notices to appear that do not contain a date and time certain for the initial hearing as triggering the stop-time rule would allow "the government [to] seek an in absentia removal order without *ever* telling an immigrant when or where the hearing would be held." But the text of Section 1229a(b)(5) forecloses that possibility: an in absentia order cannot validly be entered—and if entered it can be rescinded through reopening—if the government fails to comply with Section 1229(a)'s requirements. That difference in the texts of Sections 1229a and 1229b undermines petitioner's reading of the stop-time rule.

Petitioner relatedly contends (Br. 29) that the Board's reading would render "largely meaningless" Section 1229(b)(1)'s requirement that an alien's hearing be scheduled at least ten days after he is served with a notice to appear. That is incorrect. The explicit purpose of Section 1229(b)(1)'s ten-day requirement is that "an alien be permitted the opportunity to secure counsel before the first hearing date." 8 U.S.C. 1229(b)(1). In no event may the hearing be scheduled earlier than ten days after the notice to appear is served, absent the alien's consent. *Ibid.* If the notice to appear omits a hearing date and one is subsequently set, it must be at least ten days after the original notice is served, thereby if anything affording the alien more time to secure counsel.

Petitioner additionally argues (Br. 31-32) that the Board's interpretation would enable DHS to trigger the

stop-time rule by serving a notice containing none of the information listed in Section 1229(a)(1). That question is not before the Court in this case; the only item petitioner argues was omitted was a specific hearing date. The Board did not address in this case or in *Camarillo* whether a notice to appear omitting other required information could trigger the stop-time rule.

In any event, petitioner's fear is unfounded. Much of the information Section 1229(a)(1) calls for does not vary from one case to another and is included in standardized language on the I-862 notice-to-appear form. See J.A. 10-12 (A.R. 218); cf. 8 U.S.C. 1229(a)(1)(A)-(B), (E)-(F), and (G)(ii). Of the items particular to each alien, DHS has no reason to omit the alleged acts, charges, and statutory provisions that form the basis for removal. 8 U.S.C. 1229(a)(1)(C) and (D). To commence removal proceedings, DHS must file the notice to appear with the immigration court. 8 C.F.R. 1239.1(a). A notice that did not state any basis for removability thus would be futile. Nor could DHS trigger the stop-time rule by serving blank notices to appear that it never files. Under Board precedent, the stop-time rule is triggered only if and when the alien is served with a notice to appear that is subsequently filed, *i.e.*, only if "proceedings are actually initiated on th[e] basis" of that notice. *In re Ordaz*, 26 I. & N. Dec. 637, 642 (B.I.A. 2015); see *id.* at 638-643. Petitioner identifies no instance in the circuits that have upheld the Board's position where a blank notice to appear was served or the stop-time rule was invoked based upon it. The Court should not adopt petitioner's illogical reading of the stop-time rule based on his unsupported conjecture.

2. The stop-time rule's history and purpose support the Board's interpretation

"Statutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation" may be "clarified by the remainder of the statutory scheme," including when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The history and purpose of the stop-time rule strongly support the Board's conclusion that the absence in a notice to appear of a date and time certain for a hearing does not render the stop-time rule inapplicable.

a. Congress enacted the stop-time rule in 1996 as part of IIRIRA's overhaul of removal procedures and the forms of discretionary relief aliens may seek. See pp. 6-9, *supra.* Members of Congress expressed concern that the precursor to cancellation of removal (suspension of deportation) and other forms of relief were being "abuse[d]," in turn impeding expeditious removal of aliens unlawfully present in the United States. House Report 122; see *id.* at 114-115, 118-125. In IIRIRA, Congress modified the relevant statutory provisions in multiple respects so that "[r]elief from deportation w[ould] be more strictly limited." *Id.* at 108. Among other things, IIRIRA "limit[ed] the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted"; raised the standard nonpermanent-resident aliens must meet to be eligible; lengthened the period of continuous physical presence such an alien must accrue before seeking relief (from seven years to ten); and set an annual ceiling of 4000 on the number of aliens whose removal may be cancelled. Conf. Report 213; see pp. 6-9, *supra*.

As the court of appeals noted, "[t]he stop-time rule was enacted to address "perceived abuses arising from" a particular "legal loophole." Pet. App. 13a (internal quotation marks omitted). The pre-1996 statute contained no mechanism to stop an alien's accrual of continuous-physical-presence time once deportation proceedings began, and some courts accordingly "permit[ted] aliens to continue to accrue time toward the [then] seven year threshold even after they ha[d] been placed in deportation proceedings." House Report 122; see *Ram* v. *INS*, 243 F.3d 510, 513 (9th Cir. 2001). Aliens exploited that loophole by seeking to "buy time"—whether by delaying ongoing proceedings, or by failing to appear in proceedings and subsequently seeking to reopen them—and "during [that time] they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated." *Camarillo*, 25 I. & N. Dec. 649 (citation omitted).

Congress adopted the stop-time rule to close that loophole. See *Camarillo*, 25 I. & N. Dec. at 649; see *Ram*, 243 F.3d at 513 (stop-time rule "fundamentally altered this system" in response to frequent "'abuse[]'" (citation omitted)); *Rojas-Reyes* v. *INS*, 235 F.3d 115, 120-121 (2d Cir. 2000) (similar). The rule eliminates an alien's ability to buy time by "deem[ing]" the alien's period of continuous physical presence "to end" when the alien is "served a notice to appear" (or when the alien commits certain crimes). 8 U.S.C. 1229b(d)(1). In turn, the rule significantly reduces an alien's incentive to delay removal proceedings, or to fail to appear and later seek to reopen them.

The statutory history and purpose strongly support the Board's position that the stop-time rule does not

hinge on whether a notice to appear includes every item of information enumerated in Section 1229(a)(1). A contrary rule would frustrate the stop-time rule's core objective by enabling removable aliens who are ineligible for cancellation of removal to *become* eligible by continuing to accrue continuous-physical-presence time after being notified that the government intends to remove them—solely because of a technical, immaterial omission in the notice of information unrelated to the alien's removability. For example, such a rule would enable an alien who has been present less than ten years, who receives a notice to appear containing all required information except that he will be provided a current list of available pro bono attorneys, but who has no difficulty obtaining representation to seek cancellation once the ten-year mark has been reached. Such a rule would in turn create similar incentives as the regime the stop-time rule replaced for the alien to delay the proceedings—or to fail to appear and seek to reopen the proceedings after the ten-year mark—and argue that the original notice to appear was a nullity. It is extremely unlikely that Congress, while closing one frequently exploited loophole, intended to open another, similar loophole that would produce equally perverse results.

It is especially improbable that Congress intended the omission of a date or time certain for the initial hearing to frustrate the stop-time rule. Congress made clear that a hearing date, once set, may be changed, 8 U.S.C. 1229(a)(2), precluding any reasonable reliance on an initial date provided. Moreover, the initial hearing date has nothing to do with the basis of the alien's removability. It concerns only the mechanics of future administrative proceedings. The hearing date is "vital" (Pet. Br. 21) only to the alien's ability to participate in those

proceedings—and Congress separately ensured that an alien who does not receive the hearing date will not be removed based on failing to appear at that hearing. 8 U.S.C. 1229a(b)(5)(A) and (C)(ii). But the course of those subsequent proceedings—including when the initial hearing is held—has no bearing on application of the stop-time rule, because the rule does not depend on what transpires in those proceedings. Whether the stop-time rule applies turns on matters as they stood when the alien was served with the notice at the beginning. See *Camarillo*, 25 I. & N. Dec. at 650.[11]

The hearing date is also immaterial to the central aim of the stop-time rule: preventing aliens who know that the government is seeking their removal to benefit from the passage of time to evade the eligibility requirements for cancellation of removal. The statute sensibly operates to terminate an alien's accrual of continuous-physical-presence time once the alien is informed that the government has formally determined to seek her removal. An alien unlawfully present who is served with a notice to appear omitting only the initial hearing date knows that the government is seeking her removal, on what basis, and the consequences of disregarding the removal proceedings. With or without a hearing date, she cannot reasonably believe thereafter that the government has acquiesced in her continued unlawful presence.

---

[11] The same is true, notably, of the other event that triggers the stop-time rule: commission of certain criminal offenses. 8 U.S.C. 1229b(d)(1)(B). The alien's continuous-physical-presence period ends "when the alien has committed an offense referred to" in certain INA provisions, *ibid.*—not when the alien is convicted or charged.

b. Petitioner's attempts (Br. 38-43) to portray his contrary reading as more faithful to the statutory history and purpose are unpersuasive.

i. Petitioner contends (Br. 41) that Congress's "concern in adopting the stop-time rule was very specific": preventing aliens in already-ongoing removal proceedings from "seek[ing] to avoid, obstruct and delay those proceedings" so that they could reach the continuous-physical-presence threshold in the interim. But "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Grp.* v. *Sebben*, 488 U.S. 105, 115 (1988).

In any event, petitioner's account of Congress's concerns is incomplete. Although preventing aliens from using delay in already-commenced proceedings to acquire eligibility for discretionary relief assuredly was one abuse that concerned Congress, it was also concerned about other abuses. For example, the House Judiciary Committee expressed concern about aliens who, similar to petitioner here, "failed to appear for their deportation proceedings and were ordered deported in absentia, and then s[ought] to re-open proceedings once the requisite time has passed." House Report 122.

Moreover, petitioner's reading of the stop-time rule might encourage aliens to try to "avoid, obstruct [or] delay" removal proceedings. Pet. Br. 41. An alien served with a notice to appear that does not contain a date certain for a hearing or other ministerial details might seek to slow down the ensuing proceedings in the hope that he will not be removed before reaching the ten-year mark, and then seek cancellation of removal arguing that the notice to appear was deficient and did not stop the clock. An alien served with a notice to appear without a hearing date also might have an incentive to try to

avoid service of subsequent notices of the hearing date. See 8 U.S.C. 1229(a)(2)(A) (permitting service by mail of new hearing date only "if personal service is not practicable").

ii. Petitioner also points (Br. 38) to IIRIRA's replacement of "multiple different notices related to initiating different types of immigration hearings" with a single, unified "notice to appear" governed by new Section 1229(a). See *id.* at 38-41. That history does not help petitioner. As this Court has noted, "[f]ederal immigration law governs both the exclusion of aliens from admission to this country and the deportation of aliens previously admitted," and before IIRIRA's enactment in 1996, "these two kinds of action occurred in different procedural settings, with an alien seeking entry * * * placed in an 'exclusion proceeding' and an alien already here channeled to a 'deportation proceeding.'" *Judulang* v. *Holder*, 565 U.S. 42, 45 (2011). IIRIRA "forged [a] new," unified procedure—"removal"—that "fus[ed]" together those "two previously distinct expulsion proceedings." *Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 349, 351 (2005); see 8 U.S.C. 1229a.

Petitioner is correct that new Section 1229(a), added by IIRIRA, prescribed the requirements for written notices that initiate the newly christened "removal proceedings." 8 U.S.C. 1229(a). But those requirements did not reflect a sea change; to the contrary, Congress largely copied over the requirements that had applied to notices that been used to commence deportation proceedings, known as "order[s] to show cause." 8 U.S.C. 1252b(a)(1) (1994). The prior regime similarly required DHS's predecessor (INS) to notify aliens of the "nature of the proceedings," the "legal authority" for them, and

"acts or conduct alleged," the "charges" and the relevant "statutory provisions," and information regarding the alien's right to be represented by counsel, his duty to apprise the government of his address and phone number, and the consequences of failing to appear or keep his contact information current. *Ibid.*; cf. 8 U.S.C. 1229(a)(1). INS also was obligated to inform the alien in writing, either "in the order to show cause or otherwise," of the hearing date and time. 8 U.S.C. 1252b(a)(2)(A) (1994). Section 1229 imposes nearly identical requirements. See 8 U.S.C. 1229(a)(1). As the committee report petitioner cites observed, new Section 1229 thus "restate[d] the provisions of [then] current subsections (a) and (b) of [Section 1252b] regarding the provision of notice ('Notice to Appear') to aliens placed in removal proceedings," while "conform[ing] [them] to the establishment of a single removal hearing to replace" exclusion and deportation. House Report 230; accord Conf. Report 211.

Petitioner seizes (Br. 38-39) on the fact that prior Section 1252b permitted INS to provide the hearing date and location either "in the order to show cause *or otherwise*," 8 U.S.C. 1252b(a)(2)(A) (1994) (emphasis added), whereas Section 1229(a) requires that the notice to appear include the hearing date. According to petitioner, Congress thus "abandoned the previous flexibility of allowing the government to use multiple notices" to convey all the required information. Pet. Br. 40. He contends (Br. 40-41) that, when Congress referred in the stop-time rule to a "notice to appear under section 1229(a)," 8 U.S.C. 1229b(d)(1), it was "aware that a 'notice to appear' must include the time and place of the hearing." That is true but beside the point. It does not follow from the fact that Congress required

notices to appear to include hearing dates that Congress therefore must have intended omission of a hearing date in a notice to appear to nullify the stop-time rule—any more than it intended the omission of any other details specified before and after IIRIRA to negate the rule.

Subsequent action by Congress confirms that it did not view the minor change in the information required to be provided in the initial notice to have any bearing on the stop-time rule. IIRIRA provided that "paragraph[] (1) * * * of [Section 1229b(d)]," *i.e.*, the stop-time rule, "shall apply to notices to appear issued before, on, or after the date of the enactment of this Act." IIRIRA § 309(c)(5), 110 Stat. 3009-627. Notices to appear as such, however, did not exist before IIRIRA and thus could not have been issued "before" IIRIRA's enactment. Soon after IIRIRA's enactment, the Board construed this effective-date provision to mean that the stop-time rule applied to orders to show cause issued before IIRIRA because "the statutory language and legislative history" show "that an 'Order to Show Cause and Notice of Hearing' and a 'notice to appear' are synonymous terms as used" in the effective-date provision. *In re N-J-B-*, 21 I. & N. Dec. 812, 818 (B.I.A. 1997). The Attorney General elected to review that ruling (vacating the Board's decision pending her review). *Id.* at 841.

While *N-J-B-* was pending before the Attorney General, Congress codified the Board's understanding. In November 1997, it amended IIRIRA's effective-date provision to state that the stop-time rule "shall apply to orders to show cause (including those referred to in [8 U.S.C. 1252b(a)(1)] * * *), issued before, on, or after the date of the enactment of" that amendment. Nicaraguan Adjustment and Central American Relief Act,

Pub. L. No. 105-100, Tit. II, sec. 203(1), § 309(c)(5)(A), 111 Stat. 2196 (8 U.S.C. 1101 note); see *Rojas-Reyes*, 235 F.3d at 120-121. Congress thus made clear that it intended the stop-time rule to apply even to orders to show cause under the pre-IIRIRA framework—which as petitioner acknowledges (Br. 39) were not required to contain hearing dates.[12] It is exceedingly improbable that Congress, having taken that affirmative step to clarify that previously issued orders that might have omitted hearing dates do trigger the stop-time rule, intended notices to appear issued in the future that omit that information *not* to trigger the rule.

iii. Petitioner further argues (Br. 36, 38) that Congress likely intended to "set a high, substantive bar on what the government must do to trigger the stop-time rule" because the rule restricts only "*eligibility* for *discretionary* relief." He notes that aliens who meet the continuous-physical-presence requirement still must meet other eligibility criteria, and even then whether to cancel removal lies in the Attorney General's discretion. *Ibid.* Petitioner argues (*ibid.*) that cancellation of removal is available only for "the most deserving immigrants," and therefore Congress must have intended a narrow, alien-friendly interpretation of the stop-time rule. That contention lacks merit. IIRIRA's history emphatically shows that Congress sought to *narrow* the availability of discretionary relief. It made the eligibility criteria more stringent and imposed an annual cap on the number of aliens to whom cancellation of removal may be granted. And it adopted the stop-time rule to prevent

---

[12] The Attorney General subsequently remanded *N-J-B-* to the Board for further consideration in light of the 1997 amendment. 22 I. & N. Dec. 1057, 1057-1058 (1999).

aliens from abusing proceedings to circumvent the eligibility requirements. See pp. 37-38, *supra*.

Moreover, although the eligibility criteria are indeed demanding, petitioner's assertion that his reading safeguards the "most deserving immigrants" (Pet. Br. 36, 38) is incorrect. That might describe an alien who meets all of the eligibility criteria *and* who is determined by the Attorney General to merit one of the limited number of cancellations permitted each year. It does not describe the aliens who would benefit from petitioner's reading of the stop-time rule, who by definition did not meet even the threshold eligibility criteria at the time DHS notified them of its intent to remove them. Instead, his reading would provide a windfall to aliens, like petitioner, who knowingly entered or remained in this country unlawfully, who are personally notified that the government intends to remove them, whose removability is undisputed, and who unquestionably would *not* be eligible for relief but for the omission of a procedural detail in the notice to appear.

B. The Board's Reasonable Interpretation Of The Stop-Time Rule Is Entitled To Deference

As explained above, the INA's stop-time rule is best read to apply irrespective of whether an otherwise-valid notice to appear includes a date and time certain for a hearing. At the very least, however, the Board's interpretation is a reasonable one and therefore entitled to deference. See *Chevron*, 467 U.S. at 843-844. There is no question that *Chevron* applies to the Board's interpretation of the stop-time rule. See *Aguirre-Aguirre*, 526 U.S. at 424-425. "[J]udicial deference to the Executive Branch is especially appropriate in the immigration context," and the Board, in cases before it, possesses the Attorney General's statutory authority to

interpret and administer the INA. *Ibid.*; see 8 U.S.C. 1103(a)(1) and (g), 1229b(b)(1); 8 C.F.R. 1003.1(d)(1). The Board exercised that authority in articulating its interpretation in adjudicating *Camarillo*, *supra*, and this case, Pet. App. 18a-19a. Petitioner accordingly agreed below that the *Chevron* framework governed and that the Board's reasonable interpretation of ambiguous provisions of the statute is entitled to deference. Pet. C.A. Br. 10, 12.[13]

Under *Chevron*, an agency's interpretation of a statute it administers "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); see *id.* at 218 n.4 (courts need not determine "at the 'outset'" whether statute is ambiguous because "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"). As all but one of the circuits to consider the issue have concluded, the Board's sensible reading of the stop-time rule readily clears that bar. See Pet. App. 9a-15a; *Moscoso-Castellanos* v. *Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015); *O'Garro* v. *United States Att'y Gen.*, 605 Fed. Appx. 951, 953 (11th Cir. 2015) (per curiam); *Guaman-Yuqui* v. *Lynch*, 786 F.3d 235, 240 (2d Cir. 2015) (per curiam);

---

[13] Petitioner suggests in passing (Br. 55 & n.10) that applying *Chevron* to uphold the Board's interpretation here would raise unspecified "constitutional questions." But he does not present any constitutional arguments and did not ask the Court in his petition to address those issues. Cf. Pet. 22 n.4 (noting that Court would be "free to revisit" applicability of *Chevron*). In any event, petitioner is correct (Br. 55) that "[t]he Court need not reach those questions" because the Board's reading reflects by far the better interpretation.

Gonzalez-Garcia, 770 F.3d at 434-435; *Yi Di Wang*, 759 F.3d at 675; *Urbina* v. *Holder*, 745 F.3d 736, 740 (4th Cir. 2014).[14]

1. The Board's interpretation of the stop-time rule is at a minimum reasonable

For the reasons discussed above, the Board's conclusion that omission of a date and time certain for a hearing does not nullify the stop-time rule reflects the best interpretation of the statutory text in light of its context, structure, history, and purpose. Part A, *supra*. At a minimum, it embodies "a permissible construction of the statute." *Aguirre-Aguirre*, 526 U.S. at 424 (citation omitted). Petitioner's contention that the phrase "served a notice to appear under Section 1229(a)" in Section 1229b(d)(1) is actually shorthand for "served a notice to appear that complies perfectly with Section 1229(a)(1) in all respects" is unpersuasive; but even if his reading were also reasonable, it would not follow that the Board's contrary, commonsense understanding is unreasonable.

The reasonableness of the Board's interpretation is bolstered by the practical administrative realities of removal proceedings. As the Board has explained, because DHS does not control the scheduling of initial hearings—a task assigned to the immigration court, housed in a different agency, see p. 30, *supra*—"it is often not practical to include the date and time of the initial removal hearing on the notice to appear." *Camarillo*,

---

[14] The lone outlier, *Orozco-Velasquez* v. *Attorney General United States*, 817 F.3d 78 (3d Cir. 2016), reached a contrary conclusion based on its erroneous view that IIRIRA's "plain text" unambiguously precludes the Board's interpretation. *Id.* at 82-84. It did not address the ordinary meaning of "under" in this setting or most of the aspects of the statutory context, structure, history, and purpose that support the Board's reading. See Part A, *supra*.

25 I. & N. Dec. at 648. For example, when local law-enforcement authorities arrest an unlawfully present alien, DHS may have a short window to initiate removal proceedings, and it may be practically impossible to secure a hearing date from the immigration court in time to list it in the notice to appear. Cf. Pet. Br. 51. DHS cannot provide a hearing date it does not know. The governing regulations account for this reality by directing that the date, time, and place of the initial hearing shall be included in the notice to appear if it is "practicable"; if it is not practicable, then "the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien" of those details. 8 C.F.R. 1003.18(b). An alien who does not receive notice of those facts cannot be removed in absentia based on his failure to appear. 8 U.S.C. 1229a(b)(5)(A) and (C)(ii).

As Judge Sutton observed, the Board's sensible determination that omission of the hearing date and time does not negate the stop-time rule thus "respects the setting in which the[] requirements" to provide those details "appear," where the tasks of prosecuting cases and scheduling hearings have long been allocated to separate agencies. *Gonzalez-Garcia*, 770 F.3d at 434. There is no indication that Congress intended in IIRIRA to upend that settled allocation of authority. And "there is no reason to conclude that Congress would have expected that scheduling delays in the Immigration Court resulting from pending caseloads or other administrative issues would affect when an alien's continuous residence or physical presence ends for purposes of eligibility for relief from removal." *Camarillo*, 25 I. & N. Dec. at 650. It is also reasonable to conclude that Congress preferred DHS's procedure of apprising aliens candidly that the

hearing date is forthcoming to the alternative, which "would require [DHS] investigators to place hearing dates on all notices to appear whether the [immigration court] was prepared to schedule them or not" and then provide the actual hearing date in a further notice. *Gonzalez-Garcia*, 770 F.3d at 434-435.[15]

2. Petitioner's contrary arguments lack merit

Apart from reprising his arguments in support of his contrary reading (Br. 48-49), petitioner advances two other reasons not to sustain the Board's interpretation under *Chevron*. Neither has merit.

a. Petitioner contends that this Court's decisions require resolving "any lingering ambiguities in deportation statutes in favor of the alien." Pet. Br. 44 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001)); see *id.* at 44-48. That is incorrect. This Court has repeatedly applied the *Chevron* framework to sustain the Board's interpretation of ambiguous INA provisions, including provisions addressing relief from removal. See, *e.g.*, *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591-598 (2012); *Aguirre-Aguirre*, 526 U.S. at 424-432. See also *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203-2213 (2014) (plurality opinion); *id.* at 2215-2216 (Roberts, C.J., joined by Scalia, J., concurring in the judgment). Those decisions resolving ambiguities by according def-

---

[15] As petitioner's amici note, a scheduling system previously enabled DHS and the immigration court to coordinate in setting hearing dates in some cases, but that system has not been active for several years. NIJC Br. 30-32; see also Schmidt Br. 6-7. There is no reason to believe that Congress in 1996 intended the stop-time rule's application to depend on the existence or feasibility *vel non* of such a system and to make a given alien's eligibility for discretionary relief hinge on the availability of such a system in his case.

erence to the agency's position refute petitioner's suggestion that any uncertainty must be resolved in the alien's favor. If petitioner's view were correct, those and other cases applying *Chevron* in this setting would be wrong.

Moreover, petitioner identifies no case in which that interpretive tool of last resort was dispositive in rejecting an agency's construction under *Chevron*. For example, in *St. Cyr*, on which petitioner heavily relies (Br. 44-47), the Court's analysis rested on the presumption against retroactivity; the Court explained that deference was unwarranted because *that* presumption left "no ambiguity" in the statute. 533 U.S. at 321 n.45; see *id.* at 315-320. The Court remarked in a single sentence that its conclusion was "buttressed" by the tiebreaking rule petitioner invokes. *Id.* at 320. Petitioner's other principal authority, *INS* v. *Errico*, 385 U.S. 214 (1966), predated *Chevron* by nearly two decades and had no occasion to address whether petitioner's principle would trump deference to an agency's reasonable reading. And the Court invoked that principle only in the alternative, after having already concluded that other considerations made the statute's meaning clear. See *id.* at 225 ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

b. Petitioner also asserts (Br. 52-55) that the Board's reading of the stop-time rule is inconsistent with its conclusion in *Ordaz*, *supra*, that the stop-time rule is not triggered by a notice to appear that is never filed to commence a proceeding. Any alleged inconsistency is irrelevant. The question *Ordaz* addressed is not before the Court; if the Court's decision here has implications

for that separate question, the Board can revisit its answer to that question as appropriate.

In any event, as the Board explained in *Ordaz*, the question there was "related, but different," and the Board's analysis of both is "consistent." 26 I. & N. Dec. at 641. *Ordaz* addressed whether "served *a* notice to appear" in Section 1229b(d)(1) means a notice later filed to commence the proceedings at issue, or "*any* notice to appear," including one never filed. *Id.* at 638-639 (citation omitted; first emphasis added). The Board determined that the language alone was ambiguous but that in context the former reading better captured Congress's likely intent. *Id.* at 638-643. As it explained, "[a]ffording 'stop-time' effect to 'any' notice to appear, regardless of whether proceedings were ever commenced on that basis, would potentially render an alien ineligible for relief on the basis of a charging document that was invalid or otherwise insufficient to support a removal charge as issued." *Id.* at 640. Moreover, "if proceedings were never commenced, the alien would not have the opportunity to contest, or require the DHS to prove, the allegations and charges contained in the notice to appear." *Ibid.* Indeed, even if an alien served with an invalid notice to appear had "successfully defended against" it, the notice still could trigger the stop-time rule "in later proceedings." *Ibid.*

That reasoning and result are consistent with the Board's determination that a notice to appear that omits a hearing date still triggers the stop-time rule. Informing an alien that the hearing date will be supplied later leads to none of the concerns *Ordaz* addressed. The alien ultimately must be provided a hearing date (and other required information); otherwise, he cannot be removed in absentia based on those charges. 8 U.S.C.

1229a(b)(5)(A) and (C)(ii). He thus will have an opportunity to defend against the charges of removability in the notice. And if those charges are insufficient to support removal, he will not be removed based upon them.

Indeed, *Ordaz* mitigates some of the very concerns petitioner raises here. Because only a notice to appear that is actually filed to commence proceedings triggers the stop-time rule, DHS has no reason to serve notices to appear omitting all of the information Section 1229(a) specifies; a notice that omits, for example, the grounds of removability cannot commence a proceeding and thus will not trigger the stop-time rule. See p. 36, *supra.* The Board has reasonably construed the statute to avoid precisely those problems.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN C. BOND
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

MARCH 2018

APPENDIX

1. 8 U.S.C. 1103 provides in pertinent part:

Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

* * * * *

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

(2) Powers

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

2. 8 U.S.C. 1227 provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been

revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family

unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104-208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or

refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, pos-

sessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or

persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and

(ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship—

(i)[1] upon a determination that—

(I) the alien was acting is[2] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime—

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) 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.

---

[1] So in original. No cl. (ii) has been enacted.

[2] So in original. Probably should be "in".

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

(c) Waiver of grounds for deportation

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 1182(a) of this title) shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title based upon circumstances that existed before the date the alien was provided such special immigrant status.

(d) Administrative stay

(1) If the Secretary of Homeland Security determines that an application for nonimmigrant status under subparagraph (T) or (U) of section 1101(a)(15) of this title filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal under section 1231(c)(2) of this title until—

(A) the application for nonimmigrant status under such subparagraph (T) or (U) is approved; or

(B) there is a final administrative denial of the application for such nonimmigrant status after the exhaustion of administrative appeals.

(2) The denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings under any other provision of the immigration laws of the United States.

(3) During any period in which the administrative stay of removal is in effect, the alien shall not be removed.

(4) Nothing in this subsection may be construed to limit the authority of the Secretary of Homeland Security or the Attorney General to grant a stay of removal or deportation in any case not described in this subsection.

3. 8 U.S.C. 1229 provides:

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) of this section and (ii) a current 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 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) of this section 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) of this section.

(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.

4. 8 U.S.C. 1229a provides:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges

An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations

prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the

reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.

(6) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(A) define in a proceeding before an immigration judge or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(B) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(C) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this paragraph shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(7) Limitation on discretionary relief for failure to appear

Any alien against whom a final order of removal is entered in absentia under this subsection and who, at the time of the notice described in paragraph (1) or

(2) of section 1229(a) of this title, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (e)(1) of this section) to attend a proceeding under this section, shall not be eligible for relief under section 1229b, 1229c, 1255, 1258, or 1259 of this title for a period of 10 years after the date of the entry of the final order of removal.

(c) Decision and burden of proof

(1) Decision

(A) In general

At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing.

(B) Certain medical decisions

If a medical officer or civil surgeon or board of medical officers has certified under section 1222(b) of this title that an alien has a disease, illness, or addiction which would make the alien inadmissible under paragraph (1) of section 1182(a) of this title, the decision of the immigration judge shall be based solely upon such certification.

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant

or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or

any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation

shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this

---

[1] So in original.

section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

---

[1] So in original.

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

(d) Stipulated removal

The Attorney General shall provide by regulation for the entry by an immigration judge of an order of removal stipulated to by the alien (or the alien's representative) and the Service. A stipulated order shall constitute a conclusive determination of the alien's removability from the United States.

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

---

[2] So in original. A closing parenthesis probably should appear.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

5. 8 U.S.C. 1229b provides:

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) of this section, for purposes of subparagraph (A)(ii) or for purposes of 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), 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) of this section. 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) of this section 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) of this section 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) of this section 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) of this section, 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) of this section 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) of this section 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).

6. 8 U.S.C. 1229c provides:

Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a

physician associated with a health care facility, and submits to the Attorney General—

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (B)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any

period in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b) of this section, nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

7. 8 U.S.C. 1252b (1994) provides:

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.

(3) Form of information

Each order to show cause or other notice under this subsection—

(A) shall be in English and Spanish, and

(B) shall specify that the alien may be represented by an attorney in deportation proceedings under section 1252 of this title and will be provided, in accordance with subsection (b)(1) of this section, a period of time in order to obtain counsel and a current list described in subsection (b)(2) of this section.

(4) 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 1252 of this title, the hearing date shall not be scheduled earlier than 14 days after the service of the order to show cause, 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 1252 of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(c) Consequences of failure to appear

(1) In general

Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under subsection (a)(1)(F) of this section.

(2) No notice if failure to provide address information

No written notice shall be required under paragraph (1) if the alien has failed to provide the address required under subsection (a)(1)(F) of this section.

(3) Rescission of order

Such an order may be rescinded only—

(A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

The filing of the motion to reopen described in subparagraph (A) or (B) shall stay the deportation of the alien pending disposition of the motion.

(4) Effect on judicial review

Any petition for review under section 1105a of this title of an order entered in absentia under this subsection shall, notwithstanding such section, be filed not later than 60 days (or 30 days in the case of an alien convicted of an aggravated felony) after the date of the final order of deportation and shall (except in cases described in section 1105a(a)(5) of this title) be confined to the issues of the validity of the notice provided to the alien, to the reasons for the alien's not attending the proceeding, and to whether or not

clear, convincing, and unequivocal evidence of deportability has been established.

(d) Treatment of frivolous behavior

The Attorney General shall, by regulation—

(1) define in a proceeding before a special inquiry officer or before an appellate administrative body under this subchapter, frivolous behavior for which attorneys may be sanctioned,

(2) specify the circumstances under which an administrative appeal of a decision or ruling will be considered frivolous and will be summarily dismissed, and

(3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.

Nothing in this subsection shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior.

(e) Limitation on discretionary relief for failure to appear

(1) At deportation proceedings

Any alien against whom a final order of deportation is entered in absentia under this section and who, at the time of the notice described in subsection (a)(2) of this section, was provided oral notice, either in the alien's native language or in another language the alien understands, of the time and place of the proceedings and of the consequences under this paragraph of failing, other than because of exceptional circumstances (as defined in subsection (f)(2) of this section) to attend a proceeding under section 1252 of

this title, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the entry of the final order of deportation.

(2) Voluntary departure

(A) In general

Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien allowed to depart voluntarily unless, before such departure, the Attorney General has provided written notice to the alien in English and Spanish and oral notice either in the alien's native language or in another language the alien understands of the consequences under subparagraph (A) of the alien's remaining in the United States after the scheduled date of departure, other than because of exceptional circumstances.

(3) Failure to appear under deportation order

(A) In general

Subject to subparagraph (B), any alien against whom a final order of deportation is entered under this section and who fails, other than because of

exceptional circumstances, to appear for deportation at the time and place ordered shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date the alien was required to appear for deportation.

(B) Written and oral notice required

Subparagraph (A) shall not apply to an alien against whom a deportation order is entered unless the Attorney General has provided, orally in the alien's native language or in another language the alien understands and in the final order of deportation under this section of the consequences under subparagraph (A) of the alien's failure, other than because of exceptional circumstances, to appear for deportation at the time and place ordered.

(4) Failure to appear for asylum hearing

(A) In general

Subject to subparagraph (B), any alien–

(i) whose period of authorized stay (if any) has expired through the passage of time,

(ii) who has filed an application for asylum, and

(iii) who fails, other than because of exceptional circumstances, to appear at the time and place specified for the asylum hearing,

shall not be eligible for relief described in paragraph (5) for a period of 5 years after the date of the asylum hearing.

(B) Written and oral notice required

Subparagraph (A) shall not apply in the case of an alien with respect to a failure to be present at a hearing unless—

(i) written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the time and place at which the asylum hearing will be held, and in the case of any change or postponement in such time or place, written notice in English and Spanish, and oral notice either in the alien's native language or in another language the alien understands, was provided to the alien of the new time or place of the hearing; and

(ii) notices under clause (i) specified the consequences under subparagraph (A) of failing, other than because of exceptional circumstances, to attend such hearing.

(5) Relief covered

The relief described in this paragraph is—

(A) voluntary departure under section 1252(b)(1) of this title,

(B) suspension of deportation or voluntary departure under section 1254 of this title, and

(C) adjustment or change of status under section 1255, 1258, or 1259 of this title.

(f) Definitions

In this section:

(1) The term "certified mail" means certified mail, return receipt requested.

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

8. 8 U.S.C. 1254 (1994) provides:

Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship

to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

(2) is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(3) is deportable under any law of the United States except section 1251(a)(1)(G) of this title and the provisions specified in paragraph (2); 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; has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent); and proves that during all of such time in the United States the alien was and is a person of good moral character; and is a person whose deportation would, in the opinion of the

Attorney General, result in extreme hardship to the alien or the alien's parent or child.

(b) Continuous physical presence: inapplicability based on service in Armed Forces; brief, casual, and innocent absences

(1) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four 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 his enlistment or induction was in the United States.

(2) An alien shall not be considered to have failed to maintain continuous physical presence in the United States under paragraphs (1) and (2) of subsection (a) of this section if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence.

(c) Fulfillment of requirements of subsection (a)

Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien.

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made.

(e) Voluntary departure

(1) Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3), or (4) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(2) The authority contained in paragraph (1) shall not apply to any alien who is deportable because of a conviction for an aggravated felony.

(f) Alien crewmen; nonimmigrant exchange aliens admitted to receive graduate medical education or training; other

The provisions of subsection (a) of this section shall not apply to an alien who—

(1) entered the United States as a crewman subsequent to June 30, 1964;

(2) 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; or

(3)(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.

(g) Consideration of evidence

In acting on applications under subsection (a)(3) of this section, 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.

9. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. III, Subtit. A, § 309(c)(5), 110 Stat. 3009-627, provides:

SEC. 309. EFFECTIVE DATES; TRANSITION.

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

* * * * *

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality

Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

10. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, sec. 203(1), § 309(c)(5)(A), 111 Stat. 2196 (8 U.S.C. 1101 note), provides:

Sec. 203. MODIFICATION OF CERTAIN TRANSITION RULES. (a) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION.—

(1) IN GENERAL.—Section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; division C; 110 Stat. 3009 627) is amended to read as follows:

"(5) TRANSITIONAL RULES WITH REGARD TO SUSPENSION OF DEPORTATION.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to orders to show cause (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

11. 8 C.F.R. 242.1 (1995) provides:

Order to show cause and notice of hearing.

(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the filing of an Order to Show Cause with the Office of the Immigration Judge, except an alien who has been admitted to the United States under the provisions of section 217 of the Act and part 217 of this chapter other than such an alien who as applied for asylum in the United States. In the proceeding, the alien shall be known as the respondent. Orders to show cause may be issued by:

(1) District directors;

(2) Acting district directors;

(3) Deputy district directors;

(4) Assistant district directors for investigations;

(5) Deputy assistant district directors for investigations;

(6) Assistant district directors for deportation;

(7) Deputy assistant district directors for deportation;

(8) Assistant district directors for examinations;

(9) Deputy assistant district directors for examinations;

(10) Assistant district directors for anti-smuggling;

(11) Officers in charge (except foreign);

(12) Chief patrol agents;

(13) Deputy chief patrol agents;

(14) Associate chief patrol agents;

(15) Assistant chief patrol agents;

(16) The Assistant Commissioner, Investigations;

(17) Service center directors;

(18) Director, Organized Crime Drug Enforcement Task Force (OCDETF);

(19) Assistant Director, Organized Crime Drug Enforcement Task Force (OCDETF), (New York, NY; Houston, TX; Los Angeles, CA; and Miami, FL);

(20) The Assistant Commissioner, Refugees, Asylum and Parole;

(21) Supervisory asylum officers.

12. 8 C.F.R. 1003.1 provides:

Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them. The Board shall consist of 17 members. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

(2) *Chairman.* The Attorney General shall designate one of the Board members to serve as Chairman.

The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members to cases, and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing

in this section shall be construed to limit the management authority of the Chairman under paragraph (a)(2)(i) of this section.

(3) *Panels.* The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) *Temporary Board members.* The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary Board members for terms not to exceed six months. In addition, with the approval of the Deputy Attorney General, the Director may designate one or more senior EOIR attorneys with at least ten years of experience in the field of immigration law to act as temporary Board members for terms not to exceed six months. A temporary Board member shall have the authority of a Board member to adjudicate assigned cases, except that temporary Board members shall not have the authority to vote on any matter decided by the Board *en banc.*

(5) *En banc process.* A majority of the permanent Board members shall constitute a quorum for purposes

of convening the Board *en banc*. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case *en banc*, or reconsider as the Board *en banc* any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance or to secure or maintain consistency of the Board's decisions.

(6) *Board staff.* There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(7) [Reserved]

(b) *Appellate jurisdiction.* Appeals may be filed with the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 1240, subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 1240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a)(6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of 8 CFR chapter I or parts 1204 and 1205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 1212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 1236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 1246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to § 1208.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 1244.

(11) [Reserved]

(12) Decisions of Immigration Judges on applications for adjustment of status referred on a Notice of Certification (Form I-290C) to the Immigration Court in

accordance with §§ 1245.13(n)(2) and 1245.15(n)(3) of this chapter or remanded to the Immigration Court in accordance with §§ 1245.13(d)(2) and 1245.15(e)(2) of this chapter.

(13) Decisions of adjudicating officials in practitioner disciplinary proceedings as provided in subpart G of this part.

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to § 1241.14 of this chapter.

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any case arising under paragraph (b) of this section certify such case to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of § 1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) *Powers of the Board*—(1) *Generally.* The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals*—(i) *Standards.* A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR-26 or Form EOIR-29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

(E) The party concerned indicates on Form EOIR-26 or Form EOIR-29 that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(F) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(H) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action by the Board.* The Board's case management screening plan shall promptly identify cases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under § 1292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review.* (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigra-

tion judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo.*

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo.*

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

(4) *Rules of practice.* The Board shall have authority, with the approval of the Director, EOIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of attorneys and representatives.* The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in § 1292.2 of this chapter. It shall also determine whether any organization desiring representation is of a kind described in § 1001.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any immigration judge.

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations or examinations pursuant to § 1003.47; or

(B) The Board may provide notice to both parties that in order to complete adjudication of the appeal the

case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1003.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(i).

(7) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. In addition, a single Board member may adjudicate a Service motion to remand any appeal from the decision of a Service officer where the Service requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on

the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)" An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the rea-

soning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) *Other decisions on the merits by single Board member.* If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) *Panel decisions.* Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

(7) *Oral argument.* When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board *en banc* may hear oral argument, as a matter of discretion, at such date and time as is established under the Board's case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or his designee authorizes oral argument to be held elsewhere. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member.

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of

this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the case to himself or a Vice-Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending *en banc* Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or eases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) For any case ready for adjudication as of September 25, 2002, and that has not been completed within the established time lines, the Chairman may, as a matter of discretion, grant an extension of up to 120 days.

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

(vi) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions as precedents.* Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of

the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.

(2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.

(i) *Publication of Secretary's precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and, upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause

such decisions to be published in the same manner as decisions of the Board and the Attorney General.

(j) *Continuation of jurisdiction and procedure.* The jurisdiction of, and procedures before, the Board of Immigration Appeals in exclusion, deportation, removal, rescission, asylum-only, and any other proceedings, shall remain in effect as in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or to an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

13. 8 C.F.R. 1003.13 provides:

Definitions.

As used in this subpart:

Administrative control means custodial responsibility for the Record of Proceeding as specified in § 1003.11.

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. For proceedings initiated prior to April 1, 1997, these documents include an Order to Show Cause, a Notice to Applicant for Admission Detained for Hearing before Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien. For proceedings initiated after April 1, 1997, these documents

include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.

Filing means the actual receipt of a document by the appropriate Immigration Court.

Service means physically presenting or mailing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney and a Notice to Appear or Notice of Removal Hearing shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

14. 8 C.F.R. 1003.14 provides:

Jurisdiction and commencement of proceedings.

(a) Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party pursuant to § 1003.32 which indicates the Immigration Court in which the charging document is filed. However, no charging document is required to be filed with the Immigration Court to commence bond proceedings pursuant to §§ 1003.19, 1236.1(d) and 1240.2(b) of this chapter.

(b) When an Immigration Judge has jurisdiction over an underlying proceeding, sole jurisdiction over applications for asylum shall lie with the Immigration Judge.

(c) Immigration Judges have jurisdiction to administer the oath of allegiance in administrative naturalization ceremonies conducted by the Service in accordance with § 1337.2(b) of this chapter.

(d) The jurisdiction of, and procedures before, immigration judges in exclusion, deportation and removal, rescission, asylum-only, and any other proceedings shall remain in effect as it was in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

15. 8 C.F.R. 1003.15 provides:

Contents of the order to show cause and notice to appear and notification of change of address.

(a) In the Order to Show Cause, the Service shall provide the following administrative information to the Executive Office for Immigration Review. Omission of any of these items shall not provide the alien with any substantive or procedural rights:

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship;

(5) The language that the alien understands;

(b) The Order to Show Cause and Notice to Appear must also include the following information:

(1) The nature of the proceedings against the alien;

(2) The legal authority under which the proceedings are conducted;

(3) The acts or conduct alleged to be in violation of law;

(4) The charges against the alien and the statutory provisions alleged to have been violated;

(5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 CFR 1292.1;

(6) The address of the Immigration Court where the Service will file the Order to Show Cause and Notice to Appear; and

(7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an *in absentia* hearing in accordance with § 1003.26.

(c) *Contents of the Notice to Appear for removal proceedings.* In the Notice to Appear for removal proceedings, the Service shall provide the following administrative information to the Immigration Court. Failure to provide any of these items shall not be construed as affording the alien any substantive or procedural rights.

(1) The alien's names and any known aliases;

(2) The alien's address;

(3) The alien's registration number, with any lead alien registration number with which the alien is associated;

(4) The alien's alleged nationality and citizenship; and

(5) The language that the alien understands.

(d) *Address and telephone number.* (1) If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted. The alien may satisfy this requirement by completing and filing Form EOIR-33.

(2) Within five days of any change of address, the alien must provide written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed, or if venue has been changed, to the Immigration Court to which venue has been changed.

16. 8. C.F.R. 1003.18 provides:

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.

17. 8 C.F.R. 1239.1 provides:

Notice to appear.

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a).

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.