



Niz-Chavez, Pereira, and **Notices to Appear**

National Immigration Litigation Alliance
in collaboration with Children's Immigration Law Academy

August 2021



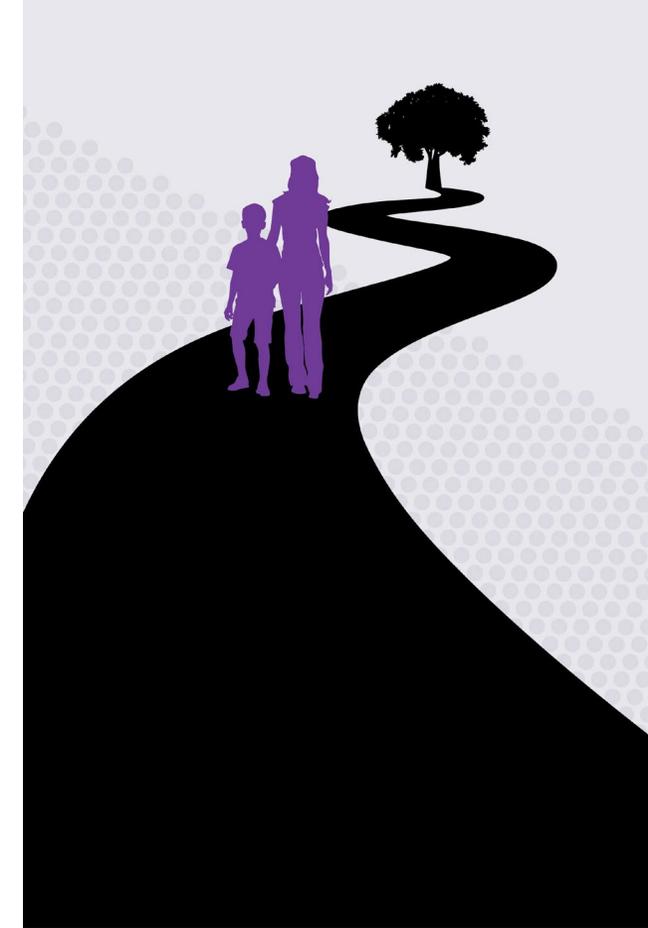
CHILDREN'S IMMIGRATION LAW ACADEMY (CILA)

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ASSOCIATION'S COMMISSION ON IMMIGRATION.

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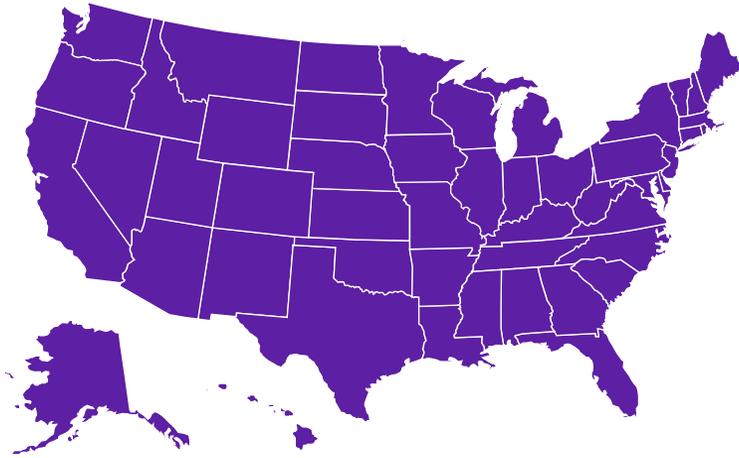
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WE BELIEVE EVERY CHILD SHOULD HAVE
REPRESENTATION.



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Nationwide & in Texas



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for Children Facing
Deportation**



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**Collaboration
through Working
Groups**



Trainings



**Support at
Emergency Shelters**



**Texas Specific
Trainings & Resources**



Pro Bono Initiatives

CILA-NILA Partnership



Provide trainings, resources and technical assistance (Texas) related to appellate and litigation practice



Some emphasis on matters originating within Fifth Circuit



Posted trainings include:

- *Ready to Win—Moving Beyond Trying Cases at the IJ Level*
- *Introduction to Federal Court Practice Parts I and II*
- *Advanced Immigration Legal Research*
- *Legal Writing*
- *Litigating SIJS Delay Cases: Mandamus and APA*
- *Attorneys Fees Under the Equal Access to Justice Act*
- *Winning at the BIA*
- *Habeas Petitions 101 – Law & Practicalities*

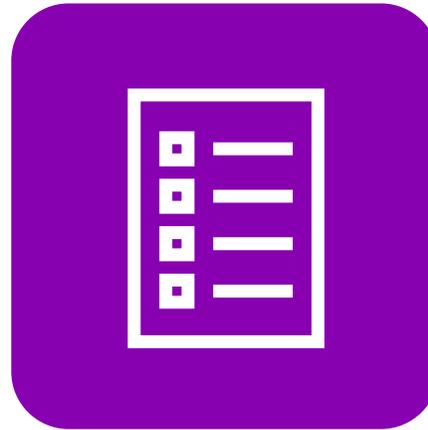
Upcoming trainings include:

- *Administrative Procedures Act (APA) Actions after SIJS Denials*
- *Petitions for Review and Judicial Stays of Removal (5th Circuit)*

CILA NILA Partnership



**Trainings –
Live and Recorded**



**Resources –
Practice
Advisories &
Templates**



**Texas –
Technical Assistance,
Legal Writing
Technical Assistance**

Overview

- Legal Background:
 - *Pereira v. Sessions*, 138 S. Ct. 2105 (2018)
 - *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)
- Options if your client may be eligible for:
 - Cancellation of removal
 - Post-conclusion voluntary departure
 - Recission of an *in absentia* removal order
 - Termination of proceedings

Pereira v. Sessions

- Interprets definition of “notice to appear” under 8 U.S.C. § 1229(a) for purposes of cancellation of removal stop-time rule, 8 U.S.C. § 1229b(d)(1)
- “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.”

BIA & Courts Respond to *Pereira*

Defective NTA is:

- Not a basis for termination: *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018); *Matter of Rosales Vargas & Rosales-Rosales*, 27 I&N Dec. 745 (BIA 2020); all courts of appeals to address the issue
- Not a basis for recission: *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019); some courts of appeals
- Able to be cured by hearing notice: *Matter of Mendoza-Hernandez & Capula-Cortez*, 27 I&N Dec. 520 (BIA 2019); circuit split

Niz-Chavez v. Garland

Stop-time rule not triggered unless and until the government issues a **single-document NTA containing the information required by 8 U.S.C. § 1229(a)(1)**, including the hearing's time and place. A subsequent hearing notice supplying information missing from the NTA does not stop time.

New Arguments after *Niz-Chavez*

- Preserve issues – no post-*Niz-Chavez* law on many issues in many jxs
- Think about:
 - Cancellation eligibility
 - Post-conclusion voluntary departure
 - Rescission of *in absentia* orders
 - Termination?

Cancellation: Pending BIA appeals

If IJ denied cancellation re: stop-time rule, raise *Niz-Chavez* on appeal:

- In merits briefing
- Post-merits briefing, in:
 - Statement of New Legal Authorities
 - Motion to Accept Supplemental Brief
- See BIA Practice Manual, Ch. 4.6(g)(i)-(ii)

Cancellation: Pending BIA appeals

If client did not apply before IJ, file a motion to remand for consideration of cancellation.

- 8 C.F.R § 1003.2(c)(4) – check for 2020 version of regs – and BIA Pr. Manual, Ch. 5.8(a)
- Comply with motion to reopen requirements
- Try this for clients who:
 - Did not apply before IJ even though eligible
 - Acquired sufficient residence/presence while BIA appeal pending



Cancellation: Pending PFRs

If it would benefit client, consider:

- Joint motion to remand, if OIL is willing
- Motion to put case in mediation
- Motion to remand/summarily grant PFR

If defective NTA issues is preserved:

- Argue in briefing, or
- If briefing is complete, file letter under FRAP 28(j)

If issue not raised below: consider filing motion to reopen at BIA;
motion to hold PFR in abeyance with court of appeals



Cancellation: Post-Final Order

Consider options for motions to reopen or motions to reconsider, including:

- Will DHS agree to joint motion to reopen?
- Does client have non-*Niz-Chavez* bases for reopening or reconsideration?
- What is/was the filing deadline for a statutory motion?
- Has client previously filed a motion to reopen or reconsider?
- Is client outside of the United States and, if so, would departure bar apply to certain motions?



Joint Motions

ICE interim policy on *Niz-Chavez* motions to reopen

- “[F]or 180 days from the date of the Supreme Court’s decision . . . ICE attorneys . . . will presumptively exercise their prosecutorial discretion to join or not oppose a motion to reopen filed by such noncitizens who demonstrate that they are prima facie eligible for cancellation of removal.”

<https://www.ice.gov/legal-notices>

- Joining motions remains in ICE’s discretion

Statutory Motions

- **Motion to reopen:** based on new and previously unavailable evidence (facts/circumstances); 90-day deadline
 - 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)
- **Motion to reconsider:** based on errors of law or fact in prior decision; 30-day deadline
 - 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b)
- Is there a basis for equitable tolling of filing deadline/one-motion limit?

Equitable Tolling

- Court-created doctrine that extends filing deadlines if:
 - (1) an extraordinary circumstance prevented timely filing; AND
 - (2) the individual acted with due diligence in pursuing their rights
- *Holland v. Florida*, 560 U.S. 631, 649 (2010), but also check circuit-specific standards!
- Also applies to one motion limit
- Reviewable on petition for review

Sua Sponte Motions

- By regulation, the IJ/ BIA may at any time reopen a proceeding in which it has made a decision. 8 CFR §§ 1003.2(a), 1003.23.
 - Check for 2020 version of the regs!
- Whenever possible, request sua sponte reopening in the alternative
 - Sua sponte reopening is entirely discretionary; there are limitations on judicial review and post-departure motions
- Argue reopening appropriate due to exceptional circumstances, including fundamental change in law.
 - *Matter of G- D-*, 22 I&N. Dec. 1132 (BIA 1999); *Matter of J- J-*, 21 I&N Dec. 976 (BIA 1997); *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998)

Post-Conclusion Voluntary Departure Eligibility

An IJ may grant voluntary departure at the conclusion of proceedings if he or she makes findings including that:

- “[The noncitizen] has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title.”

8 U.S.C. § 1229c(b)(1)(A)

Post-Conclusion Voluntary Departure Eligibility

- Strong argument that a deficient NTA does not trigger the end of physical presence
- Ninth Circuit agrees: *Posos-Sanchez v. Garland*, 3 F.4th 1176 (9th Cir. 2021)
- Bad BIA precedent before *Niz-Chavez*: *Matter of Viera-Garcia & Ordonez-Viera*, 28 I&N Dec. 223 (BIA 2021)

Post-Conclusion Voluntary Departure Eligibility

Consider:

- Requesting as relief in the alternative for currently pending cases
- Raising in cases with currently pending BIA appeals
- If may be beneficial to future options, seeking reopening for clients with final orders

Rescinding *In Absentia* Removal Orders

An IJ can rescind an *in absentia* removal order “upon a motion to reopen filed at any time if the [noncitizen] demonstrates that the [noncitizen] did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)]”

- 8 U.S.C. § 1229a(b)(5)(C)(ii)

Rescinding *In Absentia* Removal Orders

- Argue that defective NTA does not provide notice required under 8 U.S.C. § 1229(a)(1) **or** (a)(2):
 - No notice under (a)(1) because defective NTA isn't (a)(1) compliant

AND

- No need to show (a)(2) compliance because “or” is disjunctive, OR
- Under plain language, (a)(2) notice may only be provided to in case of “change or postponement in the time and place” of proceedings—not possible there was never *initial* time/place of proceedings.



Rescinding *In Absentia* Removal Orders

- Bad BIA precedent before *Niz-Chavez*: *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019); *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019)
 - Also check for decision from relevant court of appeals
- Remember:
 - To consider other bases for rescission and/or reopening
 - That automatic stay of motion to rescind lasts *only* until IJ decides the motion
 - Regs apply one-motion limit but no filing deadline

Motion to Terminate Based on Defective NTA

After *Pereira*, practitioners argued that a defective NTA does not confer jurisdiction on immigration courts and, absent sufficient NTA triggering jurisdiction, termination is required.

- See 8 C.F.R. § 1003.14(a)
- Rejected by BIA, courts before *Niz-Chavez*
- Be aware that counter-arguments are not necessarily impacted by two-step notice issue

Motion to Terminate Based on Defective NTA

Some courts consider compliance with statutory NTA requirements a non-jurisdictional, claim processing rule that can provide basis for termination *if timely raised*.

- *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019); *De La Rosa v. Garland*, 2 F. 4th 685, (7th Cir. 2021)

Motion to Terminate Based on Defective NTA

Consider:

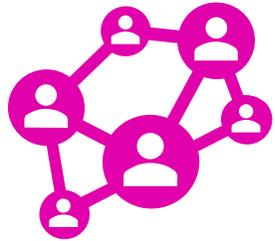
- What is benefit to termination for client? Do they outweigh negatives of filing?
- Timing of filing – has argument been waived under relevant circuit law?



CILA's Pro Bono Platform



Pro Bono Matters for Children Facing
Deportation



Place for legal service providers
to post opportunities



Place for pro bono attorneys to
find a case



Help more children have
representation

The screenshot shows the website interface for 'Pro Bono Matters for Children Facing Deportation'. At the top, there are logos for the American Bar Association (ABA) and CILA Children's Immigration Law Academy. A navigation menu includes 'Home', 'About', 'Pro Bono', 'Resources', 'Trainings', and 'Legal'. The main heading is 'Pro Bono Matters'. Below this, a welcome message reads: 'Welcome to Pro Bono Matters for Children Facing Deportation!'. A prominent purple call-to-action box says 'View Pro Bono Cases' and encourages users to click 'Interested' to submit an interest form. To the right, a text block states: 'The numbers speak for themselves. Thousands of young people in immigration court have no attorney at their side. Representation makes a significant difference in the lives of children facing deportation. Many children have legal relief available that could offer them protection and more security in the United States. The only thing missing is knowledge and guidance to navigate the system.' A pie chart titled 'Juvenile Representation Rates in Immigration Court' shows 48% represented and 52% unrepresented. Below the chart, it notes the data is from February 2021. Another section titled 'Standing with Children' discusses the need for representation for unaccompanied children. A 'Children's Immigration Law Academy (CILA) Pro Bono Guide' is also featured.

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APA Actions After SIJ
Petition Denials.

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