No. 20-504

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

WILSON N. GUADALUPE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RELATED PROCEEDING

United States Court of Appeals (3d Cir.):

Guadalupe v. *Attorney Gen. U.S.*, No. 19-2239 (Feb. 26, 2020), petition for reh'g denied (May 20, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case:

Statutes and regulations:

Statutes and regulations—Continued: Page

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The Acting Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 951 F.3d 161. The decisions of the Board of Immigration Appeals (App., *infra*, 13a-16a, 17a-18a, 19a-24a) and the immigration judge (App., *infra*, 25a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2020. A petition for rehearing was denied on May 20, 2020 (App., *infra*, 37a-38a). 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 this Court's order, the deadline for filing a petition for a writ of certiorari is October 17, 2020. 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*, 39a-42a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, grants the Attorney General the discretion to cancel the removal of an alien who is inadmissible or deportable. 8 U.S.C. 1229b(a) and (b). To obtain cancellation of removal, the alien bears the burden of demonstrating both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A).

To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must show (A) that he "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [his] application" for cancellation for removal; (B) that he "has been a person of good moral character during such period"; (C) that he "has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of [Title 8], subject to paragraph (5) [of Section 1229b(b)]"; and (D) 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." 8 U.S.C. 1229b(b)(1)(A)-(D).

The continuous-physical-presence requirement is subject to the "stop-time rule." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2110 (2018). As relevant here, the stop-time rule provides 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 under section 1229(a) of [Title 8]." 8 U.S.C. 1229b(d)(1)(A).

Paragraph (1) of Section 1229(a), in turn, provides that "written notice (in this section referred to as a 'notice to appear') shall be given * * * to the alien * * * specifying," among other things, the "nature of the proceedings against the alien," the "charges against the alien," the "time and place at which the proceedings will be held," and the "consequences under section 1229a(b)(5)" of failing to appear. 8 U.S.C. 1229(a)(1)(A), (D), and (G)(i)-(ii). Paragraph (2) of Section 1229(a) provides that, "in the case of any change or postponement in the time and place of [the removal] proceedings," "a written notice shall be given" specifying the "new time or place of the proceedings," and the "consequences under section 1229a(b)(5)" of failing to attend. 8 U.S.C. 1229(a)(2)(A).

Under Section 1229a(b)(5), "[a]ny alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of [Title 8] has been provided * * * , does not attend a proceeding under this section, shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An alien may not be removed in absentia, however, unless the Department of Homeland Security (DHS) "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." *Ibid.* An order of removal entered in absentia may be rescinded "if the alien demon-

strates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Respondent is a native and citizen of Ecuador. App., *infra*, 26a. In 2004, he became a conditional permanent resident of the United States based on his marriage to a U.S. citizen. *Ibid.*; Administrative Record (A.R.) 189, 697. Following their divorce less than two years later, A.R. 559-560, respondent filed a petition to remove the conditional basis of his permanent resident status, A.R. 553-555. In April 2007, U.S. Citizenship and Immigration Services (USCIS) denied respondent's petition and terminated his conditional permanent resident status, finding that he had not established that he had entered into the marriage in good faith. A.R. 549-552.

On May 11, 2007, DHS served respondent with a document labeled "Notice to Appear." A.R. 696 (emphasis omitted); see A.R. 698. That notice informed respondent of the "removal proceedings" being initiated against him, A.R. 696 (emphasis omitted), and charged that he was subject to removal as an "alien with permanent resident status on a conditional basis * * * who has had such status terminated," 8 U.S.C. 1227(a)(1)(D)(i); see A.R. 697. The notice did not specify the date and time of respondent's initial removal hearing. See A.R. 696 (ordering respondent to appear for removal proceedings on a date "to be set" at a time "to be set").

DHS later filed the notice to appear with the immigration court. A.R. 696. The INA's implementing regulations provide that "[t]he Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. 1003.18(a). The regulations further provide that if "the time, place and date of the

initial removal hearing" "is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R. 1003.18(b).

Four days after service of the Notice to Appear, A.R. 695, 698, the immigration court provided respondent with a document labeled "Notice of Hearing," which informed him that it had scheduled his removal hearing for June 5, 2007, at 9:30 a.m. A.R. 695 (capitalization altered). Respondent appeared at that hearing and subsequent hearings before an immigration judge (IJ). See A.R. 187-373.

In November 2008, the IJ declined to disturb USCIS's determination that respondent had not entered into his marriage in good faith. App., *infra*, 34a-35a. The IJ granted voluntary departure, but stated that, if respondent failed to timely depart, an order of removal would be effective immediately. *Id.* at 35a-36a. The Board of Immigration Appeals (Board) dismissed respondent's appeal and denied his motion to remand to the IJ for further proceedings. *Id.* at 19a-24a. The Board subsequently denied reconsideration. *Id.* at 17a-18a. Respondent failed to timely depart. *Id.* at 3a.

3. In 2018, this Court issued its decision in *Pereira* v. *Sessions*, *supra*. In *Pereira*, the Court was presented with the "narrow question," 138 S. Ct. at 2110, whether a document labeled a "notice to appear" that does not specify the time or place of an alien's removal proceedings is a "notice to appear under section 1229(a)" that triggers the stop-time rule governing the calculation of the alien's continuous physical presence in the United States for purposes of cancellation of removal, 8 U.S.C. 1229b(d)(1). 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." *Pereira*, 138 S. Ct. at 2110.

Following this Court's decision in *Pereira*, respondent filed a motion to reopen his removal proceedings so that he could apply for cancellation of removal. A.R. 18-21. In that motion, respondent asserted that he had entered the United States in November 1998. A.R. 19. He further asserted that, in light of *Pereira*, the "Notice to Appear" with which he had been served in May 2007 did not trigger the stop-time rule, because it did not contain the date and time of his removal proceedings. A.R. 18-19. Respondent therefore argued that he could establish the requisite ten years of continuous physical presence in the country for purposes of eligibility for cancellation of removal. A.R. 19.

The Board denied respondent's motion to reopen. App., *infra*, 13a-16a. The Board acknowledged that, under *Pereira*, a "Notice to Appear" that "fails to designate the specific time or place of an alien's removal proceedings" does not trigger the stop-time rule. *Id.* at 14a. The Board noted, however, that "on May 15, 2007," respondent "was issued a notice for his initial hearing, which was scheduled for June 5, 2007." *Ibid.* The Board held that "respondent's receipt of that notice, as evidenced by his attendance at the June 5, 2007 hearing, effectively cured the defect in his notice to appear by supplying the missing time and place information at issue in *Pereira*, thereby triggering the 'stop-time rule.'" *Id.* at 15a (citation omitted). The Board concluded that, because respondent had not "accrued 10 years of continuous physical presence when he received a notice of

hearing on May 15, 2007," he had "not shown that he is prima facie eligible for cancellation of removal." *Ibid.*

4. The court of appeals granted respondent's petition for review and remanded to the Board for further proceedings. App., *infra*, 1a-12a. The court held that, "for purposes of the stop-time rule, a deficient [Notice to Appear] cannot be supplemented with a subsequent notice that does not meet the requirements of 8 U.S.C. § 1229(a)(1)." *Id.* at 11a. The court explained that, in order for written notice to be sufficient to trigger the stop-time rule, the government must communicate all the information set forth in Section 1229(a)(1) in "one document." *Id.* at 6a. The court therefore concluded that the Board had erred in deeming the "Notice to Appear," together with the "Notice of Hearing," sufficient to trigger the stop-time rule in respondent's case. *Id.* at 9a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 37a-38a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the government must provide the written notice required to trigger the stop-time rule, 8 U.S.C. 1229b(d)(1)(A), in a single document. App., *infra*, 4a-12a. This Court is currently considering whether that interpretation of the INA is correct in *Niz-Chavez* v. *Barr*, cert. granted, No. 19-863 (oral argument scheduled for Nov. 9, 2020). The Court should accordingly hold this petition for a writ of certiorari pending its decision in *Niz-Chavez* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

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

Respectfully submitted.

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OCTOBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2239

WILSON N. GUADALUPE, PETITIONER

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,
RESPONDENT

Argued: Dec. 11, 2019
(Opinion filed: Feb. 26, 2020)

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency No. A096-432-645)
Immigration Judge: Annie S. Garcy

OPINION

Before: RESTREPO, ROTH and FISHER, Circuit Judges

ROTH, Circuit Judge:

In *Pereira v. Sessions*,[1] the Supreme Court held that a Notice to Appear (NTA) that omits the time and date of appearance does not stop a noncitizen's continuous residency period. The issue before us is whether *Pe-*

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[1] 138 S. Ct. 2105 (2018).

reira abrogated our decision in *Orozco-Velasquez v. Attorney General*,[2] where we held that an NTA that omits the time and date may be "cured" with a later Notice of Hearing that provides the missing information. We now hold that *Pereira* does abrogate *Orozco-Velasquez*. It is our conclusion that the Department of Homeland Security (DHS) may no longer rely on a Notice of Hearing to cure a defective NTA.

I. FACTS

Wilson Guadalupe came to the United States from Ecuador in November 1998. In 2001, he met Raquel Torres, a United States citizen. They married in February 2003. Torres filed an "immediate relative" petition on behalf of Guadalupe, and he was granted conditional permanent resident status.

Guadalupe's marriage to Torres soured quickly and the couple divorced in 2006. Shortly thereafter, Guadalupe applied for removal of the conditional basis of his permanent resident status, claiming that, despite his divorce from Torres, the marriage had not been entered into for the purpose of procuring Guadalupe's admission to the United States as an immigrant. United States Citizenship and Immigration Services (USCIS) interviewed Guadalupe about his marriage to Torres. He maintained that their marriage was bona fide. Torres, however, signed an affidavit, stating that Guadalupe married her for immigration purposes. USCIS concluded that Guadalupe's marriage to Torres had not been in good faith; on April 30, 2007, USCIS terminated Guadalupe's conditional resident status.

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[2] 817 F.3d 78 (3d Cir. 2016).

Guadalupe was then placed in removal proceedings. On May 11, 2007, DHS sent him an NTA. The NTA omitted the date and time for the removal hearing, indicating that the date and time would be set later. Four days later, the Immigration Court mailed Guadalupe a Notice of Hearing that contained the date and time. Guadalupe, along with his counsel, attended the hearing before the IJ on June 5, 2007. The IJ took additional testimony on October 23, 2008. On November 6, the IJ denied Guadalupe's motion for relief from removal and ordered him to voluntarily depart or be removed. The BIA affirmed. Guadalupe failed to depart and has remained in the United States since then.

In June 2018, the Supreme Court decided *Pereira v. Sessions*. *Pereira* held that where, as here, an NTA does not contain the date or time for the hearing, the NTA "does not trigger the stop-time rule,"[3] and a noncitizen continues to accrue time towards the ten years of continuous residence required to apply for cancellation of removal.

Guadalupe moved to reopen his case based on *Pereira*. He argued that, because his NTA did not contain the date and time for his hearing, it did not stop the clock on his continuous residency period and that he had now accrued the ten years of continuous residency required to apply for cancellation of removal.[4] The BIA

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[3] 138 S. Ct. at 2110.

[4] 8 U.S.C. § 1229b(b)(1) provides that "Nonpermanent residents, . . . who are subject to removal proceedings and have accrued 10 years of continuous physical presence in the United States, may be eligible for a form of discretionary relief known as cancellation of removal." Under the so-called "stop-time rule," set forth in

denied the motion, relying on its decision in *Matter of Bermudez-Cota*, which held that a Notice of Hearing with the date and time could cure a defective NTA for jurisdictional purposes.[5] The BIA noted that Guadalupe had received the notice of the date and time because he had appeared for his hearing. Guadalupe filed this petition for review.

II. DISCUSSION

We have jurisdiction over this case as a timely petition for review of a final order of removal under 8 U.S.C. § 1252(a)(1) and § 1252(b)(1).[6] Cancellation of removal is an exercise of the BIA's discretion that we typically lack jurisdiction to review, but we may nevertheless review the decision if "based on a false legal premise."[7] The question here is a legal one and thus is subject to de novo review.[8]

This case presents a single issue: In removal proceedings, does *Pereira v. Sessions* prohibit DHS from curing a defective NTA, which has triggered the stop-time rule, with a subsequent Notice of Hearing which

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§ 1229b(d)(1)(A), however, the period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." *Pereira*, 138 S. Ct. at 2109.

[5] *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (BIA 2018).

[6] In *Nkomo v. Attorney General*, 930 F.3d 129 (3d Cir. 2019), appellant argued that an incomplete Notice to Appear did not confer subject matter jurisdiction over removal proceedings. We held to the contrary—that *Pereira* does not implicate the IJ's authority to adjudicate. Nor does *Pereira* implicate the IJ's jurisdiction to adjudicate the stop-time issue here.

[7] *Pllumi v. Att'y Gen. of United States*, 642 F.3d 155, 160 (3d Cir. 2011).

[8] *See Tarrawally v. Ashcroft*, 338 F.3d 180, 184 (3d Cir. 2003).

contains the missing information?[9] We had held before *Pereira* that DHS could cure a defective NTA with a supplemental Notice of Hearing.[10] After *Pereira*, the Sixth Circuit in *Garcia-Romo v. Barr*[11] and the BIA in *Matter of Mendoza-Hernandez*[12] have held that DHS may cure a defective NTA with a Notice of Hearing that includes the date and time of the hearing.[13] We hold that a defective NTA may not be cured by a subsequent Notice of Hearing, containing the omitted information.

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[9] The government has made a tangential argument that Guadalupe's motion to reopen was untimely. But Guadalupe filed a motion to reopen sua sponte, which the BIA may entertain "at any time." *See* 8 C.F.R. § 1003.2(a). Regardless, we decline to address the issue of timeliness as we "may uphold agency action only on the grounds that the agency invoked when it took that action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Here, the BIA ruled on the merits of Guadalupe's claim, making no mention of timeliness.

[10] *Orozco-Velasquez*, 817 F.3d 78.

[11] 940 F.3d 192 (6th Cir. 2019).

[12] 27 I. & N. Dec. 520 (BIA 2019).

[13] Guadalupe directs this Court to the Ninth Circuit's opinion in *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019), but the Ninth Circuit subsequently granted rehearing en banc, withdrawing the *Lopez* opinion. Although other circuits have suggested that the government cannot cure a defective NTA with a subsequent notice of hearing, they did not squarely address the issue Guadalupe raises. *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 962 (7th Cir. 2019) (concluding that the government should not send an incomplete Notice to Appear and later "fill[] in the blanks for time and place" but holding that this deficiency was not of jurisdictional significance); *Perez-Sanchez v. United States Att'y Gen.*, 935 F.3d 1148, 1154 (11th Cir. 2019) (citing *Ortiz-Santiago*, 924 F.3d at 962) ("Under *Pereira*, . . . a notice of hearing sent later might be relevant to a harmlessness inquiry, but it does not render the original NTA nondeficient.").

It is our interpretation of *Pereira* that it establishes a bright-line rule:

> A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a "notice to appear under section 1229(a)," and so does not trigger the stop-time rule."[14]

The language is clear. *Pereira* holds that an NTA shall contain all the information set out in section 1229(a)(1). An NTA which omits the time and date of the hearing is defective. To file an effective NTA, the government cannot, in maybe four days or maybe four months, file a second—and possibly third—Notice with the missing information. And it makes sense to have such a bright-line rule: The ability of the noncitizen to receive and to keep track of the date and place of the hearing, along with the legal basis and cited acts to be addressed at the hearing, is infinitely easier if all that information is contained in a single document—as described in the statute.[15]

Moreover, it seems to us to be no great imposition on the government to require it to communicate all that information to the noncitizen in one document. If a notice is sent to the noncitizen with only a portion of the statutorily required information, a valid NTA can easily be sent later which contains all the required information in one document—at such time as the government has

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[14] *Pereira*, 138 S. Ct. at 2113-14.

[15] We do note that in *Pereira* the Court left "for another day whether a putative notice to appear that omits any of the other categories of information enumerated in § 1229(a)(1) triggers the stop-time rule." 138 S. Ct. at 2113 n.5.

gathered all that information together. The complete NTA would then trigger the stop-time rule.

The government argues, however, that the BIA's decision in *Matter of Mendoza-Hernandez* should be given *Chevron*[16] deference as a reasonable reading of an ambiguous statute. There, the BIA relied on *Pereira*'s position that "the fundamental purpose of notice is to convey essential information to the alien, such that the notice creates a reasonable expectation of the alien's appearance at the removal proceeding."[17] The BIA determined that this purpose can be served just as well by two or more documents as it could by one.[18]

We conclude, however, that *Chevron* deference is inapplicable here because we are not merely interpreting the stop-time rule.[19] Rather, we are deciding as a matter of law whether the Supreme Court's decision in *Pereira* forecloses our interpretation of the statute in *Orozco-Velasquez*.

We start this analysis with an overview of the statutory scheme. Nonpermanent residents who have "10 years of continuous physical presence in the United States" may apply for cancellation of removal.[20] But,

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[16] *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[17] *Matter of Mendoza-Hernandez*, 27 I. & N. Dec. at 531.

[18] *Id.*

[19] *See Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998) ("There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions.").

[20] *Pereira*, 138 S. Ct. at 2109.

under the stop-time rule, 8 U.S.C. § 1229b(d)(1), this period of continuous residence ends when the noncitizen "is served a notice to appear under section 1229(a)."[21] Section 1229(a)(1), in turn, sets out the information to be provided in an NTA as follows.

> (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
>
> . . .
>
> (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.[22]

Before *Pereira*, we held in *Orozco-Velasquez* "that an NTA served 'under section 1229(a)' is effective, for purposes of the 'stop-time' rule, only when it includes each of the items that Congress instructs 'shall be given in person to the alien.'"[23] That could be done, we held, with a "combination of notices, properly served on the

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[21] 8 U.S.C. § 1229b(d)(1).

[22] 8 U.S.C. § 1229(a)(1).

[23] *Orozco-Velasquez*, 817 F.3d at 83.

alien charged as removable, [that] conveys the *complete* set of information prescribed by § 1229(a)(1)."[24]

The Supreme Court in *Pereira* confirmed that the time and place requirement in § 1229(a)(1) is substantive. *Pereira* held that § 1229(a) "speak[s] in definitional terms, at least with respect to the 'time and place at which the proceedings will be held,'"[25] and 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."[26] *Pereira*, however, rejected the idea that an incomplete NTA could stop the time on a noncitizen's period of continuous residence.[27] If § 1229(a)(1) defines elements that make an NTA complete, the stop-time rule cannot be satisfied by an NTA which does not notify the noncitizen of the elements of the date and time and place of the hearing.

The NTA that Guadalupe received did not contain the time and date of the proceeding. It did not therefore satisfy the statutory requirements for a Notice to Appear. The Notice of Hearing that Guadalupe received included the time and date but it could not trigger the stop-time rule because it made no mention of the other requirements of an NTA, other than to note Guadalupe's file number. Thus, neither document by itself was a proper NTA sufficient to trigger the stop-time rule.

The government's contrary interpretation is unconvincing. The government contends that § 1229(a)(1)

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[24] *Id.*

[25] *Pereira*, 138 S. Ct. at 2116.

[26] *Id.* at 2110.

[27] *Id.* at 2116 (quoting *id.* at 2126 (Alito, J., dissenting)).

requires merely written notice rather than one written document; it argues that § 1229(a)'s language is properly understood as applying to information rather than to a particular document. We find this interpretation to be inconsistent with the statutory language.

The government also looks to the Dictionary Act to support reading "a notice to appear" in the stop-time rule to allow for more than one document. Under the Dictionary Act, "words importing the singular include and apply to several persons, parties, or things."[28] But the Supreme Court "has relied on this directive when the rule is 'necessary to carry out the evident intent of the statute.'"[29] Here, however, in view of the clarity of the language of the statute, it is not necessary to rely on the Dictionary Act.

Nor do we agree with the government that the BIA's error was harmless.[30] "[W]e will view an error as harmless and not necessitating a remand to the BIA when it is highly probable that the error did not affect

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[28] 1 U.S.C. § 1.

[29] *CTS Corp. v. Waldburger*, 573 U.S. 1, 15–16 (2014) (quoting *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009)).

[30] Guadalupe contends that the government waived its harmless error argument, but even when the government waives harmless error, "we may still consider the issue." *United States v. Davis*, 726 F.3d 434, 445 n.8 (3d Cir. 2013). Although the *Chenery* doctrine typically limits courts to considering only those rationales relied on by the agency, *see, e.g.*, *Michigan*, 135 S. Ct. at 2710 (citing *Chenery Corp.*, 318 U.S. at 87 (reciting "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action"), we nevertheless apply harmless error review in immigration cases. *Li Hua Yuan v. Att'y Gen. of U.S.*, 642 F.3d 420, 427 (3d Cir. 2011).

the outcome of the case."[31] The government rests its theory of harmlessness on the fact that Guadalupe appeared for his hearing. But the correct inquiry is whether the BIA's legal error affected the outcome of Guadalupe's motion to reopen. It has. The BIA's misreading of the stop-time rule was its sole reason for rejecting Guadalupe's motion to reopen. The BIA found Guadalupe ineligible for cancellation of removal based on an incorrect legal premise. That error was not harmless.

Rejecting the two-step notification process may seem overly formalistic in this case. After all, the Immigration Court sent Guadalupe his Notice of Hearing a mere four days after DHS sent his Notice to Appear, and he attended the hearing. But the government has the power to remedy this scenario in the future for countless others, in other situations. Requiring one complete NTA does not "prevent DHS and the Immigration Courts from working together to streamline the scheduling of removal proceedings";[32] nor does it prohibit DHS, when it has compiled all the information required by § 1229(a)(1), from sending out a complete NTA that includes the date and time of the hearing.

III. CONCLUSION

We conclude that, for purposes of the stop-time rule, a deficient NTA cannot be supplemented with a subsequent notice that does not meet the requirements of 8 U.S.C. § 1229(a)(1). Because the BIA reached a contrary conclusion in denying Guadalupe's motion to reopen, we will grant the petition for review, vacate the

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[31] *Li Hua Yuan*, 642 F.3d at 427.

[32] *Pereira*, 138 S. Ct. at 2115 n.6.

BIA's removal order, and remand this case to the BIA for further proceedings on Guadalupe's motion for relief from removal.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia, 22041

File: A096-432-645—Newark, NJ

IN RE: WILSON N. GUADALUPE

[Date: May 2, 2019]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Judy S. Resnick, Esquire

APPLICATION: Reopening

This matter was last before the Board on April 12, 2011, when we denied the respondent's motion to reconsider our decision of August 30, 2010, which dismissed the respondent's appeal from the Immigration Judge's decision dated November 6, 2008, that denied his application for a waiver of the requirement to file a joint petition to remove the conditional basis of his residence. *See* section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. §1186(c)(4)(B). The respondent has now filed a motion to reopen sua sponte to apply for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), arguing that he qualifies for that

relief based upon a change of law. The motion will be denied.

The respondent argues that he is eligible for cancellation of removal because he can now establish at least 10 years of continuous physical presence in the United States. *See* section 240A(b)(1)(A) of the Act. Specifically, the respondent contends that pursuant to the United States Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a defect in his Notice to Appear (NTA) in these proceedings rendered it ineffective to trigger application of the "stop-time rule" of section 240A(d)(1)(A) of the Act to terminate accrual of the continuous physical presence necessary to qualify for that relief.

The Supreme Court held in *Pereira* that a NTA that fails to designate the specific time or place of an alien's removal proceedings (as was the case here), is not a NTA under section 239(a) of the Act. As such, the NTA does not trigger the stop-time rule ending an alien's period of continuous presence in the United States. *See Pereira v. Sessions*, 138 S. Ct. at 2110.

In Matter of Bermudez-Cota, 27 I&N Dec. 441, 447 (BIA 2018), this Board held that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act so long as a notice of hearing (NOH) specifying this information is later sent to the alien. The record reflects that on May 15, 2007, the respondent was issued a notice for his initial hearing, which was scheduled for June 5, 2007 and he appeared at that time (Tr. at 1-9).

Given the Supreme Court's decision in *Pereira v. Sessions* and our decision in *Bermudez-Cota*, we deem the respondent's period of continuous physical presence to have ended in May 2007, when he was duly served with notice of his initial removal hearing (and not on May 11, 2007, when he was served with his putative notice to appear). The respondent's receipt of that hearing notice, as evidenced by his attendance at the June 5, 2007 hearing (Tr. at 1-9), effectively cured the defect in his notice to appear by supplying the missing time and place information at issue in *Pereira*, thereby triggering the "stop-time rule" of section 240A(d)(1)(A) of the Act. Accordingly, the respondent's burden is to demonstrate 10 years of continuous physical presence is measured backward from service of the hearing notice in May 2007, to May 1997.

The respondent has stated that he entered the United States as visitor on November 2, 1998, and he does not indicate that he was physically present in this country at any earlier date (Respondent's Mot. at 7). Therefore, it does not appear that the respondent could have accrued 10 years of continuous physical presence when he received a notice of hearing on May 15, 2007.

Inasmuch as the respondent has not shown that he is prima facie eligible for cancellation of removal, a remand to the Immigration Court to allow him to pursue that relief is not warranted, and the respondent's motion will be denied. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (a motion to reopen to apply for relief may be denied when the alien has not demonstrated prima facie eligibility for the relief sought); *INS v. Abudu*, 485 U.S. 94, 104 (1988); *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009); 8 C.F.R. § 1003.2(c)(1).

Accordingly, the following order will be entered.

ORDER: The motion is denied.

/s/ DANIEL MORRIS
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia, 22041

File: A096 432 645—Newark, NJ

IN RE: WILSON N. GUADALUPE

[Date: Apr. 12, 2011]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Arturo S. Suarez-Silverio, Esquire

APPLICATION:
Reconsideration

ORDER:

The respondent filed a motion on September 30, 2010, seeking reconsideration of the Board's decision of August 30, 2010. Pursuant to 8 C.F.R. § 1003.2(b)(2), a motion to reconsider must be filed within 30 days after the mailing of the Board's decision. As the respondent's motion was filed over 30 days after the Board's decision in this matter, it has been filed out of time. *See*

8 C.F.R. § 1003.2(c). Accordingly, the motion filed on September 30, 2010, is, hereby, denied.

/s/ DAVID HOLMES
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
Falls Church, Virginia, 22041

File: A096 432 645—Newark, NJ

IN RE: WILSON N. GUADALUPE

[Date: Aug. 30, 2010]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT:
Azar A. Menhaji, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)]—Conditional resident status terminated

APPLICATION:
Section 216(c)(4)(B) good faith waiver of joint filing requirement; remand; voluntary departure

The respondent is a native and citizen of Ecuador. On July 9, 2004, he became a conditional permanent resident of this country on the basis of an approved visa petition filed on his behalf by his former United States cit-

izen wife (I.J. at 1). Since he and his wife divorced before the expiration of the respondent's 2-year conditional residence period, he requires a waiver of the requirement that he and his ex-wife jointly file a petition to remove the conditional basis of his residence. On April 30, 2007, United States Citizenship and Immigration Services ("USCIS") rejected the respondent's application for a waiver under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4)(B) (I.J. at 1; Exh. 2). The respondent then renewed his application in Immigration Court and sought voluntary departure in the alternative. On November 6, 2008, the Immigration Judge denied the respondent's waiver application and granted him the privilege of voluntarily departing the United States within 27 days of the date of the decision (I.J. at 7). The respondent then filed a Motion to Remand with the Board on December 15, 2008, including evidence that he has filed a new Petition to Remove Conditions on Residence (Form I-751) with USCIS, seeking a waiver under section 216(c)(4)(A) of the Act based on extreme hardship to his United States citizen son. The respondent's appeal of the Immigration Judge's decision will be dismissed and his motion will be denied.

On appeal, the respondent only generally contests the Immigration Judge's denial of a waiver under section 216(c)(4)(B) of the Act, based on his failure to show that he entered into his marriage with his ex-wife in good faith. Respondent's Brief at 4-5, 8. Instead, he primarily asserts eligibility for a waiver under section 216(c)(4)(A) of the Act (Respondent's Brief at 2-8).

The respondent bears the burden of establishing eligibility for any requested benefit or privilege, and that

it should be granted in the exercise of discretion. 8 C.F.R. § 1240.8(d). Regarding the section 216(c)(4)(B) waiver, the Immigration Judge made an adverse credibility finding covering the respondent's testimony regarding the bona fides of his marriage (I.J. at 7). She based this finding on inconsistencies during the respondent's testimony and with regard to his statements to a USCIS adjudicator about why his marriage failed (I.J.at 7; Exh. 2). The respondent has not addressed this issue on appeal, and we thus discern no clear error in the adverse credibility finding. *See* 8 C.F.R. § 1003.1(d)(3)(i) (the Board reviews credibility determinations for clear error); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) (holding that where there are two permissible views of the evidence, the fact-finder's choice between them cannot be deemed clearly erroneous); *Matter of 3-H-*, 23 I&N Dec. 462 (BIA 2002). Additionally, the Immigration Judge ruled that the respondent failed to present reasonably available corroborating evidence of his claim that he entered into a good faith marriage, such as witness testimony and/or statements (I.J. at 6-7). In the absence of argument on this subject, pursuant to our de novo review authority over issues of law, discretion, or judgment, we find no error in this holding. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Moreover, since the respondent has presented insufficient evidence to establish the bona fides of his marriage under 8 C.F.R § 1216.5(e)(2), we agree with the denial of a waiver under section 216(c)(4)(B) of the Act.

Turning to the remaining issue, motions to remand are subject to the same substantive requirements as motions to reopen. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). A motion to reopen for the purpose of allowing an alien to apply for any form of discretionary

relief shall not be granted if it appears that the alien's right to apply for such relief was fully explained to him and he received an opportunity to apply at the former hearing, unless the relief is sought on the basis of circumstances arising after the hearing. 8 C.F.R. § 1003.2(c)(1). In the decision of November 6, 2008, the Immigration Judge noted that while the respondent's son was born on June 26, 2000, the respondent did not seek a waiver under section 216(c)(4)(A) of the Act based on extreme hardship to his son in the event of his removal (I.J. at 2 n.2). The record demonstrates that the Immigration Judge asked the respondent whether he wanted to pursue a section 216(c)(4)(A) waiver and offered to continue the proceedings while he sought one from USCIS in the first instance (Tr. at 4-8, 13-18). Nevertheless, the respondent's counsel stated that his client "definitely" was not going to seek a section 216(c)(4)(A) waiver (Tr. at 18). Since the respondent received a full explanation of his opportunity to apply for a section 216(c)(4)(A) waiver below, he had the chance to do so during the hearing, and the circumstances of his son being born did not arise after the hearing, we will deny the Motion to Remand. *See* 8 C.F.R. § 1003.2(c)(1). The respondent voluntarily abandoned any request for a section 216(c)(4)(A) waiver before the Immigration Judge.

Accordingly, the following orders are entered.

ORDER. The appeal is dismissed and the motion 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 de-

part the United States, without expense to the Government, within 27 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 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* Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this admin-

istratively 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* 73 Fed. Reg. at 76938 (to be codified at 8 C.F.R. § 1240.26(i)).

/s/ ROGER A. PAULEY
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

Case No. A096 432 645

IN THE MATTER OF GUADALUPE, WILSON N.,
RESPONDENT

[Date: November 6, 2008]

IN REMOVAL PROCEEDINGS AT NEWARK, NEW JERSEY

CHARGE:

Section 237(a)(1)(D)—deportable—conditional residence terminated.

APPLICATIONS:

Review of denied hardship waiver under Section 216(c)(4)(B) of the Immigration and Nationality Act—waiver of joint petition requirement by divorced alien; Voluntary departure under Section 240B of the Immigration and Nationality Act.

FOR RESPONDENT:

Azar Abasi Menhaji, Esquire
P.O. Box 765
Paterson, NJ 07503

FOR THE US ICE:
Chief Counsel US DHS Newark
970 Broad Street, Room 1104B
Newark, NJ 07102
Attn: Anita C. Snyder, Assistant

DECISION OF THE IMMIGRATION JUDGE

Respondent WILSON N. GUADALUPE is a divorced male native and citizen of Ecuador born on August 25, 1971. He is a conditional resident of this country; his status results from an approved visa petition filed on his behalf by the United States citizen wife to whom he had been married for less than two years at the time that he adjusted his status in this country on July 9, 2004. Because he and his wife divorced, Respondent must seek a waiver of the requirement that he and his wife file a joint petition to remove the conditional basis of his residence. His application is pursuant to Section 216(c)(4)(B) of the Immigration and Nationality Act.

The waiver application was filed with the Department of Homeland Security, the agency with sole original jurisdiction over such an application. But Respondent's application was denied on April 30, 2007 (See Exhibit 2). Respondent was placed in these removal proceedings with the filing of the Notice to Appear (Exhibit 1) with this court on May 14, 2007.

DEPORTABILITY

On June 5, 2007, Respondent appeared in court with counsel and conceded his deportability as charged. He returned to court on November 27, 2008 to announce all relief requests. Respondent announced his desire to seek de novo review of the Department of Homeland Security's denial of the Section 216(c)(4)(B) waiver that he

filed.[1] In the alternative, Respondent seeks voluntary departure from the United States of America. If removal is required, he has designated Ecuador as the country of removal, but the Department of Homeland Security does not oppose his application for voluntary departure.

BURDEN OF PROOF

Respondent bears the burden of proving that the decision denying his waiver should be reversed. The regulations at 8 C.F.R. § 1216.5 provide him with guidance; he is encouraged to present evidence of his commitment to his marriage by proving whether he commingled assets with his wife, how long they cohabited, and by presenting any other evidence that he believes would be relevant to the decisionmaker.

In considering evidence of whether the Respondent entered into his marriage in good faith, the court examines whether Respondent presents evidence that he and his wife intended to establish a life together at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

The other requirement of the Respondent's waiver application is easily fulfilled. Respondent must establish that his marriage terminated through divorce; the couple divorced on February 22, 2006 (Exhibit 2—judgment of divorce).

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[1] Although Respondent's son, Wilson Jefferson Altamirano, was born on June 26, 2000 while Respondent was still a conditional resident, Respondent has not made application for waiver under Section 216(c)(4)(A) of the Immigration and Nationality Act claiming extreme hardship to his son if Respondent is removed.

EVIDENCE CONSIDERED

The court considered Exhibit 2,the Department of Homeland Security's administrative record, Exhibit 3, Respondent's submissions that are largely cumulative of evidence already considered by the Department of Homeland Security (2004 tax return, untranslated bank statements from Citibank all in Spanish, photographs, letter from Emma Castro, letter from Manuel P. Guadalupe, letter from Gerardo R. Lalarezo L.). A combination of lack of translation of some of the submissions, lack of recent dates on the statements provided (which are mostly cumulative) and lack of any of the makers of the letters having been presented as witnesses in his case diminishes the probative value of the Respondent's submissions. Clearly, the submissions were already considered by the Department of Homeland Security in coming to a decision in this case, and the Respondent does not contend that the Department's consideration was not accurate or reasonable.

Also part of Exhibit 3 is a letter from Respondent's young son, Jefferson, written more than a year ago, is included in Exhibit 3. Respondent has also now filed evidence that the Respondent is the father of his United States citizen son and pays child support.

On November 27, 2008, an agreed deadline of August 1, 2008 was assigned for both parties to file additional evidence in this case. Because Respondent late-filed Exhibit 5 (ID) and presented no evidence of good cause for the late filing, so Exhibit 5 (ID) was excluded based on objection by the Department of Homeland Security as the merits hearing began on October 23, 2008. Similarly, the Department of Homeland Security late-filed

what was marked as Exhibit 4 (ID)[2], and the exhibit, filed in court on October 23, 2008, was also excluded based on objection by the Respondent that the document was late-filed without evidence of good cause. The two exhibits remain in the Record of Proceeding marked as "ID"—solely for identification.

Respondent was his sole witness in this case. Because the court reviews Respondent's denied waiver de novo, the court will first summarize the administrative record that resulted in Respondent's denied application.

THE ADMINISTRATIVE RECORD

The Department of Homeland Security (DHS) Administrative Record (Exhibit 2) was served on the Respondent and this court on November 30, 2007. It includes a copy of the original visa petition filed on Respondent's behalf. No inaccuracies are detected; although Respondent now had a son, that child was not born to the Respondent before the Visa Petition Form I-130 was filed on his behalf, thus no children of the Respondent are listed on the Visa Petition. During the hearing, it was discovered that the Department of Homeland Security's Exhibit 2 did not include part of what was considered by the Adjudicator in denying Respondent's waiver application. That supplemental information, the sworn affidavit from Respondent's ex-wife that is discussed in the denial decision, is now before the court as Exhibit 2A.

The DHS record includes proof of joint tax filing by the Respondent and his wife, bank statements, several

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[2] The DHS attorney asked that the original exhibit be returned to DHS, which was done during the hearing, so a copy of the Exhibit 4 (ID) remains in the Record of Proceeding.

statements by others that are not very detailed but are provided for consideration, and it is evident that the documents filed by the Respondent in support of his waiver were carefully considered by the DHS Adjudicator because they are individually listed in the written decision in this case.

The April 30, 2007 DHS written decision denying the Respondent's application for waiver is one that carefully examines all evidence submitted by the Respondent and, without previous knowledge before his interview, by his ex-wife as well. Evidently, the sworn affidavit from Respondent's ex-wife (Exhibit 2A) was presented as a surprise to the Respondent.

As detailed by the DHS Adjudicator in the decision, Respondent's ex-wife made numerous claims about the Respondent including her claims that he had children from other relationships and that, only months after he received his conditional residence, Respondent left this country and went for months to Ecuador in October 2004 and, when he returned in February 2005, did not return to live with his wife and instead went to live with his brother, Manuel Guadalupe.

Respondent's ex-wife also claimed to having been contacted by a woman claiming to be Respondent's ex-wife and also claimed that she called the Respondent's sister, who confirmed that the Respondent had another romance. She also claims that the Respondent was calling another woman in Ecuador constantly at a phone number of 59391291768.

FACTS PRESENTED BY THE RESPONDENT

Respondent claims for the first time, through testimony, that he did not really understand what took place

at his interview at the Department of Homeland Security on April 10, 2007. He voluntary attended without an interpreter and without his attorney (Exhibit 6, waiver of attorney).

Yet, Respondent presents no objective evidence through testimony of witnesses that might rebut the concerns of the DHS Adjudicator, and was given an opportunity during his hearing to do so.

Specifically, Respondent presents no witnesses to confirm his testimony that he and his wife, Raquel, met in 2001 at a Thanksgiving party and dated for 2 years before they married. He presents no testimony from family or friends to confirm that he and Raquel lived together in the Bronx. The strongest evidence that he presented to this court was a photograph of him and a woman that he claimed was his ex-wife at someone else's wedding. Respondent claimed that he and his wife were witnesses at that wedding, yet he presents neither of the spouses at that wedding or any other evidence to confirm that he and his wife socialized visibly as a couple in this manner.

Respondent did not call his brother, Manuel Guadalupe as a witness and also does not call his sister, who supposedly told his ex-wife that the Respondent was married to Viviana Vaquerizo. He did not present testimony from witnesses because he claims that, although Respondent has lived in this country since at least October 17, 1999, he does not know anyone who is not undocumented and afraid to come to Immigration Court as a witness.

He claims that the phone number that is listed on phone records that his ex-wife claimed belonged to a

woman with whom Respondent had a romance actually is his mother's number in Ecuador, yet Respondent presents no evidence of this. When asked why, Respondent first claimed that there are no phone bills or phone records available in Ecuador. He quickly abandoned that claim and admitted that he made no effort to prove his claim.

Respondent also explained that his lengthy trip to Ecuador in late 2004 was due to his mother's illness and the family's need to have the Respondent (who by then had not lived in Ecuador for about 5 years) manage a family farm. No evidence is provided by him in support of these claims. His mother is still alive—there is no evidence that Respondent could not have documented his claims.

Respondent claimed that the first problem with the marriage was because his wife's family disliked Respondent because he is an indigenous Indian from Ecuador. He claims that his wife, also from an Ecuadorian family, came from a prejudiced family that reflected racist attitudes in Ecuador toward indigenous Indians such as the Respondent. He presents no objective evidence of such racist attitudes or such cultural bias in Ecuador.

Respondent's testimony is that his marriage also collapsed because his wife would socialize without him. At first, Respondent testified that his wife would leave him to go alone to parties. Yet moments later, he admitted that she would also take him along with her and that it it was he who refused to go out with his wife on Saturday nights.

At the interview, Respondent told the DHS examiner that his marriage collapsed because his wife earned

more than he did and would spend too much on her own clothing and shoes. Respondent did not make such claims during his hearing. When asked about why the Respondent's explanations about why his marriage failed had changed, Respondent had no explanation except to say that he felt misunderstood by the DHS Adjudicator who interviewed him and that Respondent felt that the Adjudicator did not give him a chance to explain his case fully.

As evidence that she and he had a tumultuous or contentious relationship, Respondent claims that he was arrested in October 2007 because of his wife, but that she did not come to court so did not testify. But he also admitted that he was charged with having been stalking or harassing her. He also claims that she forced him to submit to AIDS and sexually transmitted disease testing. But in cross-examination, he admits that he gave an address to the doctor that is not consistent with his testimony that he was living with his wife at that time of the testing.

Respondent claimed at first in his testimony that the DHS Adjudicator never showed him any letter from his ex-wife that claimed that the Respondent only married her to get a green card. But, later during questioning by the undersigned Immigration Judge, Respondent changed his testimony to admit that, yes, he was confronted with his wife's letter during his interview and was given a chance to respond.

Respondent also testified that, even after their divorce, his wife would call and repeatedly claim that she wanted to always be Respondent's friend. Respondent presents no supplemental affidavit from his ex-wife to withdraw or to amend the affidavit considered by the

DHS Adjudicator. But she did not come to court to testify and the Respondent claims that he has not seen her since some time in 2007.

CONCLUSION

Respondent presents little new evidence to supplement his waiver application; as this court noted, most of Exhibit 3 is cumulative and Respondent does not claim that the DHS Adjudicator erred in considering the evidence. Respondent presents no witnesses to assist him in rebuttal of the conclusions of the Adjudicator and, in addition, made no effort to obtain evidence to prove that some of his claims might be true. In addition, as noted by this court in questioning the Respondent, he presents different reasons to explain his marriage breakup than those he outlined at his DHS interview. His sudden claims that the marriage collapsed because his ex-wife's family disapproved of the Respondent was a sudden and unsupported claim by the Respondent. He changed his reasoning about why his marriage failed as time passed by.

Respondent has been inconsistent both during his in-court testimony and has been inconsistent with regard to what he told the DHS Adjudicator about why his marriage failed and what he told this court. He has made little effort to obtain objective evidence or to present witnesses in support of his claim about why he left to Ecuador soon after he got his green card, to prove that he did not have a romance with another woman during his marriage to his ex-wife, or to prove that he entered into his marriage in good faith. Put simply, Respondent is not a credible, believable witness.

Respondent's failure to present witnesses that could have assisted this court to determine the facts of this case is also not reasonably explained. He simply claims that everyone who knew that he was married is undocumented so not available as a witness.

The court is convinced, even after de novo consideration of the evidence, that the decision of the DHS Adjudicator is well supported by the evidence presented and considered in the decision. Respondent's testimony, both unreliable and unsupported by documentary or objective evidence or testimony of others, is insufficient to convince the court that he entered into the marriage for reasons other than to obtain an immigration benefit. The decision of the court is as follows:

ORDER

IT IS ORDERED that, on review, the DHS decision denying Respondent's application for waiver under Section 216(c)(4)(B) of the Immigration and Nationality Act is AFFIRMED, and that Respondent's applications for hardship waiver under Section 216(c)(4)(B) of the Immigration and Nationality Act is DENIED.

IT IS FURTHER ORDERED that Respondent's application for voluntary departure from the United States of America is GRANTED and Respondent is hereby ordered to depart the United States of America voluntarily and at his own expense on or before January 3, 2009, or any date beyond that as might be permitted by any reviewing Board, Court, or official and subject to any condition as such reviewing Board, Court, or official might direct.

IT IS FURTHER ORDERED that, as a mandatory condition to voluntary departure, Respondent post bond

in the mandatory minimum amount of $500 with the Department of Homeland Security on or before November ~~15~~ [17th], 2008, a date that cannot be enlarged or modified by the undersigned under any circumstance.[3]

IT IS FURTHER ORDERED that, should Respondent fail to post said bond, or should Respondent fail to depart the United States of America when and as permitted, then, in either event, without further notice or proceeding, the above order granting voluntary departure to the Respondent shall be immediately vacated and withdrawn, and the following order entered in its stead:

IT IS ORDERED that Respondent be removed from the United States to Ecuador based on the charge of deportability contained in the Notice to Appear and sustained by the court. Signed on November 6, 2008 at Newark, New Jersey.

/s/ ANNIE S. GARCY
ANNIE S. GARCY, Immigration Judge

[3] By regulation, only five business days are permitted but November 11, 2008 is a federal holiday this year.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2239
(Agency No. A096-432-645)

WILSON N. GUADALUPE, PETITIONER

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,
RESPONDENT

Filed: May 20, 2020

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, [*]ROTH and [*]FISHER, Circuit Judges

The petition for rehearing filed by respondent in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel

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[*] The votes of the Honorable Jane R. Roth and D. Michael Fisher are limited to panel rehearing only.

and the Court en banc, is **DENIED**. Judges Hardiman, Matey and Phipps would have voted for rehearing.

BY THE COURT,

/s/ JANE R. ROTH
JANE R. ROTH
Circuit Judge

Dated: May 20, 2020
JK/cc: All Counsel of Record

APPENDIX G

1. 8 U.S.C. 1229(a)(1) and (2) provide:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

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

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

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

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

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

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

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien

may be contacted respecting proceedings under section 1229a of this title.

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

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

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

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

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

(A) In general

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

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

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

(B) Exception

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

2. 8 U.S.C. 1229b 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.

* * * * *

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

(1) Termination of continuous period

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

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