UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	
Marcos-Victor Ordaz-Gonzalez	**A077-076-421**
Respondent.	**Removal Proceedings**

BRIEF FOR *AMICUS CURIAE*, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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BRIEF OF *AMICUS CURIAE*

PRELIMINARY STATEMENT

Amicus Curiae, the American Immigration Lawyers Association (AILA), is submitting this brief to address two issues. First, under the plain language of sections 239(a)(1)(G)(i) and 240A(d)(1) of the Immigration and Nationality Act (INA) unambiguously provides that a Notice to Appear does not trigger the stop time rule if it is missing statutorily required information, including the time and place where the removal proceedings will be held. A Notice to Appear (NTA) that omits this information does not trigger the cancellation of removal stop time rule and that clock does not stop until the defect is remedied, such as through the service of a new NTA or a hearing notice. Second, when Immigration and Customs Enforcement (ICE) serves two NTAs but chooses to initiate removal proceedings by filing the second of the two NTAs, it is the second NTA that triggers the stop time rule.[1]

Congress requires certain information to be included in an NTA. INA § 239(a)(1). This includes the "time and place at which the proceedings will be held." INA § 239(a)(1)(G)(i). While an NTA that does not include this information may be effective for purposes of putting a noncitizen on notice of her address change obligations and the consequences for failing to appear at a hearing, it is not sufficient for triggering the stop time rule in INA § 240A(d)(1). When the NTA omits the hearing time and place, the clock continues to run until this defect is remedied,

[1] AILA does not take any position on the other issues raised by the Respondent or the merits of his case.

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such as when the Immigration Court issues a hearing notice. 8 C.F.R. § 1003.18(b). The Board's contrary decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011), is in conflict with *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005); *Guamanrrigra v. Holder*, 670 F.3d 404, 409 (2d Cir. 2012); and *Dababneh v. Gonzales*, 471 F.3d 806, 810 (7th Cir. 2010). The Board should use the opportunity provided by the Ninth Circuit in the instant case to reexamine *Camarillo*.

This case also presents the not uncommon scenario where ICE issues and serves one NTA but does not file that NTA. Several years later, ICE serves a second NTA and files this one with the Immigration Court to initiate removal proceedings. The second, not the first, NTA triggers the stop time rule because that is the document used to initiate removal proceedings. A contrary holding would cause considerable unfairness by giving significant legal weight to deficient charging documents that have to be rewritten before they are sufficient to file with the Immigration Court. Furthermore, ICE may choose to delay initiating removal proceedings for reasons relating to its exercise of prosecutorial discretion. In those circumstances, it would contravene congressional intent and undermine the agency's exercise of discretion to give legal weight to an NTA that was prepared several years before the eventual initiation of removal proceedings under a different charging document.

INTEREST OF *AMICI CURIAE*

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and

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teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

STATEMENT OF THE ISSUES PRESENTED

A. In light of several courts of appeals decisions interpreting the plain language of the statute, the Board should revisit its holding in *Camarillo* that a defective NTA is sufficient to trigger the stop time rule.

B. When ICE issues two NTAs but only files the second one, whether for prosecutorial discretion reasons or because the first NTA was legally deficient, the second NTA is the charging document that triggers the stop time rule, not the first NTA.

ARGUMENT

This case presents two issues of considerable importance to thousands of noncitizens, their families, and their communities. Resolution of these issues will affect the eligibility of many noncitizens for cancellation of removal. The decisions on whether or when to initiate removal proceedings against lawful permanent residents and other noncitizens is within ICE's sole discretion. When ICE chooses to initiate removal proceedings, Congress very clearly set for the process that ICE must follow.

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I. Under the Plain Language of the Statute, the Cancellation of Removal Clock does not stop until one or More Documents Satisfying all of the Section 239(a)(1) Requirement is Served on a Noncitizen

Certain applicants for cancellation of removal have to meet continuous residence or continuous physical presence requirements. INA §§ 240A(a)(2) and (b)(1)(A). Among the events that stop the accrual of additional time towards either of these requirements is the service of a "notice to appear under section 239(a)." INA § 240A(d)(1). The INA defines the NTA as a document containing the following information:

> (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) of this section and (ii) a current list of counsel prepared under subsection (b)(2) of this section.
> (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.

INA § 239(a)(1).

Congress spoke plainly in defining the NTA. When all of the required information is not included in the document, including the time and place of the hearing, it is not a "notice to appear" for purposes of triggering the stop time rule, although it may be sufficient to put the noncitizen on notice of his address change obligations and the failure to appear consequences.

The regulations anticipate a situation in which the "notice to appear" omits the time and place for the hearing. When this happens, the Immigration Court is responsible for issuing a hearing notice that contains this information. 8 C.F.R. § 1003.18(b). In those circumstances, the "notice to appear" is actually two documents: the charging document issued by ICE or another component of the Department of Homeland Security, and the hearing notice. The stop time rule is not triggered until the service of a document containing the information omitted from the charging document.

In *Camarillo*, the Board found that the statutory language is ambiguous. 25 I&N Dec. at 647. The Board favored an interpretation that effectively read the requirement that a charging document include a hearing time and place for it to constitute a "notice to appear" out of the statute. *Id.* at 648-50. The Board relied in part on the Immigration Court backlog and delays in scheduling cases. *Id.* at 650. However, a delay in holding a hearing does not prevent ICE from including a hearing time and place on a charging document. The stop time rule will be triggered if the charging document includes a hearing date even if that date is months in the future.

The Board's decision conflicts with not only the plain language of the statute but also decisions from three courts of appeals. The Board should reconsider *Camarillo* in light of these decisions.

The Ninth Circuit holds that when a charging document omits the hearing time and place, the stop time rule is not triggered until the service of a document, such as a hearing notice, containing the missing information. *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 937 n.3 (9th Cir. 2005). The Board dismissed this as dicta and concluded that the court reached a contrary result in *Popa v. Holder*, 571 F.3d 890, 895-896 (9th Cir. 2009). *Camarillo*, 25 I&N Dec. at 649 n.6. In *Popa*, the court addressed a different situation than the one present in *Garcia-Ramirez* or this case. *Popa* dealt with the sufficiency of notice of a noncitizen's address change obligations and failure to appear consequences upon receipt of a charging document that omits a hearing time and place. The Ninth Circuit, like most other circuits, found that a charging document that is missing this information is nonetheless sufficient for those limited purposes. *Popa*, 571 F.3d at 895-96.

A document that is effective to put a noncitizen on notice of her address change obligations and the consequences of failing to appear for a hearing is not sufficient to trigger the stop time rule and the resulting legal disability that flows from that. *Popa* was not concerned with the stop time rule and the sufficiency of the notice under INA § 240A(d)(1). *Garcia-Ramirez*, on the other hand, was concerned with the application of the stop-time rule. If the charging document in that case triggered the stop time rule even though it did not include the hearing place and

time, then the noncitizen would have been ineligible for cancellation of removal as a nonpermanent resident.[2] Because the stop time rule was not triggered until the service of a document containing the hearing place and time, the court then had to address whether Garcia-Ramirez's five-month absence from the U.S. triggered the stop time rule. Thus, the service date of the notice to appear was crucial to the court's resolution of that case and was not mere dicta.

Following *Camarillo*, the Second Circuit addressed this issue. *Guamanrrigra v. Holder*, 670 F.3d 404 (2d Cir. 2012). Guamanrrigra entered the U.S. in September 1995 and was served with a charging document on April 12, 2000. That document omitted a hearing time and place, a defect that the Immigration Court remedied by serving a hearing notice on May 1, 2000. *Id.* at 406. Agreeing with the Seventh Circuit, the Second Circuit found that the notice to appear was sufficient to trigger the stop time rule. *Id.* at 409; *see also Dababneh v. Gonzales*, 471 F.3d 806, 809-10 (7th Cir. 2006). However, contrary to *Camarillo*, it was not the charging document by itself that triggered the stop time rule but rather that document in combination with the hearing notice. *Guamanrrigra*, 670 F.3d at 409-10; *Dababneh*, 471 F.3d at 809-10. The combination of the two documents constitutes the "notice to appear" that triggers the stop time rule and the clock stops upon the service of the second document.

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[2] Garcia-Ramirez entered the U.S. in May 1988, the charging document was served on April 10, 1997, and the hearing notice was served on October 7, 1998.

The Second, Seventh, and Ninth Circuits relied on the plain language of the statute and regulations. The reasons given by the Board for disregarding the plain language of the statute should be revisited. *Camarillo*, 25 I&N Dec. at 647-50. Distinguishing between the adequacy of notice to a noncitizen of her address change obligations and the failure-to-appear consequences on the one hand and the sufficiency of a document to trigger the stop time rule, preserves the delicate balance between ICE and noncitizens in removal proceedings. ICE can initiate removal proceedings without bothering to obtain a hearing time and place but it cannot cut off a noncitizen's eligibility for relief from removal until it complies with the statutory requirements for a "notice to appear."

The purpose of the stop time rule, to prevent noncitizens from delaying proceedings to accrue additional time in the U.S. so they can qualify for other forms of relief, is not served by *Camarillo*. 25 I&N Dec. at 649-50; H.R. Rep. No. 104-469 (1996). Noncitizens served with a deficient charging document are not responsible for that deficiency and are not responsible for delays in the filing of that document with the Immigration Court or the issuance of a hearing notice. Under these circumstances, noncitizens are not trying to abuse the system or delay the proceedings. If anyone is responsible for the delay, it is ICE in failing to serve a proper notice to appear or promptly request a hearing date from the Immigration Court. Punishing noncitizens for ICE's actions does nothing to encourage prompt resolution of removal proceedings.

II. The Stop Time Rule is not Triggered by a Document that ICE does not use to Initiate Removal Proceedings

In addition to the question of whether a charging document that is missing the information required by INA § 239(a)(1)(G)(i) is sufficient to trigger the stop time rule, this case also presents the question of whether a document that ICE does not use to initiate removal proceedings triggers the stop time rule. For example, if ICE issues two charging documents but only uses the second one to initiate removal proceedings, the first document does not trigger the stop time rule.

In this age of ICE's increased use of prosecutorial discretion and termination of removal proceedings through programs such as Deferred Action for Childhood Arrivals[3], it is becoming increasingly likely that a noncitizen will have multiple charging documents issued against her. When ICE chooses to not file a charging document, such as because the document is deficient or because of reasons relating to prosecutorial discretion, and instead chooses to later file a different charging document, it does not serve the stop time rule's purpose to apply it to the first document. In those circumstances, the noncitizen is not trying to delay removal proceedings or game the system. *Camarillo*. 25 I&N Dec. at 649-50; H.R. Rep. No. 104-469 (1996). Rather, ICE chooses, for humanitarian or other reasons, to delay the initiation of removal proceedings. Equities that are gained while the noncitizen is allowed to remain here by ICE are given greater, not lesser, weight. *Matter of Pena-Diaz*, 20 I&N Dec. 841 (BIA 1994).

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[3] http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process (last visited January 20, 2014).

ICE and its fellow agencies within the Department of Homeland Security have complete control over whether and when to issue, serve, and file a notice to appear. When they choose to refrain from filing a charging document, the serious legal disabilities that come with triggering the stop time rule should not apply when ICE does not rely on the first document to initiate removal proceedings.

In similar circumstances, the Board found that a charging document issued in a prior proceeding does not stop the clock in a new proceeding. *Matter of Cisneros-Gonzalez*, 23 I&N Dec. 668 (BIA 2004). The stop time rule is only triggered by the service of the charging document that is used to initiate the removal proceedings. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000). The situation that arises in cases like the instant case, where there is no prior proceeding but the ongoing removal proceedings did not arise out of the service of the earlier of two charging documents, is a combination of *Cisneros-Gonzales* and *Mendoza-Sandino*. If ICE cannot or does not want to rely on the earlier charging document to initiate removal proceedings, then that earlier document does not trigger the stop time rule.

To hold otherwise would "erect an additional, gratuitous barrier to relief." *Cisneros-Gonzalez*, 23 I&N Dec. at 671. It would arbitrarily prevent the Immigration Courts from reaching the ultimate question in these cases, which is whether noncitizens should be allowed to remain in the U.S. *See Judulang v. Holder*, 132 S. Ct. 476, 485 (2011). It would also frustrate the purpose of favorable

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exercises of discretion by penalizing noncitizens that are served with charging documents that are not used for the initiation of removal proceedings.

CONCLUSION

Amicus Curiae the American Immigration Lawyers Association respectfully requests that the Board revisit and overrule *Matter of Camarillo* and that hold that (1) a charging document that omits the information required by INA § 239(a)(1) does not trigger the stop time rule because that rule is not triggered until there is a document or documents that contain the statutorily required information and (2) when there are multiple charging documents but only one document is filed to initiate removal proceedings, the stop time rule is triggered upon the service of the document that is the basis for the removal proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2014, I served a copy of the Brief of Amicus Curiae by first class mail on ICE Chief Counsel, addressed to 606 S. Olive Street, 8th Floor, Los Angeles, California 90014, and Andrew Knapp, addressed to Immigrant Access to Justice Assistance, 1301 W. 2nd Street, Suite 100, Los Angeles, California 90026.

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