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American Immigration Council

**PRACTICE ALERT**[1]

*Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022)

February 8, 2022

In *Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022), the Board of Immigration Appeals (BIA) rejected notice-based arguments for rescinding and reopening an *in absentia* order when the government serves the respondent with a Notice to Appear (NTA) lacking information about a hearing's time and place as required by Immigration and Nationality Act (INA) section 239(a)(1). This practice alert provides brief background on the case law relevant to *Laparra*, describes the *Laparra* decision and its implications, and provides practice tips for immigration practitioners in light of the decision.

## I. Jurisprudential Background for *Laparra*: Relevant U.S. Supreme Court, Court of Appeals, and BIA Decisions

The *Laparra* decision is the most recent example of the BIA's attempts to narrow the potential impact and reach of two U.S. Supreme Court decisions that have ruled that there are consequences when the government issues a respondent an NTA that lacks information about the hearing's time and place as required by INA § 239(a)(1). First, in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court held that an NTA lacking information about the hearing's time and place does not trigger the cancellation of removal stop-time rule. Then, in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Court held that an NTA must contain the time and place of the hearing in a single document in order to trigger the stop-time rule in cancellation of removal cases, and that a subsequently-issued hearing notice does not stop time if the NTA did not include the required information.[2] After each of these decisions, the BIA and U.S. courts of

[1] Publication of the National Immigration Project of the National Lawyers Guild (NIPNLG) and the American Immigration Council (AIC), 2022. This practice alert is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The authors thank Yulie Landan for her contributions. The advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case.

[2] For a detailed discussion of the *Niz-Chavez* and *Pereira* decisions and their implications, see AIC, Catholic Legal Immigration Network (CLINIC) & NIPNLG, *Strategies and Considerations in the Wake of* Niz-Chavez v. Garland (June 30, 2021),

appeals have considered how the Supreme Court's holdings regarding what comprises a statutorily sufficient NTA in the context of the cancellation of removal stop-time rule, apply to other contexts in which the law ties serious immigration consequences to the issuance of an NTA pursuant to INA § 239(a)(1). For example, courts have addressed whether a defective NTA provides a basis for termination of removal proceedings,[3] whether a defective NTA triggers the stop-time rule for post-conclusion voluntary departure,[4] and whether a defective NTA provides grounds for rescission and reopening of an *in absentia* removal order based on lack of notice.

After *Pereira*, the BIA answered the latter question in the negative in two 2019 decisions, *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019), and *Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019). But the Supreme Court's 2021 *Niz-Chavez* decision breathed new life into notice-based rescission arguments, and the two U.S. courts of appeals to so far have considered the question—the Fifth Circuit in *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), and the Ninth Circuit in *Singh v. Garland*, No. 20-70050, — F.4th —, 2022 WL 334119 (9th Cir. Feb. 4, 2022)—have agreed that a defective NTA provides ground for rescission of an *in absentia* order, regardless of a subsequently issued hearing notice. In *Rodriguez*, the Fifth Circuit noted that both the stop-time statute at issue in *Pereira* and *Niz-Chavez* and the *in absentia* statute "specifically reference the [INA § 239(a)] notice requirements," and concluded that the *Niz-Chavez* Court's "separate interpretation of the [INA § 239(a)] notice requirements . . . applies in the *in absentia* context."[5] Thus, the Fifth Circuit held that the BIA had applied a "legally erroneous interpretation" of the statute in concluding that the subsequent hearing notice served on Mr. Rodriguez following the defective NTA satisfied the notice requirements of INA § 239(a), as referenced in the *in absentia* statute, and granted his petition for review.[6]

In *Laparra*, the BIA once again rejected the argument that a defective NTA provides the basis for rescission of an *in absentia* order, as long as the respondent was subsequently issued a hearing notice supplying information about the hearing's time and place.

The Ninth Circuit rejected *Laparra* in *Singh v. Garland*, finding that "[t]he plain text [of the statute], the statutory structure, and common sense command" that the INA § 239(a) notice requirements, as established in *Pereira* and *Niz-Chavez*, apply in the *in absentia* context.[7] Like

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https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2021_30Jun_NizChavez_PA.pdf. An updated version of this advisory is forthcoming as of the date of this practice alert's issuance.

[3] *See, e.g.*, *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018); *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021); *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019) (concluding that statutory NTA requirement, while not jurisdictional, is a claim-processing rule that can provide basis for dismissal if respondent timely objects or shows excusable delay and prejudice).

[4] *See, e.g.*, *Matter of Viera-Garcia & Ordonez-Viera*, 28 I&N Dec. 223 (BIA 2021), *overruled by Matter of M-F-O-*, 28 I&N Dec. 408 (BIA 2021); *Posos-Sanchez v. Garland*, 3 F.4th 1176 (9th Cir. 2021).

[5] 15 F.4th at 355.

[6] *Id.* at 356.

[7] 2022 WL 334119, at *5.

the respondent in *Laparra*, the petitioner in *Singh* argued that his *in absentia* order should be reopened and rescinded because the NTA did not contain a date and time for his removal proceedings, even though a subsequent hearing notice contained this information. The Ninth Circuit granted the petition for review, holding that "noncitizens must receive a Notice to Appear in a single document specifying the time and date of the noncitizen's removal proceedings, otherwise any *in absentia* removal order directed at the noncitizen is subject to rescission."[8] The Ninth Circuit thus joined the Fifth Circuit in concluding that the BIA's interpretation of the *in absentia* rescission statute was "legally erroneous" in light of the Supreme Court's decision in *Niz-Chavez*.[9]

## II. The BIA's Decision in *Matter of Laparra*

Mr. La Parra De Leon[10] had been personally served with an NTA—the charging document that initiates removal proceedings in immigration court—in 2008, but it lacked information about the date or time of the hearing. Two years later, the immigration court mailed him a hearing notice with the date and time of his upcoming hearing. Mr. La Parra De Leon did not appear at his hearing, and the immigration judge (IJ) issued him an *in absentia* removal order. After the Supreme Court issued *Niz-Chavez* in 2021, Mr. La Parra De Leon relied on the decision to file a motion to reopen and terminate his removal proceedings based on lack of jurisdiction, or in the alternative to reopen and rescind his 2010 *in absentia* removal order.

The BIA denied Mr. La Parra De Leon's motion to reopen and terminate and his alternative motion to rescind and reopen the *in absentia* order. In denying the motion to terminate, the BIA noted that it had already decided in previous cases—first in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), after the Supreme Court's *Pereira* decision, and then in *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021), after *Niz-Chavez*—that a defective NTA "vests jurisdiction with an Immigration Judge so long as a respondent is later served with a notice of hearing specifying the time and place of the hearing."[11]

Turning to Mr. La Parra De Leon's motion to reopen and rescind the *in absentia* order based on the defective NTA, the BIA held that even when a respondent is served with a noncompliant NTA lacking information about a hearing's time and place, they receive sufficient written notice to support the entry of an *in absentia* order of removal where they are "properly served with a statutorily compliant notice of hearing" specifying this information.[12] It noted that it had already

[8] *Id.* at *3.
[9] *Singh*, 2022 WL 334119, at *2; *Rodriguez*, 15 F.4th at 356 (concluding, in decision issued before *Laparra*, that BIA's interpretation was "legally erroneous").
[10] Although the BIA decision is styled as *Matter of Laparra*, the respondent's correct name is Sergio Rodolfo La Parra De Leon. *See La Parra De Leon v. Garland*, No. 22-1081 (1st Cir. Jan. 31, 2022) (appeal docketed).
[11] *Laparra*, 28 I&N Dec. at 427-29.
[12] *Id.* at 434.

ruled in *Pena-Mejia* and *Miranda-Cordiero*—issued before *Niz-Chavez* but after *Pereira*—that an *in absentia* order need not be rescinded if the respondent received written notice of the hearing's time and place *either* in the NTA *or* in a subsequent hearing notice. It rejected Mr. La Parra De Leon's argument that *Niz-Chavez* warranted the BIA withdrawing its pre-*Niz-Chavez* decisions.

The *Laparra* decision distinguished *Niz-Chavez*, noting that the latter had focused heavily on the use of the word "a" preceding "Notice to Appear" in INA § 239(a) in reaching its conclusion that only a single-document NTA (and not a hearing notice) could trigger the stop-time rule. In contrast, the BIA reasoned, the *in absentia* statute lacked any definite or indefinite article preceding the term "notice," and instead "mandates the entry of an *in absentia* order of removal in certain cases where a respondent fails to appear 'after *written notice* required under paragraph (1) *or* (2) of section 239(a) has been provided.'"[13] Section 239(a)(1), the provision at the heart of *Pereira* and *Niz-Chavez*, describes the NTA's requirements, while section 239(a)(2) is titled "Notice of change in time or place of proceedings" and provides that a noncitizen must be served with a notice specifying the new time or place of proceedings and the consequences for failing to appear. According to the BIA, since the *in absentia* statute does not use the word "a" or "the" preceding "notice," it does not require a discrete act of notice provided in a single document. Instead, the BIA continued, because the *in absentia* statute uses the word "or"—referring to notice under INA § 239(a)(1) or INA § 239(a)(2)—an *in absentia* order was justified and rescission was not necessary despite a defective NTA so long as a respondent receives a statutorily compliant hearing notice.

## III. Tips for Immigration Practitioners in Light of *Laparra*

Practitioners with clients who have *in absentia* removal orders issued after service of a defective NTA will need to consider the implications of *Laparra* on potential avenues to rescission and reopening. Some initial considerations include:

1. The *Laparra* decision is not binding within the jurisdictions of the Fifth and Ninth Circuits, where *Rodriguez* and *Singh* govern, respectively, and hold that a defective NTA alone—even if a subsequent hearing notice supplies the missing information—provides grounds for notice-based rescission. The *Laparra* decision briefly acknowledged *Rodriguez* and declined to follow it in Mr. La Parra De Leon's case, which arose in the First Circuit. But since *Rodriguez* and *Laparra* both interpret the statute based on its plain language (rather than through an ambiguity framework), *see Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *Rodriguez* continues to govern within the Fifth Circuit and practitioners should rely on it in making notice-based rescission arguments. Indeed, the BIA did not even attempt to invoke *Brand*

[13] *Id.* at 431 (emphasis in original).

*X*, as it has done in the past where it believes that a new published BIA decision trumps a previous, contrary circuit court precedent that interpreted an ambiguous statute.[14] In *Singh*, the Ninth Circuit considered and expressly rejected *Laparra*, and *Laparra* is therefore not good law in the Ninth Circuit.

2. Where it serves clients' interests, practitioners in jurisdictions outside the Fifth and Ninth Circuits should argue that a defective NTA provides grounds for rescission of an *in absentia* order and that *Laparra* was wrongly decided. Making these arguments will preserve the issues for appellate review. As of the date of this practice alert's issuance, only the Fifth and Ninth Circuits have addressed, post-*Niz-Chavez*, whether a defective NTA justifies rescission despite a subsequent hearing notice.[15] But, as of January 31, 2022, *Laparra* is before the First Circuit on appeal.[16] Practitioners in the First Circuit should follow this appeal for its impact on the viability of arguments that a defective NTA provides grounds for rescission of an *in absentia* removal order.

3. In making defective NTA-based rescission arguments to preserve the issue for appeal, practitioners should develop all viable arguments, which may include:
    - The use of the word "or" in the rescission part of the *in absentia* statute, INA § 240(b)(5)(C)(ii), plainly requires rescission and reopening where the respondent can show *either* a defective NTA *or* lack of hearing notice. The BIA in *Laparra* wrongly conflates as "identical" the language found in INA § 240(b)(5)(A)—the provision discussing when IJs can proceed *in absentia*—with the language found in the statute relevant for rescission, INA § 240(b)(5)(C)(ii).[17] In fact, the structure of these provisions is meaningfully different and INA § 240(b)(5)(C)(ii) plainly authorizes rescission based only on a defective NTA. The BIA relies in part on a pre-*Niz-Chavez* Sixth Circuit decision, *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019), reaching a similar conclusion to *Laparra*, but fails to acknowledge a subsequent Sixth Circuit case which observed that "[o]n first read, the disjunctive 'or' suggests that immigrants need only prove a lack of notice under *either* paragraph (1) *or* paragraph (2) in the 'alternative.'"[18]
    - Even assuming *arguendo* that INA § 240(b)(5)(C)(ii) requires a showing of both inadequate notice under INA § 239(a)(1) and inadequate notice under INA §

[14] *See, e.g.*, *Matter of N-V-G-*, 28 I&N Dec. 380, 386 (BIA 2021).
[15] While not reaching the issue, the U.S. Court of Appeals for the Third Circuit in a footnote in *Chavez-Chilel v. U.S. Attorney General* seemed to agree with *Rodriguez*'s reasoning. 20 F.4th 138, 144 n.7 (3d Cir. 2021).
[16] *La Parra De Leon v. Garland*, No. 22-1081 (1st Cir. Jan. 31, 2022) (appeal docketed).
[17] 28 I&N Dec. at 432 n.7 ("Although we did not specifically address section 240(b)(5)(C)(ii) in *Matter of Pena-Mejia* or *Matter of Miranda-Cordiero*, to the extent that provision contains identical language to section 240(b)(5)(A), we ascribe the same meaning to that language.").
[18] *Valadez-Lara v. Barr*, 963 F.3d 560, 569 (6th Cir. 2020) (emphasis in original) (not definitively deciding issue because, following then-existing precedent undermined by *Niz-Chavez*, the court concluded that the hearing notice cured the NTA's defect under INA § 239(a)(1)).

239(a)(2) before rescission is warranted, *Niz-Chavez* and *Pereira* confirm that an individual cannot be deemed to have received proper notice under INA § 239(a)(2)—providing for notice of a "change in time or place of proceedings"—if NTA notice under INA § 239(a)(1) lacked required information about the hearing's initial time or place. The *Laparra* decision brushes this argument off in a cursory footnote without engaging it.[19] The Ninth Circuit in *Singh* forcefully engaged with this text, noting that INA § 239(a) "presupposes" that the initial NTA, as described in INA § 239(a)(1), "must have included a date and time because otherwise, a 'change' in the time or place" described in INA § 239(a)(2) "is not possible."[20] The *Singh* court also analyzed the structure of INA § 239(a), noting that the first paragraph—INA § 239(a)(1), which defines an NTA's requirements—is "longer and more descriptive."[21] In contrast, INA § 239(a)(2) is a shorter paragraph that "describes only what is required when there has been a 'Notice of change in time or place of proceedings.'"[22]

- For a more fulsome discussion of the two arguments described above, practitioners may wish to review the 2021 *Niz-Chavez* practice advisory issued by AIC, CLINIC, and NIPNLG, and the template motion to rescind and reopen produced by the National Immigration Litigation Alliance.[23] Both of these resources were issued before *Laparra*, however. For a robust critique of *Laparra*'s reasoning, including its flawed interpretation of INA § 239(a)(2), practitioners may wish to review former immigration judge Jeffrey S. Chase's blog post about the decision.[24]

4. Practitioners should include all viable arguments in a motion to reopen and rescind an *in absentia* order. Besides notice-based arguments grounded in the defective NTA, other possible bases for reopening and rescission include:
    a. other notice arguments
    b. the fact that the respondent was in custody at the time of the hearing[25]
    c. where the failure to appear was because of exceptional circumstances and the motion is filed within 180 days of the order or establishes that equitable tolling of the 180-day deadline for such motions is warranted[26]

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[19] 28 I&N Dec. at 432 n.8.
[20] 2022 WL 334119, at *5.
[21] *Id.* at *6.
[22] *Id.*
[23] The template, written in June 2021, is available on the National Immigration Litigation Alliance website, https://immigrationlitigation.org/practice-advisories/.
[24] Jeffrey S. Chase, *Stuck on Repeat* (Jan. 31, 2022), https://www.jeffreyschase.com/blog/2022/1/31/stuck-on-repeat.
[25] INA § 240(b)(5)(C)(ii).
[26] INA § 240(b)(5)(C)(i). Where an *in absentia* order was due to late arrival in court, practitioners should argue, in addition to exceptional circumstances, that the IJ issued the *in absentia* order in error because the respondent did not actually fail to appear. *See Matter of S-L-H- & L-B-L-*, 28 I&N Dec. 318, 320 n.2 (BIA 2021); CLINIC, *The Board*

d. *sua sponte* reopening, and
e. motions to reopen filed jointly with the Department of Homeland Security (DHS).

Practitioners may wish to consult existing practice advisories for a discussion of motions to reopen and rescind *in absentia* orders.[27] It remains to be seen how the Immigration and Customs Enforcement Office of the Principal Legal Advisor (ICE OPLA) will respond to requests for joining motions to reopen and rescind in light of the *Laparra* decision, but practitioners should continue to approach ICE OPLA arguing that joining is warranted in light of the client's individual facts and the administration's enforcement priorities.[28]

5. The *Laparra* decision in no way weakens (nor could it) the holdings in *Niz-Chavez* and *Pereira* that a defective NTA does not stop time for purposes of cancellation of removal. Practitioners with clients who have *in absentia* removal orders but meet the requirements of cancellation of removal in light of *Niz-Chavez* and *Pereira* may still seek rescission and reopening in order to apply for cancellation. But, as discussed above, outside of the Fifth and Ninth Circuits they will need to assert legal grounds for reopening other than merely the defective NTA as discussed above, in addition to preserving the defective NTA rescission argument for appellate review.

## IV. Conclusion

The BIA in *Laparra* seems to disavow the Supreme Court's statutory interpretation in *Niz-Chavez*, just as its previous decisions attempted to ignore the Supreme Court's statutory interpretation in *Pereira*.[29] While it is no surprise that the BIA, which is currently comprised of a Trump administration-selected super majority, has chosen to cabin *Niz-Chavez* to the most restrictive possible reading to avoid benefiting noncitizens with prior orders of removal, it is up

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*of Immigration Appeals Recognizes Tardiness May Present Exceptional Circumstances for Reopening an* In Absentia *Order* (July 28, 2021), https://cliniclegal.org/resources/removal-proceedings/board-immigration-appeals-recognizes-tardiness-may-present.

[27] *See, e.g.*, CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Order*s (updated Oct. 14, 2020), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders; Asylum Seeker Advocacy Project & CLINIC, *A Guide to Assisting Asylum Seekers with* In Absentia *Removal Orders* (updated July 10, 2019), https://cliniclegal.org/resources/asylum-and-refugee-law/guide-assisting-asylum-seekers-absentia-removal-orders.

[28] *See* Memorandum from Alejandro N. Mayorkas, DHS Sec'y, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf; Memorandum from John D. Trasviña, ICE Principal Legal Advisor, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf (noting further forthcoming guidance on joining motions to reopen); *see also* ICE Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in *Niz-Chavez v. Garland* (June 9, 2021), https://www.ice.gov/legal-notices (announcing interim legal position, which expired on November 16, 2021, toward certain motions to reopen where the respondent is now eligible for cancellation of removal).

[29] *See, e.g.*, *Matter of Mendoza Hernandez & Capula-Cortez*, 27 I&N Dec. 520 (BIA 2019) (rejected by *Niz-Chavez*).

to practitioners to preserve and present challenges to the BIA's legally erroneous interpretation of the statute. As a result of such challenges, other U.S. courts of appeals may follow the lead of the Fifth and Ninth Circuits to recognize that a defective NTA is grounds for rescission of an *in absentia* order.