No. 20-1272

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, PETITIONER

v.

FERNANDO REYES-LUEVANOS

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

PETITION FOR A WRIT OF CERTIORARI

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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 Merrick B. Garland, Attorney General.

Respondent is Fernando Reyes-Luevanos, who was petitioner in the court of appeals.

RELATED PROCEEDINGS

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

Reyes-Luevanos v. *Barr*, No. 19-9545 (Oct. 30, 2020)

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PETITION FOR A WRIT OF CERTIORARI

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 Tenth Circuit in this case.

OPINIONS BELOW

The orders and judgments of the court of appeals (App., *infra*, 1a-8a, 9a-17a) are not published in the Federal Reporter but are reprinted at 831 Fed. Appx. 415 and 822 Fed. Appx. 685. The decision of the Board of Immigration Appeals (App., *infra*, 18a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2020. 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 court of appeals' judgment. Under that order, the deadline for filing a petition for a writ of certiorari is March 29, 2021. 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*, 27a-31a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that, in removal proceedings, "written notice * * * shall be given * * * 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 written notice is served as required by Section 1229(a)(1), it can affect the accrual of ten years of continuous physical presence in the United States, which is necessary for someone who is not a lawful permanent resident 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 is served 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 "'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 this case 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. Respondent is a native and citizen of Mexico. App., *infra*, 1a. He was admitted to the United States on September 19, 2003, pursuant to a nonimmigrant H-2 temporary work visa, with an authorized period of admission not to exceed one year. *Id.* at 2a; Administrative Record (A.R.) 85, 103, 912. Respondent remained in the United States beyond his period of authorized admission. A.R. 80, 912.

On November 13, 2009, respondent was served with a document labeled "[N]otice to [A]ppear," App., *infra*, 2a, which informed him that "removal proceedings" had been initiated against him and charged that he was subject to removal as a nonimmigrant who "remained in the United States for a time longer than permitted," in violation of the INA, A.R. 912 (emphasis omitted). That notice did not specify the date and time of respondent's initial removal hearing, stating instead that the hearing would be on a date and time "to be set." App., *infra*, 2a (quoting A.R. 912). Five days later, however, respondent was served with a separate "notice of hearing" that specified the date and time of his initial removal hearing. *Ibid.*

After an immigration judge found respondent removable as charged and denied his application for cancellation of removal, respondent appealed to the Board of Immigration Appeals (Board). App., *infra*, 3a; see

A.R. 59-61, 79-93. 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

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* 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)).

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 (quoting 8 U.S.C. 1229(a)(1)(G)(i)).

The Board subsequently dismissed respondent's appeal. App., *infra*, 18a-24a. The Board determined that respondent 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 18a-23a. As relevant here, the Board explained that respondent'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 22a. The Board explained that the two documents together "satisfie[d] the notice requirement of [S]ection [1229](a)(1)," thereby triggering Section 1229b(d)(1)'s stop-time rule. *Ibid.*

3. The court of appeals initially denied respondent's petition for review. App., *infra*, 9a-17a. In response to respondent's petition for rehearing, the government acknowledged that the court of appeals in *Banuelos-Galviz* v. *Barr*, 953 F.3d 1176 (10th Cir. 2020), petition for cert. pending, No. 20-356 (filed Sept. 17, 2020), had recently rejected the Board's position that written notice triggering the stop-time rule may be provided in two documents, but the government explained that this Court had granted certiorari to decide that issue in *Niz-Chavez* v. *Garland*, No. 19-863 (argued Nov. 9, 2020), and that the government had additionally petitioned for a writ of certiorari on the issue in *Banuelos-Galviz*. Gov't C.A. Resp. to Pet. for Reh'g 1-2. The government therefore requested that the court of appeals hold this case pending this Court's decision in *Niz-Chavez*. *Id.* at

6-7. The court of appeals granted respondent's petition for panel rehearing, App., *infra*, 25a-26a; denied the government's request to hold the case pending this Court's decision in *Niz-Chavez*, *id.* at 25a; and granted respondent's petition for review, *id.* at 1a-8a.

As relevant here, the court of appeals followed its decision in *Banuelos-Galviz*. App., *infra,* 7a. As noted, 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 accordingly determined that *Banuelos-Galviz* had "rejected" the Board's conclusion 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*, 7a (citations omitted). The court thus concluded that the Board had erred and that the case should be remanded to the Board for further proceedings consistent with *Banuelos-Galviz*. *Id.* at 8a.

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*, 7a. This Court is currently considering whether that interpretation of the INA is correct in *Niz-Chavez* v. *Garland*, 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.

CONCLUSION

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

Respectfully submitted.

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MARCH 2021

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9545

FERNANDO REYES-LUEVANOS, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: Oct. 30, 2020

(Petition for Review)

ORDER AND JUDGMENT[*]

Before: **BRISCOE**, **MATHESON** and **CARSON**, Circuit Judges.

Fernando Reyes-Luevanos, a native and citizen of Mexico, petitions for review of an order by the Board of Immigration Appeals (BIA) dismissing his appeal from

[*] 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.

a decision by an immigration judge (IJ) denying his application for cancellation of removal under 8 U.S.C. § 1229b. Exercising jurisdiction under 8 U.S.C. § 1252(a), we grant the petition for review and remand for further proceedings as requested by Petitioner.

BACKGROUND

On November 13, 2009, the Department of Homeland Security (DHS) initiated removal proceedings by serving Petitioner with a notice to appear (NTA), alleging he was removable for having stayed beyond the one year allowed under the H-2B visa issued to him in 2003. The NTA provided his initial appearance before an IJ would be at a date and time "to be set." Admin. R. at 912. Five days later, he was served with a notice of hearing (NOH), which specified the date and time for his appearance. At a hearing in June 2010, Petitioner conceded he was removable but requested cancellation of removal. In September 2010, he filed an application for such relief, alleging, among other things, that he had been continuously present in the United States for the preceding ten years, as required by 8 U.S.C. § 1229b(b)(1)(A).

At a hearing before an IJ in 2018, Petitioner testified that he originally entered the United States illegally in 1998, that he travelled to Mexico in 2002 to visit family for approximately thirty days, and that he returned on a work permit, which was "the first time" he had such a permit, *id.* at 134. However, Petitioner's written application listed three departures—March to April 2000, December 2001 to February 2002, and an unspecified duration in 2003—each time for the purpose of visiting family in Mexico and each time returning to the United States on an H-2B visa. When asked to clarify the discrepancies between his application and his testimony, Petitioner stated: (1) with regard to the departure in 2000, he did not "remember," *id.* at 135; and (2) with regard to the departure in 2001, he was "travelling" but "didn't leave the country," *id.* (internal quotation marks omitted). Petitioner acknowledged that he initially testified to one departure and explained that he was "not sure how many times [he] went back to Mexico," *id.* at 159, that he could not "seem to recall them correctly," *id.*, and that he "might have left more than once, maybe twice," *id.* at 160. He later testified that he had "left perhaps two times," *id.* at 183 (internal quotation marks omitted), and that the last time was in 2002. He was unable to explain why his passport indicated he entered the United States in September 2003 after having been issued an H-2B visa a month prior.

The IJ found that the record "includes significant gaps" and that Petitioner's testimony was "equivocal," "shifting," "vague, conflicting, and insufficient to establish by a preponderance of the evidence that he did not have any departures that would cut off his physical presence." *Id.* at 88-90. The IJ found that the departures listed on the application suggest "a potential ground of ineligibility based on a more extended departure" and that Petitioner's "inability to recall the precise chronology here calls into question his entire testimony regarding this time period." *Id.* at 89. The IJ concluded Petitioner failed to carry his burden of showing continuous presence for at least ten years preceding service of the NTA on November 13, 2009. The IJ therefore denied his application for cancellation of removal but granted him voluntary departure.

On appeal to the BIA, Petitioner argued: (1) the IJ erred in not crediting his testimony about his presence in the United States; and (2) his NTA failed to specify a date and time for his hearing and, thus, was deficient under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which was issued after the IJ's decision. In particular, with respect to his *Pereira* argument, Petitioner contended the putative NTA failed both to confer jurisdiction on the IJ and to trigger the stop-time rule under 8 U.S.C. § 1229b(d)(1)(A) for purposes of his continuous presence in the United States. The BIA found that the IJ's factual findings were not clearly erroneous and that Petitioner's *Pereira* arguments lacked merit based on BIA precedent permitting a two-step process, whereby an NOH can cure a defective NTA. The BIA concluded Petitioner had failed to establish ten years of continuous physical presence prior the service of the NOH on November 18, 2009. Accordingly, the BIA dismissed his appeal. Petitioner timely petitioned this court for review.

DISCUSSION

Petitioner raises two arguments based on *Pereira*: (1) because the putative NTA failed to specify a date and time, the IJ lacked jurisdiction; and (2) the NOH did not cure the putative NTA and trigger the stop-time rule. We disagree with his first argument but agree with the second and, therefore, remand for further proceedings.

I. Standard of Review

"We review the BIA's legal determinations de novo and its findings of fact under the substantial evidence standard." *Ramirez-Coria v. Holder*, 761 F.3d 1158, 1161 (10th Cir. 2014) (internal quotation mark omitted). When, as here, a single BIA member issues a brief order affirming the IJ, "we may consult the IJ's opinion to the extent that the BIA relied upon or incorporated it," including "the IJ's more complete explanation of [the] same grounds" for the BIA's decision. *Sidabutar v. Gonzales*, 503 F.3d 1116, 1123 (10th Cir. 2007) (internal quotation marks omitted).

II. Analysis

"An alien seeking relief from removal bears the burden of establishing he satisfies the eligibility requirements and merits a favorable exercise of discretion." *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016) (internal quotation marks omitted). Under 8 U.S.C. § 1229b(b)(1), an alien subject to removal may apply to have the removal cancelled if he can show, among other things, ten years of continuous physical presence in the United States "immediately preceding the date of such application." *Id.* § 1229b(b)(1)(A). Continuous physical presence requires that the alien not have left "the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." *Id.* § 1229b(d)(2). In addition, the period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." *Id.* § 1229(d)(1)(A). Section 1229(a) lists the required contents of an NTA, which includes "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i).

In *Pereira*, the Supreme Court addressed whether service of a putative NTA that "fails to specify either the time or place of the removal proceedings . . . trigger[s] the stop-rule" under § 1229(d)(1)(A). *Pereira*, 138 S. Ct. at 2110. The Court concluded "[t]he answer is as obvious as it seems: No." *Id.* The Court held that a putative NTA that failed to designate the time or place of removal proceedings as specified by § 1229(a) was "not a notice to appear under section 1229(a)." *Id.* (internal quotation marks omitted). Such a notice therefore did "not trigger the stop-time rule" ending the period of continuous presence in the United States for purposes of an application for cancellation of removal. *Id.*; *see also id.* at 2113-14.

Petitioner first contends his NTA failed to confer jurisdiction on the IJ because it lacked a date and time and, thus, was not a valid NTA under *Pereira*. He also contends "[a] putative NTA which lacks the time or place information is deprived of [its] essential function as a charging document," Apt. Opening Br. at 21, and, thus, "is insufficient to vest jurisdiction with the Immigration Court under 8 C.F.R. § 1003.14(a)," *id.* at 23. But these jurisdictional arguments are firmly foreclosed by our decisions in *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020), and *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019).

In *Lopez-Munoz*, we held "8 C.F.R. § 1003.14 does not establish immigration judges' jurisdiction." *Id.* at 1016. We also rejected application of *Pereira* to this context, explaining that "§ 1229(a) is non-jurisdictional," *id.* at 1017, and that *Pereira* was not "an implicit pronouncement on an immigration judge's jurisdiction," *id.* at 1018. We later "follow[ed] the lead of *Lopez-Munoz* and join[ed] the overwhelming chorus of our sister circuits that have already rejected similar *Pereira*-based challenges." *Martinez-Perez*, 947 F.3d at 1278 (internal quotation marks omitted). In particular, we explained "the requirements relating to notices to appear are non-jurisdictional, claim-processing rules." *Id.* Accordingly, "[w]hile Petitioner's notice to appear was defective" because it lacked a date and time, "that did not divest the Immigration Court of jurisdiction." *Id.* at 1279.

Petitioner's second *Pereira* argument is that the BIA erred in permitting a two-step process to the stop-time rule. Relying on *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 535 (BIA 2019), the BIA concluded Petitioner's deficient NTA was perfected by the NOH containing the information missing from the NTA, thereby triggering the stop-time rule and terminating his period of continuous presence. We recently rejected the reasoning in *Mendoza-Hernandez* and held "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); *see also id.* at 1180 (holding "the stop-time rule is not triggered by the combination of a defective notice to appear and a notice of hearing"). The BIA therefore erred in concluding that the NOH triggered the stop-time rule and that Petitioner needed to show ten years of continuous physical presence prior to service of the NOH on November 18, 2009.[1]

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[1] We decline to determine whether Petitioner otherwise failed to satisfy his burden of showing ten years of continuous presence under 8 U.S.C. § 1229b(b)(1). That is a matter for the BIA to address in the first instance.

CONCLUSION

The petition for review is granted and the matter is remanded for further proceedings based on Petitioner's request. Petitioner's unopposed motion for leave to file a supplemental brief addressing the impact of *Banuelos-Galviz* is granted.[2]

Entered for the Court

Joel M. Carson III
Circuit Judge

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[2] The court has reviewed Petitioner's supplemental brief, which was attached to his motion, as well as the parties' letters under Fed. R. App. P. 28(j), addressing the impact of *Banuelos-Galviz* on this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9545

FERNANDO REYES-LUEVANOS, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: July 22, 2020

(Petition for Review)

ORDER AND JUDGMENT*

Before: **BRISCOE**, **MATHESON** and **CARSON**, Circuit Judges.

Fernando Reyes-Luevanos, a native and citizen of Mexico, petitions for review of an order by the Board of

* 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.

Immigration Appeals (BIA) dismissing his appeal from a decision by an immigration judge (IJ) denying his application for cancellation of removal under 8 U.S.C. § 1229b. Exercising jurisdiction under 8 U.S.C. § 1252(a), we deny the petition for review.

BACKGROUND

On November 13, 2009, the Department of Homeland Security (DHS) initiated removal proceedings by serving Petitioner with a notice to appear (NTA), alleging he was removable for having stayed beyond the one year allowed under the H-2B visa issued to him in 2003. The NTA provided his initial appearance before an IJ would be at a date and time "to be set." Admin. R. at 912. Five days later, he was served with a notice of hearing (NOH), which specified the date and time for his appearance. At a hearing in June 2010, Petitioner conceded he was removable but requested cancellation of removal. In September 2010, he filed an application for such relief, alleging, among other things, that he had been continuously present in the United States for the preceding ten years, as required by 8 U.S.C. § 1229b(b)(1)(A).

At a hearing before an IJ in 2018, Petitioner testified that he originally entered the United States illegally in 1998, that he travelled to Mexico in 2002 to visit family for approximately thirty days, and that he returned on a work permit, which was "the first time" he had such a permit, *id.* at 134. However, Petitioner's written application listed three departures—March to April 2000, December 2001 to February 2002, and an unspecified duration in 2003—each time for the purpose of visiting family in Mexico and each time returning to the United States on an H-2B visa. When asked to clarify the discrepancies between his application and his testimony, Petitioner stated: (1) with regard to the departure in 2000, he did not "remember," *id.* at 135; and (2) with regard to the departure in 2001, he was "travelling" but "didn't leave the country," *id.* (internal quotation marks omitted). Petitioner acknowledged that he initially testified to one departure and explained that he was "not sure how many times [he] went back to Mexico," *id.* at 159, that he could not "seem to recall them correctly," *id.*, and that he "might have left more than once, maybe twice," *id.* at 160. He later testified that he had "left perhaps two times," *id.* at 183 (internal quotation marks omitted), and that the last time was in 2002. He was unable to explain why his passport indicated he entered the United States in September 2003 after having been issued an H-2B visa a month prior.

The IJ found that the record "includes significant gaps" and that Petitioner's testimony was "equivocal," "shifting," "vague, conflicting, and insufficient to establish by a preponderance of the evidence that he did not have any departures that would cut off his physical presence." *Id.* at 88-90. The IJ found that the departures listed on the application suggest "a potential ground of ineligibility based on a more extended departure" and that Petitioner's "inability to recall the precise chronology here calls into question his entire testimony regarding this time period." *Id.* at 89. The IJ concluded Petitioner failed to carry his burden of showing continuous presence for at least ten years preceding service of the NTA on November 13, 2009. The IJ therefore denied his application for cancellation of removal but granted him voluntary departure.

On appeal to the BIA, Petitioner argued: (1) the IJ erred in not crediting his testimony about his presence in the United States; and (2) his NTA failed to specify a date and time for his hearing and, thus, was deficient under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which was issued after the IJ's decision. In particular, with respect to his *Pereira* argument, Petitioner contended the putative NTA failed both to confer jurisdiction on the IJ and to trigger the stop-time rule under 8 U.S.C. § 1229b(d)(1)(A) for purposes of his continuous presence in the United States. The BIA found that the IJ's factual findings were not clearly erroneous and that Petitioner's *Pereira* arguments lacked merit based on BIA precedent permitting a two-step process, whereby an NOH can cure a defective NTA. The BIA concluded Petitioner had failed to establish ten years of continuous physical presence prior the service of the NOH on November 18, 2009. Accordingly, the BIA dismissed his appeal. Petitioner timely petitioned this court for review.

DISCUSSION

Petitioner raises two arguments based on *Pereira*: (1) because the putative NTA failed to specify a date and time, the IJ lacked jurisdiction; and (2) the NOH did not cure the putative NTA and trigger the stop-time rule. We disagree with his first argument, and although we agree with the second, we conclude a remand is not necessary.

I. Standard of Review

"We review the BIA's legal determinations de novo and its findings of fact under the substantial evidence standard." *Ramirez-Coria v. Holder*, 761 F.3d 1158, 1161 (10th Cir. 2014) (internal quotation mark omitted). When, as here, a single BIA member issues a brief order affirming the IJ, "we may consult the IJ's opinion to the extent that the BIA relied upon or incorporated it," including "the IJ's more complete explanation of [the] same grounds" for the BIA's decision. *Sidabutar v. Gonzales*, 503 F.3d 1116, 1123 (10th Cir. 2007) (internal quotation marks omitted).

II. Analysis

"An alien seeking relief from removal bears the burden of establishing he satisfies the eligibility requirements and merits a favorable exercise of discretion." *Gutierrez-Orozco v. Lynch*, 810 F.3d 1243, 1246 (10th Cir. 2016) (internal quotation marks omitted). Under 8 U.S.C. § 1229b(b)(1), an alien subject to removal may apply to have the removal cancelled if he can show, among other things, ten years of continuous physical presence in the United States "immediately preceding the date of such application." *Id.* § 1229b(b)(1)(A). Continuous physical presence requires that the alien not have left "the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." *Id.* § 1229b(d)(2). In addition, the period of continuous physical presence is "deemed to end . . . when the alien is served a notice to appear under section 1229(a)." *Id.* § 1229(d)(1)(A). Section 1229(a) lists the required contents of an NTA, which includes "[t]he time and place at which the [removal] proceedings will be held." § 1229(a)(1)(G)(i).

In *Pereira*, the Supreme Court addressed whether service of a putative NTA that "fails to specify either the time or place of the removal proceedings . . . trigger[s] the stop-rule" under § 1229(d)(1)(A). *Pereira*, 138 S. Ct. at 2110. The Court concluded "[t]he answer is as obvious as it seems: No." *Id.* The Court held that a putative NTA that failed to designate the time or place of removal proceedings as specified by § 1229(a) was "not a notice to appear under section 1229(a)." *Id.* (internal quotation marks omitted). Such a notice therefore did "not trigger the stop-time rule" ending the period of continuous presence in the United States for purposes of an application for cancellation of removal. *Id.*; *see also id.* at 2113-14.

Petitioner first contends his NTA failed to confer jurisdiction on the IJ because it lacked a date and time and, thus, was not a valid NTA under *Pereira*. He also contends "[a] putative NTA which lacks the time or place information is deprived of [its] essential function as a charging document," Apt. Opening Br. at 21, and, thus, "is insufficient to vest jurisdiction with the Immigration Court under 8 C.F.R. § 1003.14(a)," *id.* at 23. But these jurisdictional arguments are firmly foreclosed by our decisions in *Martinez-Perez v. Barr*, 947 F.3d 1273 (10th Cir. 2020), and *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019).

In *Lopez-Munoz*, we held "8 C.F.R. § 1003.14 does not establish immigration judges' jurisdiction." *Id.* at 1016. We also rejected application of *Pereira* to this context, explaining that "§ 1229(a) is non-jurisdictional," *id.* at 1017, and that *Pereira* was not "an implicit pronouncement on an immigration judge's jurisdiction," *id.* at 1018. We later "follow[ed] the lead of *Lopez-Munoz* and join[ed] the overwhelming chorus of our sister circuits that have already rejected similar *Pereira*-based challenges." *Martinez-Perez*, 947 F.3d at 1278 (internal quotation marks omitted). In particular, we explained "the requirements relating to notices to appear are non-jurisdictional, claim-processing rules." *Id.*

Accordingly, "[w]hile Petitioner's notice to appear was defective" because it lacked a date and time, "that did not divest the Immigration Court of jurisdiction." *Id.* at 1279.

Petitioner's second *Pereira* argument is that the BIA erred in permitting a two-step process to the stop-time rule. Relying on *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 535 (BIA 2019), the BIA concluded Petitioner's deficient NTA was perfected by the NOH containing the information missing from the NTA, thereby triggering the stop-time rule and terminating his period of continuous presence. We recently rejected the reasoning in *Mendoza-Hernandez* and held "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); *see also id.* at 1180 (holding "the stop-time rule is not triggered by the combination of a defective notice to appear and a notice of hearing"). The BIA therefore erred in concluding that the NOH triggered the stop-time rule and that Petitioner needed to show continuous physical presence prior to service of the NOH on November 18, 2009.

Nevertheless, we decline Petitioner's request to remand this matter to the BIA because the result would not be any different and Petitioner has not argued otherwise. *See Nazaraghaie v. INS*, 102 F.3d 460, 465 (10th Cir. 1996) (applying harmless error). The BIA agreed with the IJ that Petitioner's "testimony regarding his departures was vague and conflicting" and that he failed to establish that the departures listed on his application did "not cut-off the requisite length of continuous physical presence." Admin. R. at 4.

In particular, Petitioner noted in his application that he left in December 2001 and returned in February 2002.[1] But he failed to provide specific dates, and thus, as the IJ noted, this departure could have been as long as ninety days. And with his 2003 departure, Petitioner failed to list even the months when he left and returned. Although Petitioner's passport indicated he entered the United States in September 2003, the IJ found that Petitioner "was unable to confirm that he did, in fact, leave the country in 2003" and that "[i]t is . . . unclear how long [he] was gone from the United States" during that time. *Id.* at 90. Petitioner has not contested these findings and therefore has waived any challenge to them. *See Krastev v. INS*, 292 F.3d 1268, 1280 (10th Cir. 2002) ("Issues not raised on appeal are deemed to be waived.").

Accordingly, Petitioner failed to establish that he did not depart "the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days" between September 24, 2000, and his application date of September 24, 2010. 8 U.S.C. § 1229b(d)(2).[2] Therefore, notwithstanding the BIA's error in applying

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[1] Petitioner also listed a departure in March 2000, but that was more than ten years prior to his application in September 2010, *see* 8 U.S.C. § 1229b(b)(1)(A).

[2] Petitioner derided as "novel" Respondent's claim that he needed to show ten years of continuous presence prior to his application, insisting instead that he has accumulated "ten years of continuous physical presence since the initiation of proceedings and throughout the appeals process." Aplt. Supp. Br. at 6. But the statute plainly requires ten years of continuous physical presence "immediately preceding *the date of such application*." 8 U.S.C. § 1229b(b)(1) (emphasis added).

the stop-time rule, it is unnecessary to remand this matter.

CONCLUSION

The petition for review is denied. Petitioner's unopposed motion for leave to file a supplemental brief addressing the impact of *Banuelos-Galviz* is granted.[3]

Entered for the Court

Joel M. Carson III
Circuit Judge

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[3] The court has reviewed Petitioner's supplemental brief, which was attached to his motion, as well as the parties' letters under Fed. R. App. P. 28(j), addressing the impact of *Banuelos-Galviz* on this appeal.

APPENDIX C

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

File: A087-679-580—Denver, CO

IN RE: FERNANDO REYES-LUEVANOS

Date: [June 12, 2019]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Pro se[1]

ON BEHALF OF DHS

Marie Brown, Assistant Chief Counsel

APPLICATION:

Cancellation of removal

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[1] Attorney Catharine Davies has filed a motion to withdraw as counsel. This motion complies with *Matter of Rosales*, 19 I. & N. Dec. 655 (BIA 1988) and, therefore, is granted. A courtesy copy of this decision will be forwarded to Attorney Davies.

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's January 8, 2018, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The respondent's appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R § 1003.1(d)(3)(ii).

The sole issue on appeal involves whether the respondent has demonstrated the requisite period of 10 years of continuous physical presence in the United States to demonstrate statutory eligibility for cancellation of removal (IJ at 8). *See* section 240A(b)(1)(A) of the Act, 8 U.S.C. § 1229b(b)(1)(A). For the reasons discussed by him, we agree with the Immigration Judge's conclusion that the respondent has not demonstrated the requisite length of physical presence in the United States to qualify for cancellation of removal (IJ at 9-13).

The respondent was served with the notice to appear ("NTA") in person on November 13, 2009 (IJ at 1; Exh. 1). On November 18, 2009, he received, in person, a hearing notice scheduling the initial removal hearing for November 23, 2009. The hearing was subsequently continued until February 18, 2010 (Tr. at 1).

The respondent initially testified that he entered the United States in May 1998, and that he departed the country on only one occasion for a period of about 30 days in

2002 (IJ at 2; Tr. at 33-35). On cross-examination, he testified that he could not remember how many times and when he departed the United States, indicating that he may have departed more than once, the last time being in 2002 (IJ at 5; Tr. at 59-62). The Immigration Judge observed that the respondent's written application for cancellation of removal reflected three departures from the United States (IJ at 3; Exh. 2). The respondent's passport reflects an admission into the United States in September 2003, but the respondent was unable to recall departing and reentering the United States at that time (IJ at 5; Tr. at 62-63; Exh. 2, p. 25).[2]

We discern no clear error in the Immigration Judge's findings of fact and, on de novo review, agree with his conclusion of law that the respondent is ineligible for cancellation of removal based on his failure to demonstrate the requisite period of continuous physical presence in the United States (IJ at 9). *See* section 240A(b)(1)(A) of the Act, 8 U.S.C. § 1229b(b)(1)(A). As the Immigration Judge noted, the evidence demonstrates that the respondent was present in the United States in November 1998 and for a significant period of time thereafter, but the respondent's testimony regarding his departures was vague and conflicting (IJ at 10). As such, standing alone, it was insufficient to establish, by a preponderance of the evidence, that the departures have not cut-off the requisite length of continuous physical presence (IJ at 10-13). Documentary evidence of

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[2] We note that the Immigration Judge inadvertently referred to Exhibit 2 as Exhibit 3 in his decision and, according to page 25 of Exhibit 2, the correct date of the respondent's entry into the United States was in September 2003 rather than September 2013 (IJ at 5; Tr. at 61-63).

record does not confirm the requisite length of continuous physical presence. Consequently, the respondent has not met his burden to demonstrate eligibility for cancellation of removal (IJ at 12). *See Gutierrez-Orozco v. Lynch*, 810 F.3d 1243 (10th Cir. 2016) (holding that an alien's credible testimony alone may be insufficient to meet the continuous physical presence burden, particularly where other evidence did not confirm such testimony and called into question the actual entry date).

On appeal, the respondent argues that his NTA does not contain the time and place of his removal hearing and, as such, it is defective and insufficient to confer jurisdiction over the proceedings with the Immigration Court, or to trigger the stop-time rule, pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (*see* Respondent's Br. at 7-10). He also contends that our decision in *Matter of Bermudez-Cota*, 27 I. & N. Dec. 441 (BIA 2018) does not indicate when or how the stop-time rule is triggered, and that it does not provide a cure for a "defective" NTA (*see* Respondent's Br. at 5, 7-9).

We disagree. In *Matter of Bermudez-Cota*, we held that an NTA that does not specify the time and place of an alien's initial hearing vests an Immigration Court with jurisdiction over removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. We emphasized that *Pereira* involved a distinct set of facts raising the narrow issue of when (or whether) the "stop-time rule" is triggered. Because the respondent in *Bermudez-Cota* received proper notice of the time and place of his removal proceedings when he received the notice of hearing, we held that the

NTA's omission of the time and place of his initial removal hearing was not a jurisdictional defect. Thus, because the respondent in the instant case received, in person, notice of the time and place of his hearing on November 18, 2009, the absence of such information from his NTA did not deprive the Immigration Court of jurisdiction.

Moreover, in *Matter of Mendoza-Hernandez* and *Capula-Cortes*, 27 I. & N. Dec. 520 (BIA 2019), we reaffirmed our approval of the "two-step process" for the triggering of the "stop-time rule" as articulated in *Bermudez-Cota*. Specifically, we held that where an NTA does not specify the time and place of the initial removal hearing, the subsequent service of a notice of hearing containing that information perfects the deficient notice to appear, satisfies the notice requirement of section 239(a)(1) of the Act, and triggers the stop-time rule of section 240A(d)(1)(A) of the Act. *Id.*, at 535. As such, service of the notice of hearing scheduling the initial removal hearing ends the accrual of the physical presence. *Id.*

The present respondent was served with the NTA in person on November 13, 2009 (Exh. 1). Moreover, notice of the initial hearing was delivered to him on November 18, 2009, and, following continuances, he appeared at the master calendar hearing on February 18, 2010 (Tr. at 1). As such, the stop-time rule for the purpose of accrual of continuous physical presence for cancellation of removal was triggered in this case with the service of the hearing notice on November 18, 2009. Thus, as discussed above, he has not accrued the required 10 years of continuous physical presence prior to

November 2009, and he remains ineligible for cancellation of removal under section 240A(b) of the Act on that basis. *See Matter of Mendoza-Hernandez* and *Capula-Cortes*, 27 I. & N. Dec. at 535. In view of the foregoing, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States under safeguards 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 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/ LINDA J. WENDTLAND
LINDA J. WENDTLAND
For the Board

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9545
FERNANDO REYES-LUEVANOS, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: Oct. 30, 2020

(Petition for Review)

ORDER

Before: **BRISCOE**, **MATHESON**, and **CARSON**, Circuit Judges.

This matter comes before the panel on the petition for rehearing and rehearing en banc filed by Fernando Reyes-Luevanos. Upon consideration of the petition, the panel grants rehearing, withdraws the Order and Judgment filed on July 22, 2020, and issues in its place the attached substitute Order and Judgment. The panel denies the government's request, included in its response to the petition, to hold the case in abeyance pending a decision by the United States Supreme Court in *Niz-Chavez v. Barr*, No. 19-863. In light of the grant of the petition for panel rehearing, the request for en banc rehearing is denied as unnecessary.

Entered for the Court

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

APPENDIX E

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 paragraph if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files

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

* * * * *

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.

* * * * *