No. 20-397

In the Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL, PETITIONER

v.

HECTOR EMILIANO PORTILLO MARTINEZ

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 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 (10th Cir.):

Portillo Martinez v. *Barr*, No. 19-9584 (Apr. 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 order of the court of appeals (App., *infra*, 1a-7a) is not published in the Federal Reporter but is reprinted at 811 Fed. Appx. 493. The decisions of the Board of Immigration Appeals (App., *infra*, 8a-14a) and the immigration judge (App., *infra*, 15a-23a, 24a-29a, 30a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 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 lower-court judgment. Under that order, the deadline for filing a petition for a writ of certiorari is September 27, 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*, 34a-37a.

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 El Salvador. App., *infra*, 15a. In 2005, he entered the United States illegally, without inspection by an immigration officer. *Ibid.*

In March 2010, DHS served respondent with a document labeled "Notice to Appear." Administrative Record (A.R.) 346 (emphasis omitted); see A.R. 347. That notice informed respondent of the "removal proceedings" being initiated against him, A.R. 346 (emphasis omitted), and charged that he was subject to removal because he was an alien present in the United States without being admitted or paroled, A.R. 348; see 8 U.S.C. 1182(a)(6)(A)(i). The notice did not specify the date and time of respondent's initial removal hearing. See A.R. 346 (ordering respondent to appear for removal proceedings "on a date to be set at a time to be set") (emphasis omitted).

DHS later filed the notice to appear with the immigration court. App., *infra*, 15a; A.R. 346. 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).

The immigration court subsequently scheduled a hearing in respondent's case for July 13, 2005, at 8:30 a.m. App., *infra*, 31a. Respondent did not appear at that hearing. *Ibid.* The immigration judge (IJ) stated that respondent had not been given notice of the hearing because respondent had failed to provide the immigration court with an address at which he could be contacted. *Id.* at 31a-32a; see 8 U.S.C. 1229(a)(1)(F). The IJ found respondent removable as charged and ordered him removed in absentia. App., *infra*, 32a-33a.

3. In 2007, respondent filed a motion to reopen his removal proceedings and rescind the in absentia order of removal. A.R. 315-316. In that motion, respondent asserted that he had attempted to notify the immigration court of his address by mailing a form to the court, but that the form had been returned to him as undeliverable. A.R. 316.

In January 2008, the IJ granted respondent's motion, finding that respondent had "failed to receive notice of his hearing through no fault of his own." App., *infra*, 28a. On January 25, 2008, the immigration court provided respondent with a document labeled "Notice of Hearing," which informed him that it had scheduled a removal hearing in his case for February 25, 2008, at 9 a.m. A.R. 294 (capitalization altered). Respondent's removal hearing was subsequently rescheduled several times. See App., *infra*, 16a; A.R. 276-278, 280, 282-283, 291, 293.

In April 2010, respondent appeared at his hearing and requested relief in the form of voluntary departure. App., *infra*, 16a; see 8 U.S.C. 1229c(a)(1). The IJ granted voluntary departure and gave respondent until August 5, 2010, to depart. A.R. 274. The IJ stated that,

if respondent failed to timely depart, an order of removal would be effective immediately. *Ibid.* Respondent failed to timely depart. App., *infra*, 13a.

4. 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. 99-118. In that motion, respondent contended that, in light of *Pereira*, the "Notice to Appear" with which he had been served did not trigger the stop-time rule, because it did not contain the date and time of his removal proceedings. A.R. 101; see A.R. 113. He therefore argued that he could establish the requisite ten years of continuous physical presence in the United States for purposes of eligibility for cancellation of removal. A.R. 115.

An IJ denied respondent's motion. App., *infra*, 15a-23a. As relevant here, the IJ determined that respondent was not eligible for cancellation of removal because respondent did not have the requisite "10 years of physical presence in the United States" in 2010, *id.* at 21a,

when he "request[ed] and accept[ed] voluntary departure," *id.* at 20a.

The Board of Immigration Appeals (Board) dismissed respondent's appeal. App., *infra*, 8a-14a. Relying on its decision in *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I. & N. Dec. 520 (B.I.A. 2019) (en banc), the Board explained that "a deficient Notice to Appear that does not include the time and place of the respondent's initial removal hearing is perfected by the subsequent service of a Notice of Hearing specifying the missing information, thus triggering the stop-time rule." App., *infra*, 12a. The Board found that "respondent entered the United States in 2005, and received various Notices of Hearing ensuring his presence at hearings before the Immigration Court, including on April 7, 2010," when he accepted voluntary departure. *Ibid.* The Board therefore concluded that "respondent cannot establish the 10 years of continuous physical presence required for cancellation of removal." *Ibid.*

5. The court of appeals granted respondent's petition for review and remanded to the Board for further proceedings. App., *infra*, 1a-7a. Relying on its decision in *Banuelos-Galviz* v. *Barr*, 953 F.3d 1176 (10th Cir. 2020), petition for cert. pending, No. 20-356 (Sept. 17, 2020), the court stated that "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." App., *infra*, 4a (citation omitted). Rather, the court held that "the stop-time rule is triggered by one complete notice to appear," not "a combination of documents." *Ibid.* (citation omitted). The court therefore concluded that the Board had relied on "an impermissible method for triggering the stop-time rule" in denying respondent's motion to reopen his removal proceedings. *Id.* at 6a.

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. 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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SEPTEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-9584
(Petition for Review)

HECTOR EMILIANO PORTILLO MARTINEZ, PETITIONER

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL, RESPONDENT

Filed: Apr. 30, 2020

ORDER AND JUDGMENT[*]

Before: **PHILLIPS**, **MURPHY**, and **MCHUGH**, Circuit Judges.

Petitioner Hector Emiliano Portillo Martinez seeks review of the Board of Immigration Appeals' ("BIA") denial of his motion to reopen removal proceedings. Mr. Portillo Martinez further asks us to impose sanc-

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[1] 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.

tions on the government. We deny his request for sanctions, but we remand this matter to the BIA to consider Mr. Portillo Martinez's motion, without reliance on precedent that is no longer valid in this circuit.

I. BACKGROUND

On March 22, 2005, within days of entering the United States without inspection, Mr. Portillo Martinez was served with a notice to appear charging him as removable. As was common in that era, Mr. Portillo Martinez's notice to appear did not contain the time and date of his removal hearing. Mr. Portillo Martinez's hearing was subsequently scheduled for July 13, 2005, in San Antonio, Texas. Mr. Portillo Martinez did not attend that hearing, and, as a result, he was ordered removed in absentia.

On January 14, 2008, an Immigration Judge ("IJ") granted Mr. Portillo Martinez's motion to reopen his removal proceedings, finding Mr. Portillo Martinez had established he did not "receive notice of his [2005] hearing through no fault of his own." AR at 142-43. On April 7, 2010, the IJ granted Mr. Portillo Martinez permission to voluntarily depart the United States prior to the completion of his removal proceedings. *See* 8 U.S.C. § 1229c(a). Mr. Portillo Martinez agreed to depart by August 5, 2010, and the IJ entered an alternate order of removal that became effective if Mr. Portillo Martinez failed to depart by that date.

Mr. Portillo Martinez did not depart the United States, and, in September of 2018, he filed a motion to again reopen his removal proceedings. Among other things, Mr. Portillo Martinez argued the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018),

rendered him prima facie eligible for cancellation of removal, and that any procedural barriers to that relief should be excused on equitable grounds. On October 4, 2018, the IJ denied the motion, concluding it was defective on both procedural and substantive grounds.

Mr. Portillo Martinez appealed the IJ's decision to the BIA, and on September 27, 2019, the BIA dismissed his appeal, issuing a written decision finding that Mr. Portillo Martinez had not established prima facie eligibility for cancellation of removal and that, even if he were otherwise eligible, his failure to voluntarily depart in 2010 operated to withhold that relief from him for a period of ten years.

Mr. Portillo Martinez timely filed this petition for review.

II. DISCUSSION

A. *Mr. Portillo Martinez's Petition for Review*

"We review the BIA's denial of [Mr. Portillo Martinez's] motion to reopen for an abuse of discretion." *See Qui v. Sessions*, 870 F.3d 1200, 1202 (10th Cir. 2017). The BIA abuses its discretion when its order contains legal error, "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements." *Mahamat v. Gonzales*, 430 F.3d 1281, 1283 (10th Cir. 2005) (quotation marks omitted).

The parties spend the bulk of their briefing debating the propriety of the BIA's decision in *In re Mendoza-Hernandez*, 27 I. & N. Dec. 520, 529 (BIA 2019) (en banc), which held that, for purposes of triggering the

"stop-time" rule,[1] a defective notice to appear is cured by subsequent service of a notice of hearing that supplies the previously-omitted information—the so-called "two-step" process for triggering the "stop-time" rule.[2] But in an opinion issued on March 25, 2020, after the instant petition became fully briefed, we rejected the reasoning of *Mendoza-Hernandez*, concluding that "the stop-time rule is triggered by one complete notice to appear rather than a combination of documents." *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1178 (10th Cir. 2020). Thus, in this circuit, "the stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing." *Id.* at 1184.

Because the BIA's conclusion that Mr. Portillo Martinez has not demonstrated prima facie eligibility for cancellation of removal relied on the government's compliance with the "two-step" process we have now held insufficient, we must set aside its order. *See* AR at 4-5

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[1] Under the so-called "stop-time" rule, an alien's eligibility for cancellation of removal under 8 U.S.C. § 1229b(b)(1) is terminated when, before the alien accrues ten years of continual physical presence in the United States, the government serves the alien with a notice to appear, thereby initiating removal proceedings. *See* 8 U.S.C. § 1229b(d)(1).

[2] Mr. Portillo Martinez appears to suggest further that the IJ who granted him pre-conclusion voluntary departure and entered an alternate order of removal was without jurisdiction to do so. Along with nine other circuits, we have definitively rejected any argument that a deficient notice to appear divests Immigration Judges of jurisdiction over removal proceedings. *See Martinez-Perez v. Barr*, 947 F.3d 1273, 1278 (10th Cir. 2020) ("[T]he requirements relating to notices to appear are non-jurisdictional, claim-processing rules."); *Lopez-Munoz v. Barr*, 941 F.3d 1013, 1017 (10th Cir. 2019) ("[Section] 1229(a) is non-jurisdictional."). These decisions foreclose Mr. Portillo Martinez's jurisdictional attack.

(identifying "various Notices of Hearing" received by Mr. Portillo Martinez and concluding that "[c]onsistent with *Mendoza-Hernandez*, the respondent has not established that he is prima facie eligible for cancellation of removal." (citation omitted)).

The government makes only one other argument for affirmance: that Mr. Portillo Martinez's failure to depart voluntarily pursuant to the 2010 order rendered him ineligible to seek voluntary cancellation for a period of ten years. *See* 8 U.S.C. § 1229c(d)(1)(B) (declaring that "if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien . . . shall be ineligible, for a period of 10 years" to receive discretionary cancellation of removal pursuant to § 1229b). But the parties agree that Mr. Portillo Martinez's ten-year period of ineligibility expired on April 7, 2020. As a result, the BIA's order cannot be sustained on this ground.[3]

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[3] The government characterizes this barrier as impacting the justiciability of this appeal as a matter of Article III standing. The government argues Mr. Portillo Martinez cannot establish that he will suffer an imminent, "concrete and particularized" injury in fact. Resp. Br. at 24-25 (quoting *Lujan v. Defs. of Wildlife*, 503 U.S. 555, 560 (1992)). But that Mr. Portillo Martinez faces an imminent injury in the form of removal is beyond dispute. If anything, Mr. Portillo Martinez's additional and independent bar to cancellation of removal (owing to the ten-year period of ineligibility) is relevant to the *redressability* requirement of Article III standing.

Now that Mr. Portillo Martinez's ten-year bar to cancellation of removal has expired, he has established a likelihood that his injury will be redressed by a favorable decision. But even if this source of ineligibility persisted, he would still have standing on appeal because, "[w]here there are legal impediments to the recovery sought,

We note that the BIA identified other procedural hurdles precluding the reopening of Mr. Portillo Martinez's removal proceedings. But the government does not defend the BIA's order on those grounds, presumably because the BIA relied on the government's compliance with the two-step process to the exclusion of these procedural obstacles. Indeed, Mr. Portillo Martinez asserted that he should be excused from these procedural requirements on equitable grounds, but the BIA expressly withheld decision on "the merits of [Mr. Portillo Martinez's] equitable" arguments because it believed the government had triggered the stop-time rule by the combination of a defective notice to appear and multiple subsequent notices of hearing. AR at 4-5.

In sum, the BIA erred by relying on the government's compliance with an impermissible method for triggering the stop-time rule to deny Mr. Portillo Martinez's motion to reopen removal proceedings, thereby committing legal error and abusing its discretion. And because Mr. Portillo Martinez is no longer prohibited from receiving cancellation of removal for failing to voluntarily depart, the BIA's order cannot be sustained on that ground.

B. *Mr. Portillo Martinez's Request for Sanctions*

In his reply brief, Mr. Portillo Martinez asks us to assess monetary sanctions against the government for what he characterizes as the government's "attempt to confuse this Court and . . . continu[e] the errors of

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it is enough for standing that the relief sought will remove some of those legal roadblocks, even if others may remain." *See Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1181-82 (9th Cir. 2018).

law and fact committed by the IJ and the [BIA]." Reply Br. at 18.

"We must deny this request because [Mr. Portillo Martinez] failed to file a separate motion or notice requesting sanctions." *Abeyta v. City of Albuquerque*, 664 F.3d 792, 797 (10th Cir. 2011). "A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice." Fed. R. App. P. 38 advisory committee's note to 1994 amendment; *see Kelley v. Smith's Food & Drug Ctrs., Inc.*, 793 F. App'x 787, 792 (10th Cir. 2019) (unpublished) (applying rule to deny request for sanctions, inserted in appellant's reply brief, for appellee's assertion of "multiple baseless allegations" on appeal).

III. CONCLUSION

For the above reasons, we grant Mr. Portillo Martinez's petition for review and remand to the BIA for further proceedings consistent with this order and judgment. Mr. Portillo Martinez's request for sanctions is denied.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

APPENDIX B

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

File: A098-912-347—Denver, CO

IN RE: HECTOR EMILIANO PORTILLO-MARTINEZ

[Filed: Sept. 27, 2019]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
Shana L. Martin
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of El Salvador, appeals the Immigration Judge's October 4, 2018, decision denying his motion to reopen, in which he sought termination of these proceedings or an opportunity to apply for cancellation of removal as a nonpermanent resident under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C § 1229b(1), in light of the Supreme Court's decision in *Pereira v. Sessions*,

138 S. Ct. 2105 (2018). The respondent's appeal will be dismissed.[1]

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

The respondent was personally served with a Notice to Appear ("NTA") on March 22, 2005, that did not state the date or time of his initial hearing (IJ2 at 1-2; Exh. 1; Respondent's Br. at 3).[2] He was removed in absentia on July 13, 2005 (IJ2 at 1; Respondent's Br. at 3; Respondent's Sept. 12, 2013, Mot. to Reopen, Tab B at 2-3). On January 14, 2008, the proceedings were reopened and the removal order was rescinded (IJ2 at 1; IJ1 at 3-4; Respondent's Br. at 3). On April 7, 2010, the respondent requested and was granted pre-conclusion voluntary departure pursuant to section 240B(a) of the Act, 8 U.S.C. § 1229c(a) requiring him to depart by August 5, 2010 (IJ2 at 1, 3; Respondent's Br. at 3; Respondent's Sept. 12, 2018, Mot. to Reopen, Tab B at 4-5). On September 28, 2018, the respondent filed the instant motion to reopen, which the Department of Homeland Security ("DHS") opposed (DHS Sept. 28, 2018, Response to Mot.

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[1] The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7).

[2] The Immigration Judge's January 14, 2008, and October 4, 2018, decisions in this matter will be referred to as IJ1 and IJ2, respectively.

To Reopen). The Immigration Judge denied the motion on October 4, 2018, and this timely appeal followed (IJ2 at 1-4).

We affirm the Immigration Judge's denial of the motion to reopen to terminate proceedings (IJ2 at 2-4). In *Pereira v. Sessions*, the Supreme Court addressed the limited issue of whether an NTA that did not include the hearing time and place was sufficient to trigger the stop-time rule applicable to cancellation of removal (IJ2 at 2). *Pereira v. Sessions*, 138 S. Ct. at 2113. Contrary to the respondent's assertion, the Supreme Court did not explicitly hold that the NTA in that case was insufficient to vest the Immigration Court with jurisdiction, nor did it terminate the underlying removal proceedings (IJ2 at 2-3; Respondent's Br. at 3-5, 9-11). We noted the narrowness of the holding in *Pereira v. Sessions* in our precedent, *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), wherein we explained that an NTA that did not contain the time and place for the initial removal hearing vests an Immigration Judge with jurisdiction over removal proceedings, and meets the requirements of section 239(a) of the Act, so long as the respondent was later served with a Notice of Hearing specifying such information.

Further, we are not persuaded to overturn our decision, as the majority of circuit courts of appeals that have addressed the issue, including the Court Appeals for the Tenth Circuit, in whose jurisdiction this case arises, has agreed with the Board's interpretation of the *Pereira* decision and the regulations governing jurisdiction. *See Soriano-Mendosa v. BarrLopez v. Barr*, Fed. Appx. 796, 802 (10th Cir. 2019); *see, e.g.*, *Banegas Gomez v. Barr*, 922 F.3d 101, 110-12 (2d Cir. 2019); *Santos-*

Santos v. Barr, 917 F.3d 486 (6th Cir. 2019); *Ali v. Barr*, 924 F.3d 983, 986 (8th Cir. 2019); *Lopez v. Barr*, 925 F.3d 396, 405 (9th Cir. 2019) ("*Pereira* simply has no application [to the Immigration Court's jurisdiction]. . . . [T]he only question [in *Pereira*] was whether the petitioner was eligible for cancellation of removal.'" (quoting *Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019))) (alteration in original).

In the present case, the respondent does not contest and the record reflects that the respondent was subsequently served with a hearing notice, specifying the time and place of his removal proceedings, and he attended the scheduled hearing on June 4, 2008 (IJ2 at 1). Therefore the NTA was not defective and jurisdiction vested with the Immigration Judge. *See Matter of Bermudez-Cota*, 27 I&N Dec. at 447.

To the extent that the respondent maintains he is eligible for reopening to apply for cancellation of removal, the Immigration Judge concluded that the respondent's September 28, 2018, motion is time-barred, because it was filed more than 90 days after the Immigration Judge's January 14, 2008, decision (IJ2 at 2). *See* section 240(c)(7)(C)(i) of the Act; 8 C.F.R. § 1003.23(b)(1). The respondent argues, however, that equitable tolling of the motion filing deadline is warranted in his case because *Pereira v. Sessions* represents an extraordinary circumstance establishing his eligibility for relief from removal and that he exercised due diligence in pursuing his rights once he became aware of the decision (Respondent's Br. at 14-16). Without deciding the merits of the respondent's equitable tolling arguments, we agree with the Immigration Judge that reopening to allow the respondent to apply for cancellation of removal

is not appropriate because he has not demonstrated prima facie eligibility for that form of relief (IJ2 at 3).

Specifically, as the respondent entered the United States in 2005, and received various Notices of Hearing ensuring his presence at hearings before the Immigration Court, including on April 7, 2010, when he accepted post-conclusion voluntary departure, the respondent cannot establish the 10 years of continuous physical presence required for cancellation of removal (IJ at 3; Exh. 2; Respondent's Br. at 3). *See* section 240(A)(b)(1)(A) of the Act. Consistent with *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520, 535 (BIA 2019), the respondent has not established that he is prima facie eligible for cancellation of removal. *Id.* (explaining that a deficient Notice to Appear that does not include the time and place of the respondent's initial removal hearing is perfected by the subsequent service of a Notice of Hearing specifying the missing information, thus triggering the stop-time rule of section 240A(d)(1)(A) of the Act).

Accordingly, we also affirm the Immigration Judge's determination that sua sponte reopening is not warranted (IJ2 at 3-4). *See, e.g., Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (discretion to reopen a case sua sponte is "an extraordinary remedy reserved for truly exceptional situations"); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (sua sponte reopening is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations); *Matter of Coehlo*, 20 I&N Dec. 464, 471 (BIA 1992) (a motion to reopen requires a showing of prima facie eligibility for the relief sought in reopened proceedings). Because the

respondent has not established that the holding in *Pereira v. Sessions* affects his eligibility for cancellation of removal, we agree with the Immigration Judge's determination that sua sponte reopening is not appropriate.

In addition, although the respondent asserts that his grant of voluntary departure is not an impediment to his eligibility for relief, we are unpersuaded (Respondent's Br. at 11-13). The April 7, 2010, grant of pre-conclusion voluntary departure required the respondent to depart by August 5, 2010 (IJ at 1, 3; Respondent's Br. at 3; Respondent's Mot. to Reopen, Tab B at 4-5, Sept. 12, 2018). The respondent acknowledges that he did not timely depart (Respondent's Br. at 11; DHS Sept. 28, 2018, Response Mot. to Reopen at 4). Accordingly, he is presently ineligible for cancellation of removal under section 240A of the Act. *See* section 240B(d)(1)(B) of the Act. However, the respondent argues that the penalties for failure to depart should not apply in this case because the Immigration Judge did not advise him of his apparent eligibility for cancellation of removal prior to granting pre-conclusion voluntary departure in exchange for a waiver of the opportunity to pursue this or any other forms of relief from removal (Respondent's Br. at 11-13).

The record reflects that the respondent was represented by counsel when he requested voluntary departure at his April 7, 2010, hearing. Therefore, we deem his decision to accept pre-conclusion voluntary departure a tactical one. *See Matter of Gawaran*, 20 I&N Dec. 938, 942 (BIA 1995) (in the absence of egregious circumstances, an alien is bound by the "reasonable tactical actions" of his or her counsel). Moreover, contrary to the respondent's arguments on appeal, the

Board lacks authority to apply an "exceptional circumstances" or other general equitable exception to the penalty provisions for his failure to depart within the time period afforded for voluntary departure. *See Matter of Zmijewska*, 24 I&N Dec. 87, 92-93 (BIA 2007).

Lastly, although the respondent argues that reopening invalidates any grant of voluntary departure, the bar on discretionary relief for failure to voluntarily depart is only excused where the Immigration Judge or this Board acts on a motion to reopen *prior* to expiration of the voluntary departure period (Respondent's Br. at 13-14). *See Dada v. Mukasey*, 554 U.S. 1, 21 (2008) (holding that aliens must be allowed to unilaterally withdraw a request for voluntary departure prior to the expiration of the departure period in order to pursue any benefits sought in conjunction with a motion to reopen without incurring the statutory penalties that attach for an individual that overstays the voluntary departure period). In the instant case, the respondent filed his motion to reopen on September 12, 2018—more than 8 years after the August 5, 2010,expiration of his voluntary departure period. Therefore, the respondent has forfeited the opportunity to rescind the grant of pre-conclusion voluntary departure and is bound by the Immigration Judge's April 7, 2010, alternate removal order. *Id.*

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ MICHAEL J. CREPPY
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1961 STOUT STREET, SUITE 3101
DENVER, CO 80294

File: A# 098-912-347

IN THE MATTER OF: PORTILLO-MARTINEZ, HECTOR, RESPONDENT

Date: [Oct. 4, 2018]

IN REMOVAL PROCEEDINGS

WRITTEN DECISION

I. Procedural History

Respondent is a native and citizen of El Salvador. He arrived in the United States on or about March 21, 2005, without then being admitted or paroled after inspection by an Immigration Officer. Based on the foregoing allegations, on March 22, 2005, the Department of Homeland Security (DHS or the Department) personally served Respondent with a Notice to Appear (NTA), charging them as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or the Act). DHS filed the NTA with the Court on April 19, 2005, thereby initiating removal proceedings.

At a hearing held on July 13, 2005, Respondent failed to appear for a hearing conducted at the San Antonio Immigration Court and was removed in his absence.

Respondent's counsel filed a motion to reopen the July 13, 2005, in absentia removal order. On January 14, 2008, Respondent's case was reopened and his in absentia removal order cancelled. Thereafter venue was changed to the Denver Immigration Court.

On June 4, 2008, Respondent appeared before the Denver Immigration Court and his attorney asked for time to prepare his case.

On November 26, 2008, Respondent once again appeared before the Denver Immigration Court with his attorney and asked for additional time to prepare his case.

On April 7, 2010, Respondent appeared again with his attorney and requested relief in the form of pre-conclusion voluntary departure. The Court granted voluntary departure and gave Respondent until August 5, 2010 to depart.

Respondent has filed the present "Motion to Reopen to Apply for Cancellation of Removal Under INA 240A(b) or in the Alternative Terminate Removal Proceedings" (Respondent's Motion).

For the reasons set forth below, the Court will deny Respondent's Motion.

II. Motion is Time and Number Barred

Respondent's motion is time barred as it has been filed well outside 90-days past the issuance of a final or-

der. 8 C.F.R. § 1003.23(b)(1). Additionally Respondent's motion is number barred as he previously filed a motion to reopen which was granted in 2008. *Id.*

Additionally, the Court finds that neither of these restrictions on filing a motion to reopen should be tolled in this case. Respondent requests that the principal of equitable tolling be applied to his case. However, the Court finds that Respondent's case should not be equitably tolled. Respondent asserts that the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) is a change in the law so substantial that the principals of equitable tolling should be applied to his case. However, Respondent's case is distinguishable from *Pereira*. In *Pereira* the Immigration Judge found that Pereira did not receive notice of the hearing he was removed in absentia at and reopened his case. Pereira's case through a confluence of events like a delay in filing the NTA with the Immigration Court and then Pereira's lack of notice for the hearing he was removed in absentia at resulted his being eligible for cancellation of removal once his case was reopened by the Immigration Judge.

Respondent in this case finds himself in a different posture. Although his case was also reopened after an in absentia order of removal he never became eligible for cancellation of removal prior to his requesting relief in the form of voluntary departure which was granted in 2010. As a result, Respondent's case is distinguishable from the *Pereira* decision and the principals of equitable tolling do not apply.

III. Argument Based on Jurisdiction

Respondent argues that pursuant to *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the NTA in their case is

"defective," which should move the Court to reopen his order of voluntary departure. The NTA in Respondent's case ordered them to appear before the Immigration Court" on a date to be set" and "at a time to be set." In *Pereira*, the Supreme Court held "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under [INA § 239(a)],' and therefore does not trigger the stop-time rule." 138 S. Ct. at 2110. Respondent argues that because the NTA in his case lacks a specific time and place for his hearing jurisdiction never vested with the Court and the case should be terminated.

A narrow question was at issue in *Pereira*—whether a Notice to Appear that lacks the "time and place at which the proceedings will be held," as required under the definition of a Notice to Appear in the Act, triggers the stop-time rule related to the continuous physical presence requirement for cancellation of removal for certain nonpermanent residents. *Id.* at 2113. The Supreme Court reasoned that Congress defined a Notice to Appear for purposes of the stop-time rule by cross referencing the rule (INA § 240A(d)(1)) with the definition of a Notice to Appear (INA § 239(a)). *Id.* at 2113-14. For the Supreme Court, this cross reference to the definitional section of a Notice to Appear resolved the case because the Act specifically referenced what Congress meant by a Notice to Appear for purposes of the stop-time rule. *Id.* at 2114 (stating that the "statutory text alone is enough to resolve this case[]" because of the express reference to Section 239(a) to determine the meaning of a Notice to Appear for purposes of the stop-time rule).

No jurisdiction vesting language appears in the Act, however. Due to this lack of jurisdictional language in the Act, the Attorney General filled this void by regulation pursuant to Congress' statutory delegation of authority to "establish such regulations . . . as [he] determines to be necessary to carry out" his responsibilities under the Act. INA § 103(g)(2). The definition of a Notice to Appear for jurisdictional purposes in the regulations is not the same as the definition in the Act for purposes of the stop-time rule. *Compare* 8 C.F.R. § 1003.15(c) *with* INA § 239(a)(1). To vest jurisdiction with the Immigration Court, therefore, all that is required is that a Notice to Appear has the requirements set forth in the regulations. 8 C.F.R. § 1003.15. An NTA need not list a date or time for an Immigration Court to have jurisdiction over a respondent's case. *Id.* Rather, proceedings commence and jurisdiction vests with the Immigration Court when a charging document is filed with the Court. 8 C.F.R. § 1003.14(a). To be a valid charging document, a document must include a certificate of service and state the Immigration Court "in which the charging document is filed." *Id.* A charging document is defined as a "written instrument which initiates a proceeding before an Immigration Judge." 8 C.F.R. § 1003.13. For cases "initiated after April 1, 1997, these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien." *Id.* The Court finds that in the present case, Respondent's NTA followed the requirements in the regulations to vest jurisdiction of Respondent's case with this Court.

Finally, Respondent's construction of *Pereira* would "impute to Congress . . . [a] contradictory and absurd purpose. . . . " 138 S. Ct. at 2116 (citation omitted). He would also have this Court find that the *Pereira* decision silently held that Immigration Courts lack jurisdiction when a Notice to Appear fails to specify a date and time proceedings will be held. Such a jurisdiction-stripping holding would change the landscape of Immigration Court jurisdiction. To accept this broad reading of *Pereira* would require this Court to find that the Supreme Court silently or implicitly held that Immigration Courts around the country lack jurisdiction because a Notice to Appear lacked a time and date. This Court will not impute a *sub silientio* holding by the Supreme Court regarding such an important question, particularly when the Court's decision only deals with the triggering of the stop-time rule. *Id.* at 2113.

Because this Court finds that there was no defect in the Notice to Appear that would deprive this Court of jurisdiction over Respondent's case, it denies his motion to reopen and terminate his proceedings on this basis.

IV. Respondent's Eligibility for Cancellation of Removal

Respondent is not eligible for cancellation of removal as reasoned by his counsel. There is no suggestion Respondent's counsel or evidence that he was eligible for relief in the form of cancellation of removal in 2010, prior to his requesting and accepting voluntary departure.

Respondent's case is different than the facts the Supreme Court addressed in *Pereira*. In that case Pereira had been order removed in his absence and his

case was reopened years after the NTA was issued and filed. When Pereira sought to reopen his case he had accumulated the necessary time to be eligible for Cancellation of Removal and his case was reopen because an Immigration Judge determined that he did not have notice of the hearing he was order removed at.

In this case, Respondent was removed in his absence and his case was reopened based on a lack of notice but during the intervening time this Respondent did not become eligible for Cancellation of Removal after having accumulated 10 years of physical presence in the United States. Instead, in this case Respondent's case was reopened and he appeared at 2 hearings and finally on his 3rd appearance he applied for and was granted voluntary departure.

As such, the Court finds Respondent's case is distinguishable from the *Pereira* and Respondent is not eligible for Cancellation of Removal. See 8 C.F.R. § 1003.23(b)(3).

V. Sua Sponte Reopening

An immigration judge may also reopen any case "upon his or her own motion at any time." 8 C.F.R. § 1003.23(b). The "power to reopen [*sua sponte*] is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). *Sua sponte* reopening, therefore, is "an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999). The respondent has the burden to show that an exceptional situation exists. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000).

Respondent has not met his burden to show than an exceptional situation exists. As discussed above, Respondent's case is distinguishable from *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). *Pereira's* case was reopened by the Immigration Court after it was determined that he did not receive notice of the hearing that he was ordered removed in absentia at. In this case there is no question that Respondent received notice of the hearing conducted on April 7, 2010 at which he requested and was granted voluntary departure.

VI. Motion for Stay

In addition to filing a motion to reopen and terminate Respondent also request that his removal be stayed. The Court finds that a stay of Respondent's case would be inappropriate as the Court has denied his requests to reopen or terminate his case. Additionally, for the reasons discussed above the Court finds that Respondent has not made a strong showing that he is likely to succeed on the Merits and as such the Court finds Respondent has also not demonstrated that he will be irreparably injured or that the public interest lies in staying his removal, because he has not demonstrated that he is eligible for the relief he seeks or that the *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) case is a change of law that impacts his case. Finally, the Court finds that staying a lawful order does injure the Department of Homeland Security the agency trusted with executing the lawful orders of the Immigration Court by impeding the effective and efficient administration of the laws of the United States.

Accordingly, the Court will enter the following orders:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen and Terminate Removal Proceedings be DENIED.

IT IS HEREBY ORDERED that Respondent's Motion for a Stay is DENIED

[10/4/2018] /s/ MATTHEW W. KAUFMAN
Date Honorable MATTHEW W. KAUFMAN
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

Case Number: A98-912-347

IN THE MATTER OF HECTOR EMILIANO PORTILLO-MARTINEZ, RESPONDENT

[Date: Jan. 14, 2008]

IN REMOVAL PROCEEDINGS
Docket: San Antonio (non-detained)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended: alien present in the United States without admission or parole.

APPLICATION: 8 C.F.R. § 1003.23(b) (2007): Motion to reopen (rescind) in absentia order.

ON BEHALF OF THE RESPONDENT:
Maria L. Rodriguez, Esq.
Rodriguez Law Firm
1580 Logan Street, Suite 300
Denver, CO 80203

ON BEHALF OF THE GOVERNMENT:
Carmen Leal, Esq.
Assistant Chief Counsel
P.O. Box 1939
San Antonio, TX 78297-1939

WRITTEN DECISION OF
THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Hector Emiliano Portillo-Martinez, a thirty-two-year-old male, is a native and citizen of El Salvador who entered the United States at or near Eagle Pass, Texas on or about March 21, 2005. *See* Record of Proceedings (ROP) Exhibits 1 & 2. The Department of Homeland Security (DHS) personally served Respondent with a Notice to Appear (NTA) on March 22, 2005 charging him with being removable pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended (the Act), in that he was present in the United States without admission or parole. ROP Exhibit 1.

The charging document contains a section titled "**Failure to appear**," which specifies, *inter alia*, that Respondent is required to provide to the Government and the Court a full mailing address to which hearing notices will be sent. The consequences of failing to appear for any scheduled hearing was explained to Respondent in the Spanish language. *See* ROP Exhibit 1, certificate of service block.

Respondent did not provide the government or the Court with a mailing address where he could be contacted, as required. ROP Exhibits 1 & 2. Thus, the Court was not required to provide Respondent with

written notice of his hearing. INA § 240(b)(5)(B); 8 C.F.R. § 1003.18(b).

On July 13, 2005, Respondent was not present for a scheduled master calendar hearing and was unavailable for examination under oath. Respondent did not provide reasonable cause for his failure to appear. At the request of the DHS, and as the Court knew of no exceptional circumstance for Respondent's absence, the Court preceded *in absentia* as mandated. *See* INA § 240(b)(5)(A); 8 C.F.R. § 1003.26(c). The Government offered a Form I-213, Record of Deportable/Inadmissible Alien. ROP Exhibit 2. It established alienage, time, place, and manner of entry; it contained a narrative. Thus, removability as charged was established by evidence that was clear, convincing, and unequivocal. 8 C.F.R. § 1003.26(c).

Respondent was ordered removed *in absentia* on the lodged charge from the U.S. to El Salvador.

II. Statement of the Case

On November 27, 2007, the Court received Respondent's Motion to Rescind *In Absentia* Removal Order and Reopen Removal Proceedings. The Government filed a timely opposition to the motion. The issue for the Court is whether to grant Respondent's motion.

III. Statement of the Law

An *in absentia* order of removal may be rescinded only: (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances; or (ii) upon a motion to reopen filed at any time if the alien demonstrates that he did not receive notice in accordance with paragraph (1) or

(2) of section 239(a) of the Act, or the alien demonstrates that he was in Federal or State custody and the failure to appear was through no fault of his own. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). Written notice is considered sufficient if it was sent to the most recent address provided by the alien, or if it was mailed to the alien's attorney of record. *See* INA § 239(a)(1); 8 C.F.R. §§ 1003.13, 003.26(d).

A. 180 Day Time Limit

A motion to reopen must be filed within 180 days of the order of removal. INA § 240(b)(5)(C). The Court issued Respondent's order of removal on July 13, 2005. Respondent filed his motion over two years later, on November 27, 2007. Therefore, Respondent's motion was untimely filed and any argument alleging exceptional circumstances is time-barred. INA § 240(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii). However, the Court may consider whether the alien can demonstrate that he failed to appear because he never received notice. *Id.*

IV. Argument

In the instant case, Respondent argues that his failure to appear at the scheduled removal hearing should be excused because Respondent never received notice of the hearing. Respondent attempted to notify the Court of his mailing address by submitting the Form EOIR-33, Alien's Change of Address Form/Immigration Court, but the form was returned as undeliverable, thus preventing Respondent from fulfilling his statutory obligation. The government argues that Respondent's single attempt to notify the Court of his address did not meet his continuing duty to keep the Court informed of his

mailing address. By failing to make further attempts, Respondent's failure to receive notice is his own fault.

V. Analysis

According to Respondent, he attempted to notify the Immigration Court of his mailing address in April 2005, but the Form EOIR-33 was returned as undeliverable. Respondent has attached a copy of that Form EOIR-33 with his motion to reopen. The Form EOIR-33, which was given to Respondent by DHS when the NTA was served, contained an incorrect mailing address for the Immigration Court. The Form EOIR-33 provided to Respondent incorrectly listed the Court's previous address, 615 E. Houston St., Room 598, San Antonio, TX 78205-2040, as the address for submission of the form. The respondent mailed the Form EOIR-33 to the address provided on the form, and it was returned. While the NTA had the correct mailing address for the Court, Respondent's reliance on the address on the Form EOIR-33 was reasonable under the circumstances, particularly given the fact that the NTA explicitly instructed Respondent that: "[y]ou must notify the Immigration Court by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form." ROP Exhibit 1. Respondent complied with his obligation by attempting to notify the Court in the manner instructed by the NTA and by using the form provided by DHS. His failure to adequately provide his address resulted from the government's instruction. As Respondent failed to receive notice of his hearing through no fault of his own, his motion to reopen will be granted.

VI. Findings of Fact and Conclusions of Law

After a careful review of the record the Court makes the following findings of fact and conclusions of law:

I FIND that the Court has continuing jurisdiction over both the subject matter and Respondent in these proceedings based on the proper issuance, service and filing of a Notice to Appear.

I FIND that no issues of law or fact remain unresolved.

I FIND that Respondent filed an untimely motion to reopen with respect to the issue of exceptional circumstances, thought the motion was timely with respect to the issue of notice, with the appropriate fees.

I FIND that Respondent has shown that a failure to receive proper notice prevented his appearance in Court.

I FIND that Respondent's Motion to Reopen should be granted.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be **GRANTED**.

Date [1-14-08] /s/ JOHN D. CARTE
JOHN D. CARTE
United States Immigration Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
800 DOLOROSA STREET-SUITE 300
SAN ANTONIO, TX 78207

Case No. A98-912-347

IN THE MATTER OF PORTILLO-MARTINEZ, HECTOR EMILIANO, RESPONDENT

[Filed: July 13, 2005]

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:

PORTILLO-MARTINEZ, HECTOR EMILIANO

ON BEHALF OF THE DEPT. OF HOMELAND SECURITY:

CARMEN A. LEAL
Asst. District Counsel,
Dept. of Homeland Security
P.O. Box 1939
San Antonio, TX 78297-1939

CHARGE(S):

[X] Section 212(a)(6)(A)(i)—Present in the U.S. without having been admitted or paroled after inspection.

[ ] Section 212(a)( )( )( ) -

[ ] Section 237(a)( )( )( ) -

MEMORANDUM AND ORDER

The above-entitled matter was scheduled for a hearing at 8:30 A.M. on Jul 13, 2005. The Department of Homeland Security (the Department) appeared by and through its Assistant District Counsel.

X Respondent was not present and no reasonable cause was provided for respondent's failure to appear.

___ Respondent's counsel of record was present but could offer no reasonable cause for respondent's failure to appear.

The charging document, the Notice to Appear (Exhibit 1), indicates that it was personally served upon the respondent. A notice of the hearing was

___ mailed to respondent. The address to which the notice was mailed is the last known address of record and is an Exhibit.

___ mailed to respondent's counsel of record.

___ personally served upon the respondent/ respondent's counsel at a previous hearing.

X not given to the respondent because the respondent failed to provide the court with his/her address as required under Section 239(a)(1)(F)

of the Act after having been advised of that requirement in the Notice to Appear.

The hearing notice (and any attachment thereto) is entered into the hearing record as an Exhibit. The Immigration Judge determined to proceed with a hearing in absentia pursuant to Section 240 of the Act.

In an in absentia hearing held pursuant to Section 240(b)(5)(A) of the Act the Department has the burden of proving the alien is removable by evidence which is clear, unequivocal and convincing. To meet its burden of proof the Department offered:

_X_ Form I-213 Record of Inadmissible/Deportable Alien.

___ Conviction documents.

___ Other: _____

The Immigration Judge finds that the evidence offered by the Department relates to the respondent and it is entered into the record as an Exhibit.

The respondent, not being present, was unable to meet any applicable burden of proof or to apply for or establish eligibility for any relief to prevent removal from the United States. Any previously filed relief application is deemed abandoned by respondent's failure to appear.

Upon consideration of all the evidence of record, which the Immigration Judge finds to be clear, unequivocal and convincing, the Immigration Judge concludes that the respondent is subject to being removed from the United States for the reason(s) charged in the Notice to Appear.

WHEREFORE, IT IS HEREBY ORDERED that respondent be removed from the United States to EL SALVADOR.

Dated [7-13-05] /s/ JOHN D. CARTE
JOHN D. CARTE
Immigration Judge

APPENDIX F

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.

* * * * *