

Immigration Court: BIA

Case: *Matter of Viera-Garcia and Ordenez-Viera*, 28 I&N Dec. 223 (BIA 2021)

Date: January 26, 2021

Adjudicated by: Wilson, Goodwin, Donovan

Opinion: Wilson

Tags: Immigration, defective NTA, Hearing Notice, stop-time rule, post-conclusion voluntary departure, smuggling, discretionary analysis, smuggling fee

Questions Presented:

- Does a defective NTA trigger the stop-time rule for Post-Conclusion Voluntary Departure?
- Can a defective NTA be cured by the subsequent service of a Notice of Hearing specifying the missing information, for purposes of the stop-time rule governing Post-Cancellation Voluntary Departure?

Holdings:

- Defective NTA does not stop accrual of physical presence for PCVD either.
- Hearing notice cures the defective NTA and stops accrual of physical presence. [Note that this holding may not last under *Niz-Chavez*]

Rationale: *Pereira* dictates that a defective NTA does not stop the accrual of physical presence, so we'll apply that to the PCVD statute too. As of the date of this decision, *Bermudez-Cota* directs that a subsequent hearing notice cures a defective NTA for purposes of the stop-time rule, so we'll apply it to PCVD too.

Facts: Mother and son from El Salvador entered U.S. May 1, 2014 and were served NTAs without time and date a couple days later. Hearing notices were served on May 4, 2015.

Procedural History:

- **2018: IJ**—request for Post-Conclusion Voluntary Departure denied because IJ did not find the stop-time rule application to PCVD in *Pereira*.

Appeals to Statute & Precedent:

- **8 U.S.C. §1229c(d)(1) / INA §240A(d)(1):** stop-time rule for post-conclusion VD (one year of physical presence before service of NTA)
- **INA §240B(b)(1)(A):** accrual of physical presence shall be deemed to end when the alien is served a NTA under section **239(a)** of the Act.

- ***Pereira v. Sessions*, 138 S. Ct. 2015 (2018):** defective NTA ain't no NTA; does not trigger stop-time rule for cancellation of removal.
- ***Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018):** subsequent Notice of Hearing cures a defective NTA. (overruled by *Niz-Chavez v. Garland* (US 2021))
- ***Matter of Mendoza-Hernandez and Capula Cortes*, 27 I&N Dec. 520 (BIA 2019):** confirmed *Bermudez-Cota*

Respondents' Argument:

- A defective NTA does not trigger the stop-time rule for Post-Conclusion Voluntary Departure, per *Pereira*.

Discussion:

- “After *Pereira*, we have considered arguments that the Supreme Court’s holding applies to cases that do not involve the ‘stop-time’ rule, but we have declined to expand the Court’s narrow holding.” 225
- Here: NTA was deficient; accrual of physical presence was stopped when they were served with Hearing Notices from the court. 226
 - ***Pre-Niz-Chavez:* does not answer the question whether the two-step process is applicable in Post-Conclusion Voluntary Departure cases.**
 - But they’d made it one year, so case gets remanded.
- **Discretion re. PCVD:**
 - Denied because IJ noted that respondent had paid \$10K to a smuggler to bring them—but actually it was her mother who paid.
 - **“The significance of this factual error to the discretionary analysis may depend on the respondents’ knowledge of and involvement in the smuggling.” 227**