No. 20-923

In the Supreme Court of the United States

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

RODRIGO ACOSTA-PENA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
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

Additional Captions Listed on Inside Cover

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

JOE RICHARD ARTUR A.K.A. JOE RICHARD ARTHUR

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

LUIS MORENO-LOPEZ

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

ISAIAS JIMENEZ JUAREZ

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

MOISES MAGANA ARIAS

QUESTION PRESENTED

Whether the government must provide written notice under 8 U.S.C. 1229(a)(1), which is required to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A), in a single document.

PARTIES TO THE PROCEEDING

Petitioner is Jeffrey A. Rosen, Acting Attorney General.

Respondents are Rodrigo Acosta-Pena, Joe Richard Artur (a.k.a. Joe Richard Arthur), Luis Moreno-Lopez, Isaias Jimenez Juarez, and Moises Magana Arias, who each were a petitioner in the court of appeals.

RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

Acosta-Pena v. *Barr*, No. 19-9557 (July 22, 2020)

Artur v. *Holder*, No. 13-9582 (July 16, 2014)

Artur v. *Barr*, No. 19-9537 (June 26, 2020)

Moreno-Lopez v. *Barr*, No. 18-9584 (July 2, 2020)

Jimenez Juarez v. *Barr*, No. 18-9577 (July 14, 2020)

Magana Arias v. *Barr*, No. 19-9541 (July 20, 2020)

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

In the Supreme Court of the United States

No. 20-923

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

RODRIGO ACOSTA-PENA

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

JOE RICHARD ARTUR A.K.A. JOE RICHARD ARTHUR

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

LUIS MORENO-LOPEZ

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

ISAIAS JIMENEZ JUAREZ

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL,
PETITIONER

v.

MOISES MAGANA ARIAS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Acting Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in these related cases. The government is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

In *Acosta-Pena*, the order of the court of appeals (App., *infra*, 1a-3a) is not published in the Federal Reporter but is reprinted at 812 Fed. Appx. 796. The decisions of the Board of Immigration Appeals (Board or BIA) (App., *infra*, 4a-9a, 10a-11a) are unreported.

In *Artur*, the order of the court of appeals (App., *infra*, 13a-18a) is not published in the Federal Reporter but is reprinted at 819 Fed. Appx. 618. The decision of the BIA (App., *infra*, 19a-22a) is unreported.

In *Moreno-Lopez*, the order of the court of appeals (App., *infra*, 24a-31a) is not published in the Federal Reporter but is reprinted at 818 Fed. Appx. 824. The decision of the BIA (App., *infra*, 32a-34a) is unreported.

In *Jimenez Juarez*, the order of the court of appeals (App., *infra*, 37a-41a) is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 930. The decision of the BIA (App., *infra*, 42a-46a) is unreported.

In *Magana Arias*, the order of the court of appeals (App., *infra*, 49a-59a) is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 933. The decision of the BIA (App., *infra*, 60a-63a) is unreported.

JURISDICTION

In *Acosta-Pena*, the judgment of the court of appeals was entered on July 22, 2020. A petition for rehearing was denied on August 11, 2020 (App., *infra*, 12a).

In *Artur*, the judgment of the court of appeals was entered on June 26, 2020. A petition for rehearing was denied on August 13, 2020 (App., *infra*, 23a).

In *Moreno-Lopez*, the judgment of the court of appeals was entered on July 2, 2020. A petition for rehearing was denied on August 25, 2020 (App., *infra*, 35a-36a).

In *Jimenez Juarez*, the judgment of the court of appeals was entered on July 14, 2020. A petition for rehearing was denied on August 31, 2020 (App., *infra*, 47a-48a).

In *Magana Arias*, the judgment of the court of appeals was entered on July 20, 2020. A petition for rehearing was denied on September 4, 2020 (App., *infra*, 64a-65a).

On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying a timely petition for rehearing. Under that order, the deadline for filing a petition for a writ of certiorari in *Acosta-Pena*, *Artur*, *Moreno-Lopez*, *Jimenez Juarez*, and *Magana Arias* is, respectively, January 8, January 10 (a Sunday), January 22, January 28, and February 1, 2021. In each case, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 66a-70a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that, in removal proceedings, "written notice" be provided to the alien of several categories of information, including, as relevant here, "[t]he time and place at which the proceedings will be held." 8 U.S.C. 1229(a)(1)(G)(i). That "written notice" required by Section 1229(a)(1) is "in [Section 1229] referred to as a 'notice to appear.'" 8 U.S.C. 1229(a)(1).

If an alien is served written notice as required by Section 1229(a)(1), one of the consequences concerns his accrual of ten years of continuous physical presence in the United States, which is necessary for aliens like respondents who are not lawful permanent residents to qualify for the discretionary relief of cancellation of removal. 8 U.S.C. 1229b(b)(1)(A). Under the stop-time rule, the accrual of continuous presence is "deemed to end" when the alien has been given "a notice to appear under [S]ection 1229(a)." 8 U.S.C. 1229b(d)(1)(A).

In *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018), this Court determined that Section 1229b(d)(1)(A)'s stop-time rule is triggered only when the government serves an alien "'written notice (in [Section 1229] referred to as a "notice to appear")'" of the time and place of the removal proceedings, not by mere service of a standard-form "document that is labeled 'notice to appear'" but that does not contain that information. *Id.* at 2109-2110 (quoting 8 U.S.C. 1229(a)(1)). The question in these related cases is whether "written notice" of the information required by Section 1229(a)(1) must be served in a single document in order to trigger the stop-time rule, or whether such notice may be served in two documents that together convey all the required information.

2. a. Respondent Acosta-Pena is a native and citizen of Mexico. App., *infra*, 1a, 4a. In 2001, he entered the United States without inspection by an immigration officer. *Id.* at 5a; see 19-9557 Administrative Record (A.R.) 495.

In February 2009, Acosta-Pena was served with a document labeled "[N]otice to [A]ppear," App., *infra*, 6a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal because he was an alien present in the United States without being admitted or paroled. 19-9557 A.R. 495 (emphasis omitted). That notice did not specify the date and time of Acosta-Pena's initial removal hearing, stating instead that the hearing would be on a date and time "to be set." App., *infra*, 6a (citation omitted). About one week later, however, Acosta-Pena was served with a separate "notice of hearing" that specified the date and time of his initial removal hearing. *Id.* at 7a.

After an immigration judge (IJ) found Acosta-Pena removable as charged and denied his application for cancellation of removal, Acosta-Pena appealed to the BIA. App., *infra*, 4a; see 19-9557 A.R. 47-48, 51. While that administrative appeal was pending, this Court issued its 2018 decision in *Pereira*, *supra*. In *Pereira*, the government had served Pereira with a document labeled "notice to appear" that "included all of the information required by [Section] 1229(a)(1)" except "the date and time of Pereira's removal proceedings," and Pereira "never received" the subsequent notice sent to inform him of "the specific date and time of his hearing" before he accrued ten years of physical presence in the United States. 138 S. Ct. at 2112-2113. This Court stated that the case presented the "narrow question"

whether service of "a document that is labeled 'notice to appear,'" but that fails to specify the time or place of removal proceedings, is itself "a 'notice to appear under section 1229(a)'" as that phrase is used in Section 1229b(d)(1)(A)'s stop-time rule. *Id.* at 2109-2110.[*] The Court answered no, holding that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a)' and therefore does not trigger the stop-time rule." *Id.* at 2110. The fact that a document may be "styled as a 'notice to appear,'" the Court explained, is insufficient to provide the requisite notice "in [Section] 1229(a)(1)" of the substantive information required by statute, including the "'time and place at which the proceedings will be held.'" *Id.* at 2113 & n.5 (quoting 8 U.S.C. 1229(a)(1)(G)(i)).

The Board subsequently dismissed Acosta-Pena's appeal. App., *infra*, 4a-9a. As relevant here, the Board determined that Acosta-Pena was not eligible for cancellation of removal because he failed to establish the requisite ten years of continuous physical presence in the United States. *Id.* at 5a-7a. The Board explained

---

[*] Although Section 1229(a)(1) provides that the "written notice" that it requires is "in this section"—*i.e.*, in Section 1229—referred to as "a 'notice to appear,'" 8 U.S.C. 1229(a)(1), that statutory definition of "notice to appear" does not itself apply to the stop-time rule, which Congress codified in a separate statutory provision (Section 1229b). See 8 U.S.C. 1229b(d)(1). *Pereira* accordingly explained that the stop-time rule's reference to "'a notice to appear under section 1229(a)'" independently "specifies where to look to find out what 'notice to appear' means" in Section 1229b(d)(1)(A), and that "Section 1229(a), in turn, clarifies that the type of notice" required is "a 'written notice . . . specifying'" the information required by Section 1229(a)(1). *Pereira*, 138 S. Ct. at 2114 (quoting 8 U.S.C. 1229(a)(1), 1229b(d)(1)(A)).

that Acosta-Pena's continuous presence was deemed to end when he was served with both a document labeled "notice to appear" and a subsequent document labeled "notice of hearing." *Id.* at 6a. The Board explained that the two documents together "satisfied the notice requirements of [S]ection [1229](a)," thereby triggering Section 1229b(d)(1)'s stop-time rule. *Id.* at 6a-7a.

b. Respondent Artur is a native and citizen of Ghana. App., *infra*, 13a. In June 2004, he was admitted to the United States pursuant to a nonimmigrant visa, and, when that visa expired, he remained in the United States without authorization. *Id.* at 14a.

In June 2011, Artur was served with a document labeled "Notice to Appear," App., *infra*, 14a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal because he had remained in the United States beyond the period authorized by his visa. 19-9537 A.R. 886 (emphasis omitted). That notice did not specify the date and time of Artur's initial removal hearing, stating instead that the hearing would be on a date and time "to be set." *Ibid.* A few days later, however, Artur was served with a separate hearing notice that specified the date and time of his initial removal hearing. App., *infra*, 14a.

In May 2012, an IJ found Artur removable as charged and denied his requests for relief from removal. App., *infra*, 14a, 19a. The Board dismissed Artur's administrative appeal. *Ibid.* The court of appeals then denied his petition for review in part and dismissed it in part. *Artur* v. *Holder*, 572 Fed. Appx. 592 (10th Cir. 2014). Notwithstanding the final order of removal requiring his departure, Artur continued to live in the United States. App., *infra*, 14a.

In January 2019, Artur moved the Board to reopen its proceedings based on this Court's 2018 decision in *Pereira*. App., *infra*, 20a-21a. The Board denied the motion. *Id.* at 19a-22a. The Board determined that the motion was untimely. *Id.* at 20a. In addition, the Board declined to exercise its authority to reopen proceedings *sua sponte* to allow Artur to apply for cancellation of removal, concluding that he was not eligible for such relief. *Id.* at 20a-22a. The Board explained that although Artur was initially served with a notice to appear that omitted the date and time of his removal hearing, the notice requirements of Section 1229(a)(1) were satisfied when he was later served with a hearing notice that provided the omitted information, thereby triggering Section 1229b(d)(1)(A)'s stop-time rule and terminating his period of continuous physical presence before he satisfied the ten-year minimum required for cancellation relief. *Id.* at 21a-22a.

c. Respondent Moreno-Lopez is a native and citizen of Mexico. App., *infra*, 25a. After departing the United States pursuant to a grant of voluntary departure in April 2008, he reentered the United States on an unknown date, without inspection by an immigration officer. *Ibid.*; see 18-9584 A.R. 96.

In February 2017, Moreno-Lopez was served with a document labeled Notice to Appear, App., *infra*, 25a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal because he is an alien present in the United States without being admitted or paroled. 18-9584 A.R. 96 (emphasis omitted). That notice did not specify the date and time of Moreno-Lopez's initial removal hearing, stating instead that the hearing would be on a date and time "[t]o be set." *Ibid.* Less than a

week later, however, Moreno-Lopez was served with a separate hearing notice that specified the date and time of his initial removal hearing. *Id.* at 94; see App., *infra*, 26a.

Moreno-Lopez conceded his removability. App., *infra*, 26a. He also submitted an application for cancellation of removal, but withdrew that application based on his conclusion that he could not satisfy "'the statutory requirement of ten [years of] physical presence' in the United States." *Ibid.* (brackets in original; citation omitted). After the IJ ordered him removed from the United States, Moreno-Lopez appealed to the Board. *Ibid.* While that administrative appeal was pending, this Court issued its decision in *Pereira*, *supra*. Moreno-Lopez then moved the Board based on *Pereira* to terminate his removal proceedings for lack of jurisdiction or, in the alternative, to remand to the IJ so that he could reapply for cancellation of removal. App., *infra*, 26a; see 18-9584 A.R. 18-21.

The Board dismissed Moreno-Lopez's appeal and denied his motion to terminate or remand. App., *infra*, 32a-34a. As relevant here, the Board concluded that a remand to allow Moreno-Lopez to pursue cancellation relief was unwarranted. *Id.* at 33a-34a. The Board stated that a document labeled as a "notice to appear" that does not specify the date and time of an alien's removal hearing and a subsequent "notice of hearing" that provides that information will together satisfy "the [notice] requirements of [S]ection [1229](a)." *Ibid.* The Board did not expressly address whether Moreno-Lopez could satisfy the ten-year continuous-physical-presence requirement for cancellation relief in light of the stop-time rule. See *ibid.*

d. Respondent Jimenez Juarez is a native and citizen of Mexico. App., *infra*, 37a. The government alleges that Jimenez Juarez entered the United States without inspection by an immigration officer in or about October 2009. 18-9577 A.R. 274. Jimenez Juarez concedes that he entered without inspection, but he contends that he did so in October 2006. *Id.* at 84.

In February 2014, Jimenez Juarez was served with a document labeled "Notice to Appear," App., *infra*, 38a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal because he is an alien present in the United States without being admitted or paroled. 18-9577 A.R. 274 (emphasis omitted). That notice did not specify the date and time of Jimenez Juarez's initial removal hearing, stating instead that the hearing would be on a date and time "[t]o be set." *Ibid.* About two weeks later, however, Jimenez Juarez was served with a separate hearing notice that specified the date and time of his initial removal hearing. App., *infra*, 38a.

After the IJ ordered that Jimenez Juarez be removed if he failed to depart voluntarily, Jimenez Juarez appealed to the Board. App., *infra*, 38a; see 18-9577 A.R. 96-97. Jimenez Juarez then moved the Board to remand his case to the IJ to allow him to apply for cancellation of removal in light of this Court's decision in *Pereira*. App., *infra*, 39a.

The Board dismissed Jimenez Juarez's appeal and denied his motion. App., *infra*, 42a-46a. As relevant here, the Board denied the remand motion because it determined that Jimenez Juarez could not satisfy "the 10-year continuous physical presence requirement for cancellation of removal." *Id.* at 43a-44a. The Board re-

jected Jimenez Juarez's contention that he could be eligible for cancellation relief, which he based on the theory that the "Notice to Appear [with which he was served] * * * did not specify the date and time for his initial hearing" and, for that reason, "did not trigger [Section 1229b(d)(1)'s] stop-time rule." *Ibid.* The Board concluded instead that a "notice to appear" that "does not specify the date and time of the alien's initial removal hearing" and a subsequent "notice of hearing specifying this information" together satisfy "the [notice] requirements of [S]ection [1229](a)(1)" and that, in this case, such notice triggered the stop-time rule and prevented Jimenez Juarez from satisfying the ten-year continuous-physical-presence requirement for cancellation relief. *Ibid.*

e. Respondent Magana Arias is a native and citizen of Mexico. App., *infra*, 49a. Magana Arias entered the United States on an unknown date, without inspection by an immigration officer. *Id.* at 50a; 19-9541 A.R. 405. He contends that he last entered the United States in December 2000. App., *infra*, 50a.

In March 2010, Magana Arias was served with a document labeled "Notice to Appear," App., *infra*, 50a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal because he is an alien present in the United States without being admitted or paroled. 19-9541 A.R. 403, 405 (emphasis omitted). That notice did not specify the date and time of Magana Arias's initial removal hearing, stating instead that the hearing would be on a date and time "to be set." *Id.* at 403. About two weeks later, however, Magana Arias was served with a separate hearing notice that specified the

date and time of his initial removal hearing. App., *infra*, 50a.

In 2017, the IJ ordered Magana Arias to be removed from the United States. App., *infra*, 51a; 19-9541 A.R. 126. In October 2018, the Board dismissed his administrative appeal. App., *infra*, 51a; 19-9541 A.R. 40-42. Magana Arias then moved the Board to reconsider its decision and to remand, as relevant here, to allow him to pursue cancellation-of-removal relief in light of this Court's intervening decision in *Pereira*. 19-9541 A.R. 27, 29.

The Board denied respondent's motion for reconsideration. App., *infra*, 60a-63a. As relevant here, the Board stated that it had "recently held that 'in cases where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the "stop-time" rule, and ends the alien's period of continuous residence or physical presence in the United States.'" *Id.* at 62a (quoting *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 529 (B.I.A. 2019)). The Board concluded that petitioner could not establish his eligibility for cancellation relief on remand, because he had been served with the notice required to trigger the stop-time rule "before he had acquired the 10 years of continuous physical presence required for cancellation of removal." *Ibid.*

3. a. The court of appeals granted each respondent's petition for review and remanded each case to the Board for further proceedings. App., *infra*, 1a-3a (Acosta-Pena), 13a-18a (Artur), 24a-31a (Moreno-Lopez), 37a-41a (Jimenez Juarez), 49a-59a (Magana Arias). As relevant here, the court in each case followed its recent

decision in *Banuelos-Galviz* v. *Barr*, 953 F.3d 1176 (10th Cir. 2020), petition for cert. pending, No. 20-356 (filed Sept. 17, 2020). See App., *infra*, 2a, 17a-18a, 30a-31a, 40a-41a, 53a-54a. In *Banuelos-Galviz*, the court of appeals rejected the government's contention that the written notice required by Section 1229(a)(1), which triggers Section 1229b(d)(1)(A)'s "stop time rule," may be provided "by the combination of an incomplete notice to appear and a [subsequent] notice of hearing." 953 F.3d at 1184. The court instead held that "the stop-time rule is triggered by one complete notice to appear rather than a combination of documents." *Id.* at 1178.

The court of appeals concluded that *Banuelos-Galviz* "rejected" the position taken in each case by the Board, which determined that a "combination of documents"—a document labeled a "notice to appear" and another labeled a "notice of hearing"—"triggered the stop-time rule as of the date of the notice of hearing." App., *infra*, 2a; see *id.* at 17a-18a, 30a-31a, 40a-41a, 53a-54a. The court therefore remanded each case to the Board for further proceedings consistent with its holding in *Banuelos-Galviz*. *Id.* at 3a, 18a, 31a, 41a, 59a.

b. The government petitioned the court of appeals for panel rehearing in each of the five cases, explaining that this Court had granted certiorari on the question resolved by *Banuelos-Galviz* in *Niz-Chavez* v. *Rosen*, No. 19-863 (argued Nov. 9, 2020), and requesting that the court of appeals hold each case pending this Court's decision in *Niz-Chavez*. App., *infra*, 23a, 35a-36a, 47a-48a, 64a-65a; see 19-9557 Gov't C.A. Pet. for Panel Reh'g 1-2 (*Acosta-Pena*). The court of appeals denied those requests. App., *infra*, 3a, 23a, 36a, 48a, 65a.

4. In light of the court of appeals' decision in *Acosta-Pena*, but before the time to petition this Court for a

writ of certiorari in that case expired, the Board remanded *Acosta-Pena* to the IJ for further proceedings. App., *infra*, 10a-11a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the government must provide the "written notice" specified by 8 U.S.C. 1229(a)(1)—which is necessary to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A)—in a single document. App., *infra*, 2a, 17a-18a, 30a-31a, 40a-41a, 53a-54a. This Court is currently considering whether that interpretation of the INA is correct in *Niz-Chavez* v. *Rosen*, No. 19-863 (argued Nov. 9, 2020). The Court should accordingly hold this petition pending its decision in *Niz-Chavez* and then dispose of the petition as appropriate in light of that decision.

Although the Board has remanded *Acosta-Pena* to the IJ for further proceedings, App., *infra*, 10a-11a, such proceedings on remand based on "the mandate of the Court of Appeals" do "not moot [a] case" where, as here, the case is otherwise properly before this Court for review. *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); see, *e.g.*, *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 126 n.2, 128 n.3 (1991). Even if the agency were to render a new decision in *Acosta-Pena* on remand, that disposition would pose no barrier to certiorari review, because vacatur or "reversal of [the court of appeals'] decision" would unwind the remand proceedings and dispose of the case according to the judgment of this Court. *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); cf. *id.* at 594-596 (Brennan, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Niz-Chavez* v. *Rosen*, No. 19-863 (argued Nov. 9, 2020), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

JANUARY 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9557
(Petition for Review)
RODRIGO ACOSTA-PENA, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: July 22, 2020]

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

This petition for review stemmed from the government's effort to remove Mr. Rodrigo Acosta-Pena, a Mexican citizen, based on his presence in the United States without admission or parole. *See* 8 U.S.C. § 1182(a)(6)(A)(i). He sought cancellation of removal,

---

* Oral argument would not materially help us to decide this appeal. We have thus decided the appeal based on the appellate briefs and the record on appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

and an immigration judge denied relief, finding that Mr. Acosta-Pena had not remained physically present in the United States for the required ten-year period. The Board of Immigration Appeals upheld the immigration judge's decision. Mr. Acosta-Pena petitions for review,[1] and we grant the petition.

As a nonpermanent resident, Mr. Acosta-Pena may be eligible for cancellation of removal if 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). But under the so-called "stop-time" rule, the period of continuous 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)(A).

Mr. Acosta-Pena received a putative notice to appear. The notice didn't tell him the time or place of the removal hearing, but the immigration court later supplied this information in a notice of hearing. The Board of Immigration Appeals determined that this combination of documents triggered the stop-time rule as of the date of the notice of hearing (March 4, 2009). We recently rejected this view in *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020), holding that "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing."[2]

---

[1] Although we generally lack jurisdiction over administrative denial of cancellation of removal, *see* 8 U.S.C. § 1252(a)(2)(B)(i), we retain jurisdiction to review constitutional claims and questions of law. *See* § 1252(a)(2)(D).

[2] The Board issued its decision before *Banuelos-Galviz*, so the Board understandably relied on its own contrary precedent.

Though the stop-time rule did not apply, Mr. Acosta-Pena must still show that he remained continuously in the United States for at least ten years when he applied for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(A). He applied for cancellation of removal on April 5, 2011, so he must show continuous presence in the United States since April 5, 2001.

Mr. Acosta-Pena left the United States in July 2001. But neither the immigration judge nor the Board of Immigration Appeals decided how long Mr. Acosta-Pena had stayed away. If he had stayed away for more than 90 days, his trip would have broken the period of continuous presence. 8 U.S.C. § 1229b(d)(2). The duration of his trip in July 2001 may thus determine Mr. Acosta-Pena's eligibility for cancellation of removal.

Because the Board erroneously relied on the stop-time rule, we grant the petition for review and remand for further administrative proceedings. On remand, the agency cannot apply the stop-time rule based on the combination of the notice to appear and notice of hearing. Though the stop-time rule does not apply, Mr. Acosta-Pena must still show continuous presence in the United States in the ten-year period preceding his application for cancellation of removal. The agency must determine whether Mr. Acosta-Pena satisfied this requirement in the absence of the stop-time rule.

Entered for the Court

Robert E. Bacharach
Circuit Judge

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A089-822-630—Denver, CO

IN RE: RODRIGO ACOSTA-PENA

Date: [July 5, 2019]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

DENIS P. DA SILVA, Esquire

ON BEHALF OF DHS:

SUNIKA PAWAR
Assistant Chief Counsel

APPLICATION:

Cancellation of removal under section 240A(b) of the Act; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated January 29, 2018, denying his application for cancellation of removal for certain nonpermanent residents pursuant to section 240A(b)(1) of the Immigration and Nationality

Act, 8 U.S.C. § 1229b(b)(1), but granting his request for voluntary departure under section 240B(b)(1) of the Act, 8 U.S.C. § 1229c(b)(1). The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is not eligible for cancellation of removal because he did not meet his burden to demonstrate the requisite 10 years of continuous physical presence in the United States. *See* 240A(b)(1)(A) of the Act. It is undisputed that the respondent last entered the United States in 2001 (IJ at 2-3; Respondent's Br. at 4-5). Although the respondent testified that he first entered the United States in 1996, he has not challenged the Immigration Judge's determination that he was unable to establish his continuous physical presence prior to his 2001 entry because of his various departures from the United States (IJ at 4-5; Tr. at 45-47). *See* 240A(d)(2) of the Act.

Under section 240A(d)(1) of the Act, any period of continuous physical presence ends "when the alien is served a notice to appear under section 239(a)" of the Act, 8 U.S.C. § 1229(a). *See also Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000); *Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004). To trigger this "stop-time" rule, however, the notice to appear must contain "[t]he time and place at which the proceedings will

be held." *See* 239(a)(1)(G)(i) of the Act; *Pereira v. Sessions*, 138 S. Ct. 2105, 2113-14 (2018). In *Pereira v. Sessions*, the Supreme Court held that a notice to appear that does not designate the time and place of a removal proceeding does not trigger the "stop-time" rule ending the period of continuous presence in the United States, applicable to certain cancellation of removal applications. *See* 240A(d)(1)-(2) of the Act.

On appeal, the respondent alleges that he has not been served with a compliant notice to appear (Respondent's Br. at 4). The respondent asserts that he can satisfy the continuous physical presence requirement for purposes of cancellation of removal pursuant to *Pereira v. Sessions*, because the notice to appear did not designate a specific time and place of removal proceedings and therefore did not trigger the "stop-time" rule ending his period of continuous presence in the United States for purposes of section 240A(b) of the Act, 8 U.S.C. § 1229b(b) (Respondent's Br. at 3-5).

The respondent's argument is foreclosed by our recent decision in *Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019). In that case, we distinguished *Pereira v. Sessions* and held that a deficient notice to appear that does not include the time and place of an alien's initial removal hearing is perfected by the subsequent service of a notice of hearing specifying that missing information, which satisfies the notice requirements of section 239(a) of the Act, and triggers the "stop-time" rule of section 240A(d)(1) of the Act. *Id.* at 529.

The respondent was personally served with the notice to appear on February 27, 2009, which indicated that the date and time of the hearing as "to be set" (IJ

at 1; Exh. 1). Shortly thereafter, on March 4, 2009, he was personally served a notice of hearing indicating that a removal hearing was scheduled for 9:00 AM on March 10, 2009, in Aurora, Colorado. The respondent does not argue that he did not receive this hearing notice. The subsequent service of the notice of hearing containing the date, time, and place of the respondent's initial removal hearing perfected the deficient notice to appear, and satisfied the notice requirements of section 239(a) of the Act, effectively triggering the "stop-time" rule of section 240A(d)(1) of the Act. Consequently, the respondent's continuous physical presence was cut off on March 4, 2009.

In light of the foregoing, we agree with the Immigration Judge's conclusion that the respondent is unable to establish the requisite 10 years of continuous physical presence. Therefore, the respondent is not eligible for cancellation of removal. Accordingly, the respondent's appeal will be dismissed. We will reinstate the period of voluntary departure previously granted to the respondent by the Immigration Judge. The following orders will be entered.

ORDER: The appeal is dismissed.

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

In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of ten years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

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

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her

departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/ MICHAEL J. CREPPY
MICHAEL J. CREPPY
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A089-822-630—Denver, CO

IN RE: RODRIGO ACOSTA-PENA

Date: [Nov. 4, 2020]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

PRO SE

This matter is presently before the Board pursuant to a July 22, 2020, decision of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit remanded this matter for further proceedings—specifically, for the agency to determine whether the respondent satisfied the 10-year continuous physical presence requirement for cancellation of removal, "in the absence of the stop-time rule." *See* section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Court noted that neither the Immigration Judge nor the Board had decided the duration of the respondent's trip

from the United States in July 2001, which "may [] determine [his] eligibility for cancellation of removal."

As further fact-finding will be required, we will remand this matter for further proceedings on the respondent's eligibility for cancellation of removal. The following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the Tenth Circuit's order and for the entry of a new decision.

/s/ EDWARD R. GRANT
EDWARD R. GRANT
FOR THE BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9557
(Petition for Review)

RODRIGO ACOSTA-PENA, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: Aug. 11, 2020]

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **BACHARACH**, Circuit Judges.

Respondent's petition for rehearing is denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9537
(Petition for Review)

JOE RICHARD ARTUR, A/K/A JOE RICHARD ARTHUR,
PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY
GENERAL, RESPONDENT

[Filed: June 26, 2020]

ORDER AND JUDGMENT*

Before **HOLMES**, **KELLY**, and **BACHARACH**, Circuit Judges.

Joe Richard Artur, a native and citizen of Ghana, petitions for review of a final order issued by the Board of Immigration Appeals (BIA) denying his motion to reopen. In that motion, he asserted that his case merited

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sua sponte reopening based on a fundamental change in the law due to the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). He argued that, after the *Pereira* decision, he was eligible for relief in the form of cancellation of removal, which had been previously unavailable to him. The BIA denied his motion, relying on its decision in *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019), to conclude that Mr. Artur was not prima facie eligible for cancellation of removal. We grant the petition for review and remand for further proceedings consistent with this decision.

I. Background

Mr. Artur was admitted to the United States on June 30, 2004, as a nonimmigrant visitor and remained in this country without authorization after his visa expired. He was issued a Notice to Appear (NTA) on June 13, 2011. The NTA did not specify the time or place of his initial removal hearing. He was subsequently issued a Notice of Hearing (NOH) a few days later that did specify the time and place of his hearing.

Mr. Artur applied for asylum, withholding of removal, and protection under the Convention Against Torture, but the Immigration Judge (IJ) denied all forms of relief and the BIA upheld the IJ's decision. This court dismissed in part and denied in part Mr. Artur's petition for review of the BIA's decision. *See Artur v. Holder*, 572 F. App'x 592, 593 (10th Cir. 2014).

Although he was subject to a final order of removal, Mr. Artur continued to live in the United States. In January 2019, he filed his motion to reopen his removal

proceedings based on *Pereira*.[1] In *Pereira*, the Supreme Court held that a NTA that fails to designate the specific time and place of a removal proceeding does not trigger the stop-time rule[2] to end the period of continuous presence in the United States required for cancellation of removal. *See* 138 S. Ct. at 2109-10.

In its decision, the BIA acknowledged that Mr. Artur's NTA did not designate the specific time or place of his initial removal hearing. After *Pereira*, however, the BIA issued *Mendoza-Hernandez*, in which it held that the subsequent service of a NOH containing the time and place of the initial hearing perfected a deficient NTA and triggered the stop-time rule. 27 I. & N. Dec. at 535. The NOH issued to Mr. Artur in June 2011 contained the necessary information, so the BIA relied on *Mendoza-Hernandez* to conclude that the NOH perfected the deficient NTA and terminated Mr. Artur's accrual of continuous physical presence. Because Mr. Artur lacked the requisite period of continuous physical presence to be prima facie eligible for cancellation of removal, the BIA declined to exercise its sua sponte authority to reopen his removal proceedings. In denying the motion to reopen, the BIA recognized that Mr. Artur had offered other evidence to support his application for

---

[1] Mr. Artur also filed a motion to stay his removal pending the BIA's consideration of his motion to reopen. The BIA denied his request for a stay of removal. In February 2019, U.S. Immigration and Customs Enforcement (ICE) removed him from the United States.

[2] Under the so-called "stop-time rule," an alien's period of continuous presence ends when the government serves the alien with an NTA. *See* 8 U.S.C. § 1229b(d)(1).

cancellation of removal, but it did not consider that evidence. Mr. Artur timely filed this petition for review of the BIA's decision.

II. Discussion

The government first argues that we lack jurisdiction to consider Mr. Artur's petition for review. We agree that we generally lack jurisdiction to review the BIA's exercise of discretion in deciding whether to sua sponte reopen removal proceedings. *See Salgado-Toribio v. Holder*, 713 F.3d 1267, 1270-71 (10th Cir. 2013). But we do retain jurisdiction to review constitutional claims or questions of law raised in a petition for review. *Id.* at 1271. Here, the question underpinning the BIA's denial of the motion to reopen is a legal one—whether the BIA correctly relied on *Mendoza-Hernandez* to determine that Mr. Artur is not prima facie eligible for cancellation of removal. We retain jurisdiction to review that question of law. *See Reyes-Vargas v. Barr*, 958 F.3d 1295, 1300 (10th Cir. 2020); *see also Pllumi v. Att'y Gen.*, 642 F.3d 155, 160 (3d Cir. 2011) ("[W]hen presented with a BIA decision rejecting a motion for *sua sponte* reopening, we may exercise jurisdiction to the limited extent of recognizing when the BIA has relied on an incorrect legal premise."); *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) ("[W]here the Agency may have declined to exercise its *sua sponte* authority because it misperceived the legal background and thought, incorrectly, that a reopening would necessarily fail, remand to the Agency for reconsideration in view of the correct law is appropriate."). Mr. Artur also contends that the BIA violated his constitutional rights to due process. We likewise retain jurisdiction to review that constitutional claim.

"We review the BIA's denial of [Mr. Artur's] motion to reopen for an abuse of discretion." *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). We first address Mr. Artur's claim that the BIA violated his due process rights. In removal proceedings, "aliens are entitled only to procedural due process, which provides the opportunity to be heard at a meaningful time and in a meaningful manner." *Schroeck v. Gonzales*, 429 F.3d 947, 952 (10th Cir. 2005) (internal quotation marks omitted). Mr. Artur contends that "[t]he proceedings before the BIA with respect to the motion to reopen and remand did not constitute a meaningful opportunity for [him] to be heard." Pet'r's Br. at 12. He complains that the BIA denied his motion to stay his removal prior to ruling on his motion to reopen and then delayed issuing its decision, which resulted in him being removed. But he fails to adequately explain how the BIA's actions prevented him from having a meaningful opportunity to be heard. To the contrary, the BIA considered and ruled on his motion for a stay and considered and ruled on his motion to reopen. That the BIA denied his stay motion and ICE removed him prior to the denial of his motion to reopen does not demonstrate that his due process rights were violated—he had been subject to a final order of removal since July 2013. Mr. Artur's constitutional claim provides no basis to overturn the BIA's decision.

The parties spend the bulk of their briefs debating the propriety of the BIA's decision in *Mendoza-Hernandez*. But after briefing concluded in this appeal, we issued a published decision rejecting the reasoning of *Mendoza-Hernandez* and concluding that "the stop-time rule is triggered by one complete notice to appear rather than

a combination of documents." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020). Thus, in this circuit, "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Id.* at 1184.

The BIA's decision not to exercise its sua sponte authority to reopen Mr. Artur's removal proceedings was based on its conclusion that he was not prima facie eligible for cancellation of removal, which in turn was based on its decision in *Mendoza-Hernandez*. Because *Mendoza-Hernandez* is no longer good law in this circuit, we grant the petition for review and remand for the BIA to consider the motion to reopen in light of our decision in *Banuelos-Galviz*.

Entered for the Court

Jerome A. Holmes
Circuit Judge

APPENDIX F

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A096-596-007—Salt Lake City, UT

IN RE: JOE RICHARD ARTUR A.K.A.
JOE RICHARD ARTHUR

Date: [May 10, 2019]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

MARGARET W. PASCUAL, Esquire

ON BEHALF OF DHS:

ADAM N. GREENWAY
Assistant Chief Counsel

APPLICATION:

Reopening

On July 17, 2013, the Board dismissed the respondent's appeal from the Immigration Judge's May 2, 2012, decision, and on January 9, 2019, the respondent filed

the instant motion to reopen with the Board.[1] The Department of Homeland Security opposes this motion. The motion is untimely and will be denied. *See* sections 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2).

It does not appear that any exception to the filing deadline imposed on motions to reopen applies to the instant motion. *See generally* 8 C.F.R. § 1003.2(c)(3). Although the respondent expresses fear of returning to his native country, Ghana, he neither seeks reopening to reapply for asylum and withholding of removal, nor has he offered country conditions evidence with this motion reflecting changed circumstances or conditions in Ghana since the previous removal hearing to warrant reopening pursuant to section 240(c)(7)(C)(ii) of the Act. *See also Matter of S-Y-G-*, 24 I&N Dec. 247, 253, 358 (BIA 2007); 8 C.F.R. § 1003.2(c)(3)(ii).

The respondent, however, seeks reopening pursuant to the Board's sua sponte authority to apply for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (discussing the Board's limited authority to reopen and reconsider cases sua sponte in exceptional situations); 8 C.F.R. § 1003.2(a). Specifically, he seeks reopening based on a change in law reflected in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), in which the

---

[1] On July 16, 2014, the United States Court of Appeals for the Tenth Circuit denied and dismissed the respondent's petition for review of the Board's decision dismissing his appeal from the Immigration Judge's decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *Artur v. Holder*, 572 F. App'x 592 (10th Cir. 2014).

United States Supreme Court held that a Notice to Appear (NTA) that fails to designate the specific time or place of a removal proceeding is not a NTA under section 239(a) of the Act, 8 U.S.C. § 1229(a), and does not trigger the "stop-time" rule under section 240A(d)(1) of the Act, to end the period of continuous presence in the United States required for cancellation of removal. *See Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (holding that a fundamental change in law may warrant sua sponte reopening notwithstanding otherwise applicable time and number limitations on motions). *See also* section 240A(d)(1) of the Act (pertaining to the "stop-time" rule).

In this case, the NTA does not designate the specific time or place of the respondent's initial removal hearing (Exh. 1). However, this Board has recently held in *Matter of Mendoza-Hernandez*, 27 I&N Dec. 520 (BIA 2019), that "where a [NTA] does not specify the time and place of an alien's initial removal hearing, the subsequent service of a notice of hearing (N)H) containing that information 'perfects' the deficient [NTA], satisfies the notice requirements of section 239(a)(1) of the Act, and triggers the "stop-time" rule of section 240A(d)(1)(A) of the Act." The record reveals that a NOH was issued to the respondent on June 16, 2011.

The record also reveals that the respondent was admitted to the United States on June 30, 2004 (IJ at 1; Exh. 1). It does not appear, therefore, that the respondent is prima facie eligible for cancellation of removal. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (holding that the Board may deny a motion to reopen where a prima facie case for the relief sought has not been established). Inasmuch as the NOH issued on

June 16, 2011, perfected the deficient NTA and terminated the accrual of continuous physical presence, the respondent lacks the requisite period of continuous physical presence in the United States to qualify for cancellation of removal. *See* sections 240A(b)(1)(A), (d)(1).

We recognize that the respondent has offered evidence of his character, as well as evidence in support of his claim that his removal to Ghana would result in "exceptional and extremely unusual" hardship to a qualifying relative. *See* sections 240A(b)(1)(B), (D) of the Act. Nevertheless, we decline to exercise our sua sponte authority under 8 C.F.R. § 1003.2(a) where the respondent has not shown that he is prima facie eligible for relief from removal. Accordingly, the respondent's untimely motion to reopen will be denied.

ORDER: The motion to reopen is denied.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9537

JOE RICHARD ARTUR, A/K/A JOE RICHARD ARTHUR,
PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY
GENERAL, RESPONDENT

[Filed: Aug. 13, 2020]

ORDER

Before **HOLMES**, **KELLY**, and **BACHARACH**, Circuit Judges.

Respondent filed a petition for panel rehearing. In the petition, Respondent requested that this panel "hold [the] petition for rehearing pending the Supreme Court's decision in *Niz-Chavez v. Barr* and then dispose of it as appropriate in light of the final resolution of that case." Pet. for Rehearing at 6. The petition for panel rehearing is denied.

Judge Kelly would hold the petition in abeyance pending the Supreme Court's opinion.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9584
(Petition for Review)

LUIS MORENO-LOPEZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: July 2, 2020]

ORDER AND JUDGMENT*

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

An immigration judge (IJ) denied Luis Moreno-Lopez's (Mr. Moreno) application for voluntary departure and ordered him removed to Mexico. He appealed to the Board of Immigration Appeals (BIA or Board). While his appeal was pending, he filed a motion to ter-

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

minate or remand proceedings under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The BIA denied the motion to remand and dismissed his appeal. Mr. Moreno petitions for review of the BIA's order.

Exercising jurisdiction under 8 U.S.C. § 1252(a), we grant the petition for review in part, deny in part, and remand to the BIA for further proceedings. In doing so, we distinguish *Pereira* to conclude that the Immigration Court had jurisdiction over the removal proceeding even though the notice to appear (NTA) failed to designate a time and place for the proceeding. But, as regards the motion to remand for consideration of cancellation of removal to allow Mr. Moreno to demonstrate presence in the United States for a continuous period of not less than 10 years immediately preceding the date of said application, *see* 8 U.S.C. § 1229b(b)(1), we conclude *Banuelos-Galviz v. Barr*, 953 F.3d 1176 (10th Cir. 2020), controls. *Banuelos-Galviz* held a petitioner is not disqualified from seeking cancellation of removal based on a combination of an incomplete NTA and a notice of hearing (NOH), such as Mr. Moreno received here. *See id.* at 1184.

I.

Mr. Moreno is a native and citizen of Mexico. He asserts he entered this country in January 2000. In April 2008 an IJ permitted him to voluntarily depart the United States. He claims he reentered this country two weeks later, on April 24, 2008.

In February 2017 the Department of Homeland Security (DHS) served a NTA on Mr. Moreno. The NTA stated he had entered the United States at an unknown place and date. It charged him with removability as an

alien who was present in the United States without being admitted or paroled and ordered him to appear before an IJ at a date and time "[t]o be set." R. at 96.

The DHS later served a NOH on Mr. Moreno. The NOH required his appearance at an IJ hearing scheduled on April 24, 2017. Mr. Moreno appeared at the hearing. At a later hearing he conceded he was removable and designated Mexico as the country of removal.

Mr. Moreno applied for cancellation of removal, but he later withdrew that application. At a hearing in October 2017, his attorney explained that because of his voluntary departure in 2008, "[w]e do not believe he meets the statutory requirement of ten [years of] physical presence" in the United States for a cancellation claim. *Id.* at 74. Instead, he requested voluntary departure.

The IJ denied voluntary departure, finding that Mr. Moreno was ineligible based on the 2008 grant of voluntary departure after he was found inadmissible for entering the United States without inspection. *See* 8 U.S.C. § 1229c(c). The IJ thus ordered Mr. Moreno removed to Mexico.

Mr. Moreno appealed to the BIA. While his appeal was pending, he filed a motion to terminate or remand proceedings based on *Pereira*. He requested two forms of relief. First, he argued for termination of the proceedings because the failure of the NTA to designate the date and time of his hearing meant the immigration court lacked both personal and subject-matter jurisdiction to order him removed to Mexico. Second, in a two-sentence argument at the end of the motion, he argued alternatively that the BIA should remand proceedings to the IJ

because he "would be eligible for . . . cancellation [of removal] but for the defective [NTA]." R. at 21.

The BIA affirmed the IJ's finding that Mr. Moreno was ineligible for voluntary departure.[1] Relying on its precedent in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018), it denied his *Pereira*-based motion to terminate the proceedings, finding that the NTA in combination with the NOH had vested the IJ with jurisdiction. The BIA did not address Mr. Moreno's separate argument that the case should be remanded to the IJ so he could apply for cancellation of removal.

II.

A.

Where, as here, a single BIA member affirmed the IJ's decision in a brief order, we review the BIA's opinion, but "when seeking to understand the grounds provided by the BIA, we are not precluded from consulting the IJ's more complete explanation of those same grounds." *Neri-Garcia v. Holder*, 696 F.3d 1003, 1008-09 (10th Cir. 2012) (quotation marks omitted). We review the BIA's legal determinations de novo and its factual findings for substantial evidence. *See Luevano v. Holder*, 660 F.3d 1207, 1211 (10th Cir. 2011). We review its denial of a motion to remand under the deferential abuse-of-discretion standard. *Neri-Garcia*, 696 F.3d at 1009.

---

[1] Mr. Moreno does not appear to challenge this aspect of the BIA's decision.

B.

Mr. Moreno argues the BIA erred in determining that the immigration court acquired jurisdiction through service of the defective NTA coupled with the NOH that stated the time and place of his removal hearing. He contends the BIA's decision conflicts with *Pereira*. In *Pereira*, the Supreme Court held that "[a] putative notice to appear that fail[ed] to designate the specific time or place of the noncitizen's removal proceedings [was] not a notice to appear under section 1229(a)" of the immigration statutes. *Pereira*, 138 S. Ct. at 2113-14 (internal quotation marks omitted). Such a notice therefore did not trigger the stop-time rule ending the noncitizen's period of continuous presence in the United States for purposes of a cancellation-of-removal application. *See id.*; 8 U.S.C. § 1229b(d)(1).

We recently rejected arguments that *Pereira* should be read to hold that a defective NTA deprives the immigration court of jurisdiction. *See Martinez-Perez v. Barr*, 947 F.3d 1273, 1277-78 (10th Cir. 2020); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1017-18 (10th Cir. 2019). For the reasons stated in those cases, we also reject Mr. Moreno's jurisdictional argument.[2]

---

[2] Mr. Moreno also argues that the immigration court lacked *personal* jurisdiction over him due to the defective NTA. He analogizes service of an NTA to service of a civil complaint under Fed. R. Civ. P. 4, *see* Pet'r Opening Br. at 17-18, and contends that "an NTA lacking time and place information cannot confer personal jurisdiction over an individual because it does not contain the necessary information required by the rules," *id.* at 18. To the extent this represents an argument separate from his *Pereira*-based subject-matter jurisdiction argument, we reject it. The absence of personal jurisdiction may be waived. *See Trujillo v. Williams*, 465 F.3d

C.

This leaves us with Mr. Moreno's alternate *Pereira*-based argument: that the BIA should have remanded to permit him to apply for cancellation of removal. He made this argument to the BIA, giving the Board the opportunity to rule on it. *See Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1237 (10th Cir. 2010) ("[A noncitizen] must present the same specific legal theory to the BIA before he or she may advance it in court." (emphasis omitted)). The issue is therefore preserved, albeit minimally, for our review.

The Attorney General may grant cancellation of removal to a noncitizen who is subject to removal from the United States if the noncitizen

> (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 [8 U.S.C. §§] 1182(a)(2), 1227(a)(2), or 1227(a)(3) . . . ; and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States

---

1210, 1217 (10th Cir. 2006) (citing Fed. R. Civ. P. 12(h)(1)). Mr. Moreno's repeated appearance at proceedings before the IJ without objection irrefutably waived any claim that the immigration court lacked personal jurisdiction over him.

> or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1).

The government contends the BIA's failure to remand for the IJ to consider cancellation relief was harmless because Mr. Moreno cannot meet the first of these requirements: ten years of continuous physical presence within the United States.

Mr. Moreno claims he last reentered the United States on April 24, 2008. The cancellation statute's stop-time rule states that "any period of . . . continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear." 8 U.S.C. § 1229b(d)(1). The agency served the NTA on Mr. Moreno in February 2017, less than ten years after he entered this country.[3] As previously noted, however, an NTA that does not specify the hearing date and time does not trigger the stop-time rule. *See Pereira*, 138 S. Ct. at 2113-14. Thus, if *Pereira* applies here, the NTA did not bar Mr. Moreno from seeking cancellation relief.

The government argues *Pereira* does not apply here because DHS later served Mr. Moreno with a NOH that stated the date and time of the hearing. The combination of these two documents, it contends, activated the stop-time rule. But we recently rejected a similar argument, concluding that "the stop-time rule is not trig-

---

[3] Mr. Moreno filed his motion to remand in August 2018. By that time, if the stop-time rule were not considered, more than ten years had elapsed since his purported reentry in April 2008.

gered by the combination of an incomplete notice to appear and a notice of hearing." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020). Our holding in *Banuelos-Galviz* governs here. The stop-time rule was not triggered by service of the incomplete NTA and the NOH, and Mr. Moreno was not disqualified from seeking cancellation of removal based on the combination of those notices.

In sum, after *Pereira* clarified that the stop-time rule did not apply, Mr. Moreno asked the BIA to remand his case to the IJ to permit him to pursue cancellation of removal. The BIA's failure to address this aspect of his request for remand was an abuse of discretion, and its error is not harmless. We therefore remand the matter to the BIA to exercise its authority to address the request for remand. *See, e.g.*, *Martinez-Perez*, 947 F.3d at 1282, 1284 (remanding to BIA to exercise its authority to address issue in the first instance).

III.

For the foregoing reasons, we grant in part and deny in part the petition for review, vacate the denial of Mr. Moreno's motion to remand, and remand to the BIA for further proceedings consistent with this order and judgment.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX I

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A200-089-874—Salt Lake City, UT

IN RE: LUIS MORENO-LOPEZ

Date: [Nov. 21, 2018]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:

T. LAURA LUI, Esquire

ON BEHALF OF DHS:

JONATHAN STOWERS
Assistant Chief Counsel

APPLICATION:

Voluntary departure

The respondent, a native and citizen of Mexico, appeals from the October 23, 2017, Immigration Judge's decision denying the respondent's application for voluntary departure. The Department of Homeland Security (DHS) has filed a reply opposing the appeal. The appeal will be dismissed.

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

The respondent's appellate contention that the Immigration Judge erred in finding the respondent did not qualify for pre-conclusion voluntary departure is without merit (Notice of Appeal, Form EOIR-26). An alien who applies for voluntary departure under either section 240B(a) or 240B(b) of the Act is ineligible for voluntary departure if the alien was previously permitted to so depart after having been found inadmissible under section 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) of the Immigration and Nationality Act. *See* section 240B(c) of the Act; 8 U.S.C. § 1229c(c). The respondent was previously found inadmissible under section 212(a)(6)(A) of the Act and was granted voluntary departure in 2008 (IJ at 2; Tr. at 12-13). Consequently, the Immigration Judge properly found the respondent ineligible for voluntary departure.

The respondent's motion arguing that proceedings should be terminated or remanded in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) is foreclosed by our recent decision in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018) (holding that a notice to appear (NTA) that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing (NOH) specifying this information is later sent to the alien). In particular, like the alien in

Bermudez-Cota, the respondent here was served a NOH (which specified the date and time of his hearing) subsequent to the NTA; the respondent also appeared at several hearings subsequent to service of the NOH; and through counsel, the respondent did not contest proper service of the NTA, and admitted and conceded the charges therein (IJ at 2; Tr. at 7; Exh. 1).

For the foregoing reasons, and those articulated by the Immigration Judge in his decision, we affirm the Immigration Judge's decision, pursuant to our authority at 8 C.F.R. § 1003.1(e)(5).

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion is denied.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9584
(Petition for Review)

LUIS MORENO-LOPEZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: Aug. 25, 2020]

ORDER

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

The Government has filed a petition for rehearing from our decision remanding this case to the Board of Immigration Appeals (BIA). The Government does not argue that our decision overlooked or misapprehended any point of existing law or any fact in the record. *See* Fed. R. App. P. 40(a)(2). Instead, it suggests that if the Supreme Court concludes in the pending case of *Niz-Chavez v. Barr*, 789 F. App'x 523 (6th Cir. 2019), *cert. granted*, 2020 WL 3038288 (U.S. June 8, 2020) (No. 19-863), that the stop-time rule is triggered when a Notice of Hearing contains the time and place of the petitioner's removal hearing, such a decision "may indicate

that the judgment here rests upon misapprehensions of law." Pet. at 6.[1]

In view of this possibility, the Government asks us to "hold this petition pending the final disposition of *Niz-Chavez*." *Id.* We construe this as a request to stay the issuance of our mandate. As such, the request is denied. The panel has issued its decision, which comports with existing authority. The Government is of course free to seek abatement of proceedings on remand to the agency, pending the disposition of *Niz-Chavez*.

The petition for panel rehearing is therefore denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

[1] The Supreme Court granted certiorari in *Niz-Chavez* on June 8, 2020, and the panel entered its decision in this case on July 2, 2020. The Government did not seek abatement of this appeal based on *Niz-Chavez* while it was under initial consideration.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9577
(Petition for Review)

ISAIAS JIMENEZ JUAREZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: July 14, 2020]

ORDER AND JUDGMENT*

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

Isaías Jiménez Juárez, a native and citizen of Mexico, petitions for review of a final order of removal in which the Board of Immigration Appeals ("BIA") denied his motion to remand. In that motion, Mr. Jiménez Juárez argued that he may be eligible to apply for cancellation

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

of removal based on the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

We deny the Government's motion to continue the abatement of this matter, and we lift the abatement. Exercising jurisdiction under 8 U.S.C. § 1252(a), we grant the petition for review and remand to the BIA for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Jiménez Juárez first entered the United States without inspection in October 2006. In February 2014, the Department of Homeland Security ("DHS") instituted removal proceedings by serving a Notice to Appear ("NTA") on him. Rather than specify the date and time of the removal hearing, the NTA listed the date and time as "[t]o be set." Admin. R. at 25. About two weeks later, DHS served Mr. Jiménez Juárez with a Notice of Hearing ("NOH") directing him to appear before the Immigration Judge ("IJ") in September 2014.

Mr. Jiménez Juárez admitted the allegations in the NTA and conceded inadmissibility. He applied for asylum, restriction on removal, and protection under the Convention Against Torture ("CAT"). After the hearing, the IJ denied those requests and granted voluntary departure. Mr. Jiménez Juárez appealed the IJ's decision to the BIA. While the appeal was pending, the Supreme Court issued *Pereira*.

Pereira addressed the impact of a deficient NTA on the "stop-time rule." Noncitizens who are subject to removal proceedings and who have accrued 10 years of continuous physical presence in the United States may be eligible for cancellation of removal. *See* 8 U.S.C.

§ 1229b(b)(1).[1] Under the stop-time rule, however, the period of continuous presence ends when the government serves an NTA. *See id.* § 1229b(d)(1)(A). *Pereira* held that when an NTA fails to designate the specific time and place of a removal proceeding, it does not trigger the stop-time rule for cancellation of removal. 138 S. Ct. at 2109-10. As noted, Mr. Jiménez Juárez's NTA lacked that information.

Based on *Pereira*, Mr. Jiménez Juárez asked the BIA to remand his case to the IJ to pursue cancellation of removal, arguing he had accrued the requisite 10 years of continuous physical presence because his NTA was deficient.[2]

---

[1] More specifically, the Attorney General may grant cancellation of removal to a noncitizen who is subject to removal from the United States if the noncitizen

> (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 [8 U.S.C. §§] 1182(a)(2), 1227(a)(2), or 1227(a)(3) . . . ; and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship 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. § 1229b(b)(1).

[2] Mr. Jiménez Juárez has two U.S. citizen children who are the qualifying relatives for purposes of establishing eligibility for cancellation of removal under § 1229b(b)(1)(D).

The BIA concluded that the NTA and the NOH, in combination, vested the IJ with jurisdiction over the removal proceedings under *In re Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018). Though it did not specifically analyze Mr. Jiménez Juárez's *Pereira* stop-time argument, it summarized and implicitly rejected the argument, concluding that Mr. Jiménez Juárez "cannot meet the 10-year continuous physical presence requirement for cancellation of removal," Admin. R. at 4. The BIA denied the motion to remand, upheld the IJ's finding of removability, and dismissed the appeal.

Mr. Jiménez Juárez's petition for review challenges only the BIA's ruling on his motion to remand.

II. DISCUSSION

We review the BIA's legal determinations de novo and its factual findings for substantial evidence. *See Luevano v. Holder*, 660 F.3d 1207, 1211 (10th Cir. 2011). "We review the denial of a motion to remand for an abuse of discretion." *Witjaksono v. Holder*, 573 F.3d 968, 978-79 (10th Cir. 2009). The BIA abuses its discretion when it makes an error of law. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017).

Mr. Jiménez Juárez argues the BIA abused its discretion because its decision was contrary to *Pereira*. The Government counters that the BIA properly applied the stop-time rule. After briefing concluded in this appeal, we held that "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020). It "is triggered by one complete notice to appear rather than a

combination of documents." *Id.* at 1178. The Government acknowledged in its recent status report that *Banuelos-Galviz* may be dispositive of the petition for review. *See* Resp't Status Report at 2 (June 24, 2020).

Although the BIA's decision focused on a jurisdictional issue that the parties did not raise and failed to analyze the stop-time argument that Mr. Jiménez Juárez did raise, it ultimately rejected his *Pereira* argument. Its conclusion that the stop-time rule applies to Mr. Jiménez Juárez conflicts with *Banuelos-Galviz* and constitutes an abuse of discretion.

III. CONCLUSION

We lift the abatement of this matter, grant the petition for review, reverse the BIA's decision denying the motion to remand, and remand to the BIA to consider Mr. Jiménez Juárez's motion to remand in light of *Banuelos-Galviz*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

APPENDIX L

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A206-133-458—Denver, CO

IN RE: ISAIAS JIMENEZ JUAREZ

Date: [Nov. 1, 2018]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:

DARIO AGUIRRE, Esquire

ON BEHALF OF DHS:

SHANA L. MARTIN
Assistant Chief Counsel

APPLICATION:

Asylum; withholding of removal, Convention Against Torture; remand

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated September 28, 2017, denying his request for asylum pursuant to section 208(b)(1)(A) of the Immigration and Na-

tionality Act, 8 U.S.C. § 1158(b)(1)(A), withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c)-.18. During the pendency of the appeal, the respondent filed a motion to remand. The Department of Homeland Security has filed a motion for summary dismissal and an opposition to the motion to remand. The appeal will be dismissed and the motion will be denied.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's Notice of Appeal challenges the Immigration Judge's pretermission of his asylum claim (IJ at 5-6), the denial (assuming arguendo that the application was timely filed) of his asylum claim (IJ at 7-10), and the denial of both forms of withholding of removal (IJ at 10-13). The respondent did not file a brief, however, and the motion to remand does not discuss these issues. We deem the issues to be waived. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190 n.2 (BIA 2018).

The respondent's motion to remand will be denied. The respondent seeks remand in order to apply for cancellation of removal. He asserts that, pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Notice to Appear, which did not specify the date and time for his initial hearing, did not trigger the stop-time rule of section 240A(d)(1) of the Act. The respondent asserts that, as he is now prima facie eligible for cancellation of

removal based on a change in law, the record should be remanded to allow him to apply for cancellation of removal.

The record reflects that the respondent was served with a Notice to Appear on February 26, 2014. The Notice to Appear did not specify the date and time of the initial removal hearing. However, on March 12, 2014, a notice of hearing specifying this information was sent to the respondent. A notice to appear that that [*sic*] does not specify the date and time of the alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings, and meets the requirements of section 239(a)(1) of the Act, 8 U.S.C. § 1229(a)(1) when a notice of hearing specifying this information is sent to the alien. *Matter of Bermudez-Costa*, 27 I&N Dec. 441, 445-47 (BIA 2018). The respondent does not contest that he received this notice. The respondent does not claim an entry into the United States before March 12, 2004—10 years before the notice of hearing was sent. Thus, the respondent cannot meet the 10-year continuous physical presence requirement for cancellation of removal.[1] Sections 240A(b)(1)(A) and 240A(d)(1) of the Act. As such, there is no basis for granting the motion to remand.

The DHS has not challenged the grant of voluntary departure, and the respondent submitted proof that he filed the requisite bond. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

---

[1] In his Motion to Remand, the respondent asserts an entry date of October, 2006. Respondent's Motion to Remand, page 3, n.1.

FURTHER ORDER: The respondent's motion to remand is denied.

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

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

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

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-9577
(Petition for Review)

ISAIAS JIMENEZ JUAREZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: Aug. 31, 2020]

ORDER

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

The Government has filed a petition for rehearing from our decision remanding this case to the Board of Immigration Appeals. The Government has not shown that our decision overlooked or misapprehended any point of existing law or any fact in the record. *See* Fed. R. App. P. 40(a)(2).

The Government suggests that if the Supreme Court concludes in the pending case of *Niz-Chavez v. Barr*, 789 F. App'x 523 (6th Cir. 2019), *cert. granted*, 2020 WL 3038288 (U.S. June 8, 2020) (No. 19-863), that the stop-time rule is triggered when a Notice of Hearing contains the time and place of the petitioner's removal hearing, such a decision "may indicate that the judgment here

rests upon misapprehensions of law." Pet. at 5. In view of this possibility, the Government asks us to "hold proceedings pending *Niz-Chavez*." *Id.* at 6. We construe this as a request to stay the issuance of our mandate. As such, the request is denied. The panel has issued its decision, which comports with existing authority. The Government is of course free to seek abatement of proceedings on remand to the agency, pending the disposition of *Niz-Chavez*.

The petition for panel rehearing is denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9541
(Petition for Review)

MOISES MAGANA ARIAS, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: July 20, 2020]

ORDER AND JUDGMENT*

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

Moises Magana Arias, a native and citizen of Mexico, petitions for review of the final order of removal in which the Board of Immigration Appeals ("BIA") denied his motion to reconsider. Exercising jurisdiction under 8 U.S.C. § 1252, we grant the petition for review in part,

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

deny in part, and remand to the BIA for further proceedings consistent with this decision.

I. BACKGROUND

Mr. Magana Arias has entered the United States without inspection and been removed several times. He claims he has lived in the United States since he last entered in December 2000. His fifteen-year-old child is a United States citizen.

In March 2010, the Department of Homeland Security ("DHS") instituted removal proceedings by serving a Notice to Appear ("NTA") on Mr. Magana Arias. Rather than specify the date and time of the removal hearing, the NTA listed the date and time as "to be set." Admin. R. at 382. About two weeks later, DHS served a Notice of Hearing ("NOH") directing him to appear before the Immigration Judge ("IJ") on April 23, 2010. He appeared at all scheduled hearings.

Mr. Magana Arias admitted the allegations in the NTA and conceded inadmissibility. He applied for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").[1] To support his applications, he testified about threats he received from criminals he arrested during his five years as a police officer in Mexico, the kidnapping of his nephew by organized criminals, and a neighbor's threats to his brother. The IJ deemed Mr. Magana Arias generally credible but found that (1) his asylum application was time-barred;

---

[1] Mr. Magana Arias initially sought cancellation of removal as well, but he later withdrew his application based on his understanding that the NTA triggered the stop-time rule and ended his period of continuous physical presence—and thus his eligibility for cancellation.

(2) in any event, he had not established the requirements for asylum and withholding of removal; and (3) he had not established, for purposes of his CAT claim, that he probably would suffer torture upon return to Mexico. The IJ denied relief and ordered him removed to Mexico.

Mr. Magana Arias appealed the IJ's decision to the BIA. The BIA upheld the IJ's finding of removability and dismissed the appeal. The BIA echoed the IJ's reasoning, except it did not address the timeliness of the asylum application because it agreed with the IJ's alternative grounds for denial of asylum.

While the appeal to the BIA was pending, the Supreme Court issued *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). *Pereira* addressed the impact of a deficient NTA on the "stop-time rule." Noncitizens who are subject to removal proceedings and who have accrued 10 years of continuous physical presence in the United States may be eligible for cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1). Under the stop-time rule, however, the period of continuous presence ends when the government serves an NTA. *See id.* § 1229b(d)(1)(A). *Pereira* held that when an NTA fails to designate the specific time and place of a removal proceeding, it does not trigger the stop-time rule for cancellation of removal. 138 S. Ct. at 2110. As noted, Mr. Magana Arias's NTA lacked that information. The BIA did not consider the stop-time issue in its initial decision.

Mr. Magana Arias filed a motion to reconsider the BIA's decision dismissing his appeal. He argued that he may now be eligible to apply for cancellation of removal based on *Pereira* and asked for a remand to the IJ. He also sought reconsideration on several issues

relating to his applications for asylum, withholding of removal, and protection under CAT. The BIA found no error of fact or law in its previous decision and denied the motion to reconsider. Mr. Magana Arias filed this petition for review.

II. STANDARD OF REVIEW

"A motion to reconsider . . . is available to raise errors of fact or law committed by the BIA in its prior decision." *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 n.3 (10th Cir. 2005); *see also* 8 U.S.C. § 1229a(c)(6)(C) (stating that a motion to reconsider "shall specify the errors of law or fact in the previous order"). A party also may use a motion to reconsider to "ask[] the agency to consider a change in the law." *Rodas-Orellana v. Holder*, 780 F.3d 982, 986 n.3 (10th Cir. 2015) (internal quotation marks omitted).

"We review the BIA's decision on a motion to reconsider for an abuse of discretion." *Id.* at 990. An abuse of discretion occurs when the BIA's decision "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Id.* (internal quotation marks omitted). The BIA also abuses its discretion when it makes a legal error. *Qiu v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). Conversely, "[t]here is no abuse of discretion when the BIA's rationale is clear, there is no departure from established policies, and its statements are a correct interpretation of the law, even when the BIA's decision is succinct." *Rodas-Orellana*, 780 F.3d at 990 (internal quotations omitted).

III. DISCUSSION

Mr. Magana Arias argues the BIA abused its discretion by (A) failing to remand his case to allow the IJ to consider his eligibility for cancellation of removal in light of *Pereira*; (B) not reconsidering whether he has suffered, or is likely to suffer, persecution because of his membership in a particular social group ("PSG") in light of intervening BIA precedent; (C) providing only summary, conclusory statements in denying reconsideration of the timeliness of his asylum application; and (D) failing to provide a rational explanation for denying reconsideration of his eligibility for CAT protection.

A. *Cancellation of Removal and the Stop-Time Rule*

As explained above, Mr. Magana Arias asked the BIA to remand his case to allow the IJ to consider his eligibility for cancellation of removal in light of *Pereira*. The BIA rejected his *Pereira* argument, relying on its post-*Pereira* decision in *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520 (BIA 2019), to conclude he was not eligible for cancellation of removal. In *Mendoza-Hernandez*, the BIA held the service of an NOH containing the time and place of the initial removal hearing cures a deficient NTA and triggers the stop-time rule. *Id.* at 535. The NOH issued to Mr. Magana Arias contained that information, so the BIA relied on *Mendoza-Hernandez* to conclude the NTA and NOH together stopped his accrual of continuous physical presence—8 months before he fulfilled the 10-year requirement.

After briefing concluded in this appeal, we issued a published decision rejecting the reasoning of *Mendoza-Hernandez* and concluding "the stop-time rule is triggered by one complete notice to appear rather than a

combination of documents." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020). Thus, in this circuit, "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Id.* at 1184. The BIA's conclusion that the stop-time rule applies to Mr. Magana Arias conflicts with *Banuelos-Galviz* and therefore constitutes an abuse of discretion.

B. ***Membership in a Particular Social Group***

To qualify for asylum or withholding of removal, a noncitizen must establish he is a refugee by showing "that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (explaining the burden of proof for asylum applicants).[2] If a noncitizen relies on membership in a PSG, as Mr. Magana Arias did, there must be a "nexus" between that membership and persecution. *Niang v. Gonzales*, 422 F.3d 1187, 1200-01 (10th Cir. 2005). This means "the victim's protected characteristic must be central to the persecutor's decision to act against the victim." *Id.* at 1200.

Mr. Magana Arias sought asylum based on his membership in two PSGs: (1) former policemen and (2) his family. The IJ thoroughly analyzed both alleged PSGs and denied asylum after finding he did not establish past persecution, a well-founded fear of future persecution, or a nexus to a protected ground. The BIA agreed.

---

[2] The proof required for withholding of removal is higher than it is for asylum. An applicant who fails to establish eligibility for asylum therefore cannot qualify for withholding of removal. *See Ustyan v. Ashcroft*, 367 F.3d 1215, 1218 (10th Cir. 2004).

In his motion to reconsider, Mr. Magana Arias faulted the IJ and the BIA for not adequately addressing whether former policemen and his family constitute PSGs. He also asked the BIA to remand to the IJ for additional fact-finding because the intervening decision in *In re W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018), changed the landscape for PSGs. The BIA generally denied the motion to reconsider, concluding that Mr. Magana Arias had not articulated any legal or factual error in its previous decision. It specifically declined to reconsider his arguments regarding PSGs because the nexus between membership and persecution was lacking.

In his petition for review, Mr. Magana Arias argues the BIA failed to adequately analyze his PSGs and abused its discretion by not providing a sufficient rationale for its findings. The administrative record reveals to the contrary. The BIA's reasoning is evident. In its initial decision affirming the IJ, the BIA appropriately incorporated the IJ's detailed reasoning. *See Neri-Garcia v. Holder*, 696 F.3d 1003, 1008-09 (10th Cir. 2012) (allowing us to consult the IJ's more complete explanation of the grounds provided by the BIA when a single BIA member affirms the IJ's decision). In denying the motion to reconsider, the BIA found no reason to change its affirmance.

Mr. Magana Arias also argues the BIA should have remanded for the IJ to reconsider his PSGs in light of *In re W-Y-C- & H-O-B-*. There, the BIA held that an applicant seeking asylum or withholding of removal based on membership in a PSG must clearly indicate the exact delineation of any proposed PSG on the record before the IJ. It also said it generally will not address a

newly articulated PSG that was not advanced before the IJ. Mr. Magana Arias has not shown how this decision helps him. Indeed, the decision seems to make requirements *more* stringent for PSGs, not less. Moreover, the BIA here acted consistently with the limitations set forth in *In re W-Y-C- & H-O-B-* when it refused to provide relief. *See* 27 I. & N. Dec. at 192 ("[W]e decline to remand proceedings for the [IJ] to make factual findings regarding the respondent's new [PSG], and we will not consider this group in the first instance on appeal.").

Finally, Mr. Magana Arias argues in his reply brief that the BIA lacked jurisdiction to factually evaluate his PSGs in denying the motion to reconsider. This argument conflicts with another new argument in his reply brief: "[T]he [BIA] dismissed [his] articulated [PSGs] without rendering the 'fact-based inquiry' and 'case-by-case' analysis required. . . . " Reply Br. at 20. In any event, we will not consider arguments raised for the first time in a reply brief. *Wheeler v. Comm'r*, 521 F.3d 1289, 1291 (10th Cir. 2008).

For these reasons, the BIA did not abuse its discretion in denying reconsideration of Mr. Magana Arias's PSG arguments.

C. *Timeliness of Asylum Application*

A noncitizen seeking asylum must file an application "within 1 year after the date of . . . arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). A late filing may be excused, however, if the noncitizen demonstrates "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application." *Id.* § 1158(a)(2)(D).

The IJ found Mr. Magana Arias's asylum application was time-barred and, in any event, he had not established past persecution, a well-founded fear of future persecution, or a nexus to a protected ground. In its initial decision, the BIA stated it was "unnecessary" to address whether the application was time-barred because the IJ "properly denied the . . . asylum application on alternative grounds." Admin. R. at 32. It then cited the "general rule" that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach." *Id.* (quoting *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam)).

In his motion to reconsider, Mr. Magana Arias sought a remand for the IJ to consider whether he met the timeliness exception for changed or extraordinary circumstances based on his nephew's kidnapping or his "significant psychological issues." *Id.* at 20. The BIA denied the motion, explaining it "did not need to reach that issue" because he "is ineligible for asylum on alternative grounds." *Id.* at 4. Mr. Magana Arias now argues the BIA's statement was so conclusory as to constitute an abuse of discretion. It was not.

In denying this portion of the motion to reconsider, the BIA referred back to the reasoning in its initial decision. Although the BIA's rationale is succinct, it is clear, adheres to established policies, and correctly interprets the law. *See Rodas-Orellana*, 780 F.3d at 990. It is not unusual for the BIA to bypass the timeliness question and to decide an appeal on the merits, even if the IJ denied asylum based on timeliness *and* the merits. *See, e.g.*, *Ba v. Mukasey*, 539 F.3d 1265, 1268 (10th Cir. 2008).

D. *Protection under CAT*

To receive CAT protection, Mr. Magana Arias had to "demonstrate that it is more likely than not that he will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (internal quotation marks omitted). The IJ found he did not satisfy this standard. The IJ noted the lack of record evidence that Mr. Magana Arias would face torture with the acquiescence of Mexico's government and rejected the argument that police corruption is enough to meet this standard. The BIA conducted its own analysis and upheld the IJ's denial of relief.

In seeking reconsideration of this ruling, Mr. Magana Arias merely repeated arguments the BIA had soundly rejected. The BIA denied the motion to reconsider, explaining that it "discern[ed] no clear error in the [IJ's] conclusion that the Mexican government does not acquiesce in harm to persons such as [Mr. Magana Arias] and, to the contrary, takes measures to curb such criminality." Admin. R. at 4. Mr. Magana Arias now attacks the depth of the BIA's explanation without advancing any new arguments. But the BIA's rationale is clear, and it correctly interprets the law. Mr. Magana Arias did not specify any errors of law or fact, and the BIA did not abuse its discretion in refusing to revisit his claim for protection under CAT.

IV. CONCLUSION

We grant the petition for review on the stop-time issue and remand to the BIA to address Mr. Magana Arias's motion to reconsider in light of *Banuelos-Galviz*. We deny the remainder of the petition for review.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

APPENDIX O

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

File: A078-285-446—Denver, CO

IN RE: MOISES MAGANA ARIAS

Date: [May 23, 2019]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

CHRISTINE M. HERNANDEZ, Esquire

ON BEHALF OF DHS:

JASON GOODCHILD
Assistant Chief Counsel

APPLICATION:

Reconsideration

The respondent, a native and citizen of Mexico, has filed a timely motion to reconsider this Board's October 30, 2018, decision dismissing his appeal. The motion will be denied.

The respondent argues that pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), he has established the requisite continuous physical presence for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and his case should be reconsidered and remanded. The respondent also contends that the record should be reconsidered and remanded to address several issues relating to his applications for asylum under section 208 of the Act, 8 U.S.C. § 1158; withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A); and protection under Article 3 of the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18.

This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent argues that according to the Supreme Court's recent decision in *Pereira v. Sessions*, a notice to appear that does not designate the specific time or place of the noncitizen's removal proceedings is not a notice to appear under section 239(a) of the Act, 8 U.S.C. § 1229(a), and does not trigger the stop-time rule for purposes of calculating continuous physical presence for cancellation of removal under section 240A(b) of the Act (Respondent's Motion at 9-13). 138 S. Ct. at 2108. The respondent entered the United States most recently in December of 2000 and was served with the notice to appear on March 23, 2010 (Exh. 1). He conceded at the hearing that he had not acquired the requisite continuous physical presence because that presence was

stopped on March 23, 2010, with the service of the notice to appear. The respondent contends that, pursuant to *Pereira*, however, because the notice to appear did not designate the specific time and date of his initial removal hearing, proceedings should be reopened because he is now eligible for cancellation of removal.

We disagree. We recently held that "in cases where a notice to appear does not specify the time or place of an alien's initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, triggers the 'stop-time' rule, and ends the alien's period of continuous residence or physical presence in the United States." *Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520, 529 (BIA 2019). Thus, the respondent's hearing notice was perfected when he was notified of the date and time of the hearing on April 23, 2010, approximately 8 months before he had acquired the 10 years of continuous physical presence required for cancellation of removal. Therefore, we will deny the respondent's motion to reconsider to apply for cancellation of removal.

Regarding the respondent's arguments that we should reconsider our decision denying his applications for asylum, withholding of removal, and protection pursuant to the Convention Against Torture, the respondent's motion does not articulate legal or factual error in our prior decision. *See* 8 C.F.R. § 1003.2(b)(1). The respondent argues that we should remand to the Immigration Judge to address whether the respondent has established extraordinary circumstances or changed country conditions to excuse the 1-year requirement for filing his

asylum application. Because we concluded that the respondent is ineligible for asylum on alternative grounds, however, we did not need to reach that issue. Similarly, we need not reconsider whether the harm the respondent experienced constituted persecution or the cognizability of the respondent's proposed particular social groups because he has not established that the harm he experienced or fears is on account of one of those groups or any other protected ground.

Finally, we recognize the respondent's argument that willful blindness does not require actual knowledge. The respondent cites *Karki v. Holder*, 715 F.3d 792 (10th Cir. 2013), in which the court concluded that country conditions established that the Nepalese government was largely controlled by the Maoist forces that the respondent feared. *Karki v. Holder*, 715 F.3d at 807. In contrast, however, in the respondent's case, we discern no clear error in the Immigration Judge's conclusion that the Mexican government does not acquiesce in harm to persons such as the respondent and, to the contrary, takes measures to curb such criminality (IJ at 10). *See Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (an Immigration Judge's predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review). Accordingly, the motion to reconsider will be denied.

ORDER: The respondent's motion to reconsider is denied.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9541
(Petition for Review)

MOISES MAGANA ARIAS, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

[Filed: Sept. 4, 2020]

ORDER

Before **BRISCOE**, **MATHESON**, and **EID**, Circuit Judges.

The Government has filed a petition for rehearing from our decision remanding this case to the Board of Immigration Appeals. The Government has not shown that our decision overlooked or misapprehended any point of existing law or any fact in the record. *See* Fed. R. App. P. 40(a)(2).

The Government suggests that if the Supreme Court concludes in the pending case of *Niz-Chavez v. Barr*, 789 F. App'x 523 (6th Cir. 2019), *cert. granted*, 2020 WL 3038288 (U.S. June 8, 2020) (No. 19-863), that the stop-time rule is triggered when a Notice of Hearing contains the time and place of the petitioner's removal hearing, such a decision "may indicate that the judgment here

rests upon misapprehensions of law." Pet. at 6. In view of this possibility, the Government asks us to "hold proceedings pending *Niz-Chavez*." *Id.* at 7. We construe this as a request to stay the issuance of our mandate. As such, the request is denied. The panel has issued its decision, which comports with existing authority. The Government is of course free to seek abatement of proceedings on remand to the agency, pending the disposition of *Niz-Chavez*.

The petition for panel rehearing is denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX Q

1. 8 U.S.C. 1229 (INA § 239) provides in pertinent part:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

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

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

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

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

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

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

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

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

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

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

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

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

(A) In general

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

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

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this pargraph 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).

* * * * *

2. 8 U.S.C. 1229b (INA § 240A) provides in pertinent part:

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

* * * * *

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

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

* * * * *