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Stopping the Clock: Resolving the Circuit Split over the Notice to Appear and the Stop-Time Rule under the Immigration and Nationality Act

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Stopping the Clock: Resolving the Circuit Split over the Notice to Appear and the Stop-Time Rule under the Immigration and Nationality Act

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ABSTRACT

The Immigration and Nationality Act (INA or "the Act") is the primary governing body of law on immigration in the United States. The INA establishes the procedures for removing noncitizens from the country.

To initiate removal proceedings, the Department of Homeland Security (DHS) serves a Notice to Appear (NTA) on a noncitizen deemed to be removable. The INA specifies information to be contained in the NTA, including the hearing date and location. A form of relief from removal that noncitizens may apply for is cancellation of removal, which is contingent on factors such as continuous residence in the United States for a certain period of time. Once the DHS serves a noncitizen with an NTA, however, the noncitizen's continuous residence is suspended based on a provision in the INA called the "stop-time" rule.

Courts are split on whether the NTA must contain *all* information listed in the INA to trigger the stop-time rule. Most circuits, upon determining that the INA is ambiguous on this point and in deference to the Board of Immigration Appeals (BIA), have held that the NTA need not contain the hearing date and location. The Third Circuit is the only circuit that has found the INA unambiguous, holding that the INA plainly requires the NTA to contain all information to trigger the stop-time rule.

This Comment first provides an overview of the INA, focusing on removal proceedings. This Comment then discusses the circuit

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split on whether an NTA lacking information listed in the INA triggers the stop-time rule. This Comment concludes that an NTA must contain all information specified in the INA, consistent with the plain meaning of the text, statutory context, and policy considerations.

TABLE OF CONTENTS

I. INTRODUCTION

Substantial numbers of noncitizens seek admission into the United States annually.[1] The Immigration and Nationality Act[2] (INA or "the Act") places restrictions on the admissibility of these applicants, establishing grounds for excluding certain noncitizens.[3] Similarly, admitted noncitizens who are determined to be deportable based on deportation provisions[4] of the INA face removal from the United States.[5]

In *Matter of Camarillo*,[6] in 2005, the government charged Judith Elma Camarillo with alien smuggling as a basis for removal from the country.[7] Camarillo, a Guatemalan citizen, had been residing as a lawful permanent resident in the United States since 2000.[8] The charging document, or Notice to Appear ("NTA"), indicated that the hearing time was yet to be determined, and it was not until two years later in 2007 that Camarillo was eventually notified of her hearing date.[9] Through the ensuing removal proceedings and subsequent appeal, the Board of Immigration Appeals (BIA or "the Board")[10] ultimately found Camarillo ineligible for cancellation of removal, a form of relief that would allow her to stay in the

1. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS 2015 63 (2016), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf.

2. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2012).

3. *Id.* § 1182. Admission refers to "the lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). Examples of grounds for inadmissibility include health-related and criminal grounds. *Id.* § 1182.

4. *Id.* § 1227. Deportation involves removing a noncitizen, already within and admitted to the United States, based on certain grounds such as criminal and national security grounds. *Id.*

5. *Id.* § 1229a(a).

6. Matter of Camarillo, 25 I. & N. Dec. 644 (B.I.A. 2011).

7. *Id.* at 644.

8. *Id.*

9. *Id.* at 644–45.

10. The Board of Immigration Appeals, consisting of 17 members appointed by the Attorney General, serves as the appellate body within the Department of

United States.[11] The Board found that she had not met the statutory requirement of seven years of continuous residence under the INA,[12] beginning from when she became a lawful permanent resident in 2000 to when she was served with the NTA in 2005—even if the NTA did not specify the hearing date and time.[13] This finding was based on the INA's "stop-time" rule, which establishes that service of an NTA on a noncitizen suspends the noncitizen's continuous residence period for purposes of determining eligibility for cancellation of removal.[14] The BIA concluded in *Camarillo* that an NTA could still trigger the stop-time rule, regardless of whether the NTA included the hearing date and time.[15]

Other circuits followed suit, deferring to the BIA's interpretation of the INA.[16] Five years after the *Camarillo* decision, in 2016, the Third Circuit departed from the reasoning of the majority of circuits, instead holding that the NTA must contain *all* the information plainly listed under the INA in order to trigger the stop-time rule and suspend a noncitizen's continuous-residence period.[17]

This Comment will examine the circuit split on the issue of whether an NTA must contain all of the listed information specified in the INA.[18] Part II of this Comment will first provide an overview of the INA,[19] focusing on the procedure for removing eligible noncitizens[20] and the eligibility of these noncitizens for relief.[21] Part II will also introduce the stop-time rule of the INA, explaining how the provision affects noncitizens' eligibility for relief.[22] Finally, Part II will present the circuit split on the issue of whether an NTA must contain all of the information listed in the INA to trigger the stop-time rule, discussing the BIA's interpretation,[23] how the majority of federal circuit courts have deferred to the BIA's interpre-

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Justice responsible for reviewing administrative adjudications in certain classes of proceedings, such as removal and asylum. 8 C.F.R. § 1003.1 (2017).

11. *Camarillo*, 25 I. & N. Dec. at 645.
12. 8 U.S.C. § 1229b(a) (2012).
13. *Camarillo*, 25 I. & N. Dec. at 645.
14. 8 U.S.C. § 1229b(d).
15. *Camarillo*, 25 I. & N. Dec. at 651.
16. *See infra* Part II.E.2.
17. *See infra* Part II.E.3.
18. *See infra* Part II.E.
19. *See infra* Part II.A.
20. *See infra* Part II.B.
21. *See infra* Part II.C.
22. *See infra* Part II.D.
23. *See infra* Part II.E.1.

tation,[24] and how the Third Circuit Court of Appeals reached a divergent result.[25]

Next, Part III of this Comment will present arguments consistent with the Third Circuit's position that an NTA, in order to trigger the stop-time rule and end a noncitizen's period of continuous residence in the United States, must contain all the information specified in the INA.[26] This comports with the plain text of the specific provisions at issue;[27] statutory context, including other portions of the statute[28] and legislative intent;[29] and policy considerations.[30]

Part IV will conclude that an NTA must contain all the information plainly listed in the INA in order to trigger the stop-time rule.[31]

II. BACKGROUND

A. Immigration and Nationality Act

1. Overview of the INA

Enacted in 1952, the INA is, and has been, the primary governing body of law on immigration within the United States.[32] The INA establishes the processes through which a noncitizen can become a lawful permanent resident[33] ("LPR") and, eventually, a citizen.[34] Additionally, the INA also establishes the processes for rescinding a granted petition for LPR status,[35] determining whether

24. *See infra* Part II.E.2.
25. *See infra* Part II.E.3.
26. *See infra* Part III.
27. *See infra* Part III.A.
28. *See infra* Part III.B.1.
29. *See infra* Part III.B.2.
30. *See infra* Part III.C.
31. *See infra* Part IV.
32. *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/laws/immigration-and-nationality-act (last updated Sept. 10, 2013); Liliana Zaragoza, Note, *Delimiting Limitations: Does the Immigration and Nationality Act Impose a Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1330 (2012).
33. 8 U.S.C. § 1255 (2012). Lawful permanent residents are noncitizens that have been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." *Id.* § 1101(a)(20). Lawful permanent residents (also known as "green card" holders) enjoy privileges such as working without special restrictions, owning property, and applying to become citizens provided they meet certain requirements. *Lawful Permanent Residents*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/lawful-permanent-residents (last published Aug. 4, 2017).
34. 8 U.S.C. § 1427.
35. *Id.* § 1256.

noncitizens[36] should be precluded from entering or staying in the United States,[37] and removing noncitizens from the United States on certain grounds.[38]

2. 1996 Amendments to the INA

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[39] which drastically modified the INA and immigration law.[40] Under IIRIRA, Congress established a new form of relief called cancellation of removal,[41] codified at § 240A of the INA,[42] which replaced the relief provided through suspension of deportation[43] and waiver of deportation.[44]

In enacting this provision on cancellation of removal,[45] Congress "narrowed the class of aliens who could qualify for relief."[46] A non-LPR must now have ten years of continuous physical presence in the country, as opposed to the seven years previously required for suspension of deportation.[47] Additionally, to qualify for

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36. Noncitizens, or aliens, are persons that are not citizens or nationals of the United States. *Id.* § 1101(a)(3).

37. *Id.* § 1227(a); *id.* § 1182(a).

38. *Id.* § 1229a.

39. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996).

40. *See* Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief? – The 1996 IIRIRA Amendments: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 1 (2000).

41. *See infra* Part II.C.

42. 8 U.S.C. § 1229b.

43. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-624 (1996). To qualify for suspension of deportation, a non-LPR must show: a) physical presence in the United States for a continuous period of at least seven years (or ten years, depending on the basis of deportation); b) good moral character during that period; and c) that deportation would result in extreme hardship (or exceptional and extremely unusual hardship, depending on the basis of deportation) to the alien or a spouse, parent, or child who is a citizen or permanent resident. 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996).

44. Illegal Immigration Reform and Immigrant Responsibility Act § 304(b), 110 Stat. 3009–597. A waiver of deportation, or section 212(c) waiver, was available to an LPR denied admission and seeking to return to a lawful domicile of seven consecutive years in the United States, suggesting that "Congress intended to benefit aliens who had significant ties to this country." Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240a of the Immigration and Nationality Act—the Impact of the 1996 Reform Legislation*, 12 GEO. IMMIGR. L.J. 65, 66 (1997); 8 U.S.C. § 1182(c) (1994) (repealed 1996).

45. *See infra* Part II.C.

46. In Re Monreal-Aguinaga, 23 I. & N. Dec. 56, 58 (B.I.A. 2001).

47. *Id.*; 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996); 8 U.S.C. § 1229b(b) (2012).

relief, the non-LPR now has to establish "exceptional and extremely unusual hardship," rather than merely "extreme hardship."[48]

IIRIRA also introduced the stop-time rule, which affects the eligibility of a noncitizen, whether an LPR or a non-LPR, to apply for relief from being removed from the United States.[49] Specifically, the stop-time rule affects the requirement that a noncitizen must have continuously resided in the United States for seven or ten years (depending on status as an LPR or non-LPR).[50] Under the stop-time rule, a noncitizen's period of continuous residence ends when the noncitizen is served with a Notice to Appear[51] or when he commits certain acts rendering him inadmissible or deportable.[52]

B. Navigating the Immigration System

1. Notice to Appear

An NTA marks the beginning of a noncitizen's path through the Immigration Courts.[53] Once the Department of Homeland Security[54] (DHS) serves the noncitizen with an NTA, he or she is

48. *Monreal-Aguinaga*, 23 I. & N. Dec. at 58 (citing 8 U.S.C. § 1254(a)(1)); 8 U.S.C. § 1229b(b). This same "exceptional and extremely unusual hardship" standard previously applied only to non-LPRs who were deportable for certain criminal convictions, but now encompasses *all* non-LPRs applying for cancellation of removal. *See* 8 U.S.C. § 1254(a)(2) (1994) (repealed 1996). The BIA noted that "although many of the factors that were considered in assessing 'extreme hardship' . . . should also be considered in evaluating 'exceptional and extremely unusual hardship,' an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in . . . cases involving the 'extreme hardship' standard." *Monreal-Aguinaga*, 23 I. & N. Dec. at 56.

49. *See infra* Part II.D.

50. 8 U.S.C. §§ 1229b(a), 1229b(b).

51. *See infra* Part II.B.

52. 8 U.S.C. § 1229b(d).

53. *See id.* § 1229(a)(1); 8 C.F.R. § 1003.14(a) (2017).

54. DHS, established by the Homeland Security Act of 2002, is primarily responsible for preventing terrorist attacks within the United States and reducing the vulnerability of United States to Terrorism. 6 U.S.C. § 111 (2012). DHS enforces immigration laws and administers immigration and naturalization benefits. EXEC. OFF. FOR IMMIGR. REV., B.I.A. PRACTICE MANUAL 2 (2015), https://www.justice.gov/eoir/file/431306/download. DHS assumed the responsibilities of the now-abolished Immigration and Naturalization Service ("INS"), with immigration functions distributed across three units, namely Customs and Border Protection, Immigration and Customs Enforcement, and Citizenship and Immigration Services. *See* 6 U.S.C. §§ 211, 251, 271.

placed in removal proceedings,[55] which involve hearings before an immigration judge.[56]

Immigration officers performing inspections of arriving noncitizens at points of entry, as well as other duly authorized officers of the DHS, have the authority to issue NTAs to noncitizens.[57] Noncitizens encounter DHS officers under various circumstances, such as "at a point of entry into the country, through referral to the DHS by local law enforcement after an arrest or criminal conviction, during a worksite raid, or during the process of applying for certain immigration benefits with DHS."[58]

After issuing the NTA, the DHS officer files the NTA to vest jurisdiction with an immigration judge.[59] Filing the NTA with the Immigration Court commences the removal proceeding, and the noncitizen must then appear before an immigration judge.[60]

2. Removal Proceedings

The Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ),[61] administers immigration laws and adjudicates immigration cases through the Immigration Courts.[62] Removal hearings are civil administrative proceedings[63] over which an immigration judge presides[64] and decides the inadmissibility or deportability of a noncitizen.[65] The immigration judge has the authority to issue subpoenas ordering the attendance of witnesses and presentation of evidence, examine and cross-examine the noncitizen and any witnesses, and hold individuals in contempt of court.[66] An Immigration and Customs Enforce-

55. *See* 8 U.S.C. § 1229a(a)(1).

56. *See id.* Immigration judges are attorneys appointed by the Attorney General as administrative judges to conduct certain proceedings, including removal proceedings. 8 C.F.R. § 1003.10(a).

57. *See* 8 C.F.R. § 239.1.

58. Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1541 (2011).

59. 8 C.F.R. § 1003.14(a).

60. *See* 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1003.14(a).

61. The DOJ is the primary federal criminal investigation and enforcement agency. *About DOJ*, DEP'T OF JUSTICE, https://www.justice.gov/about (last visited Sept. 3, 2017).

62. *EOIR at a Glance*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/eoir-at-a-glance (last visited Sept. 3, 2017).

63. Matter of Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972).

64. 8 U.S.C. § 1229a(a)(1).

65. *Id.*

66. *Id.* § 1229a(b)(1).

ment (ICE)[67] attorney represents the government in removal hearings and presents evidence on the noncitizen's removability.[68] Removal hearings focus predominantly on two issues: a) the removability of the noncitizen, and b) the eligibility of the noncitizen for relief from removal.[69]

a. Removability

A noncitizen is deemed removable based on a determination of inadmissibility under § 1182 of the INA or deportability under § 1227 of the INA.[70] Removal hearings begin with a master calendar hearing, followed by an individual merits hearing.[71] The master calendar hearing is "similar to a criminal arraignment"[72] as the immigration judge ensures the noncitizen understands his or her alleged immigration law violations[73] and advises the noncitizen of his or her right to representation.[74] The master calendar hearing functions to "dispose of cases . . . that are susceptible to summary disposition"[75] (e.g., voluntary departure[76]) and, in cases where the noncitizen disputes his or her removability and/or wishes to apply for relief,[77] to prepare and schedule those cases for the individual merits hearing.[78]

Whether or not the noncitizen contests his or her removability, the immigration judge must inform the noncitizen of his or her apparent eligibility for relief.[79] At the end of the master calendar hearing, the immigration judge schedules an individual merits hearing for the noncitizen and government to present the merits of the case with respect to removability and relief.[80]

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67. ICE is an agency within the DHS responsible for enforcing federal laws in border control, detention and removal, investigations, and inspections. 6 U.S.C. § 251 (2012).

68. 8 C.F.R. § 1240.2(a) (2017).

69. Chapman, *supra* note 58, at 1542.

70. 8 U.S.C. § 1229a(e)(2).

71. EXEC. OFF. FOR IMMIGR. REV., *supra* note 62.

72. Chapman, *supra* note 58, at 1542–43.

73. EXEC. OFF. FOR IMMIGR. REV., *supra* note 62.

74. 8 C.F.R. § 1240.10(a) (2017).

75. EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION JUDGE BENCHBOOK: INTRODUCTION TO THE MASTER CALENDAR 1, https://www.justice.gov/eoir/page/file/988051/download (last visited Sept. 2, 2017).

76. 8 U.S.C. § 1229c(b) (2012).

77. Chapman, *supra* note 58, at 1543.

78. EXEC. OFF. FOR IMMIGR. REV., *supra* note 75, at 1.

79. 8 C.F.R. § 1240.11(a)(2).

80. EXEC. OFF. FOR IMMIGR. REV., *supra* note 62.

The individual merits hearing functions as the "trial stage of the removal hearing."[81] If the noncitizen disputes his or her removability based on the government's allegations, the government bears the burden of establishing, by clear and convincing evidence, that the admitted noncitizen is deportable.[82]

b. Relief

The outcome of most removal hearings depends on the noncitizen's eligibility for relief[83] because proving the alleged violations is "relatively easy for the government."[84] A noncitizen applying for relief bears the burden of proof to establish that he or she satisfies the requirements for eligibility and "merits a favorable exercise of discretion."[85] Asylum and cancellation of removal, both of which are established by statute and have "a long history within the United States' immigration context," are the two most commonly requested forms of discretionary relief.[86]

C. Cancellation of Removal

Cancellation of removal is a form of relief available to both LPRs and non-LPRs[87] deemed to be removable (i.e., inadmissible or deportable).[88] For non-LPRs, relief may be available to those who have "established affiliation" in the United States.[89] This relief may be granted if the non-LPR:

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81. Chapman, *supra* note 58, at 1544.
82. 8 U.S.C. § 1229a(c)(3) (2012).
83. EXEC. OFF. FOR IMMIGR. REV., *supra* note 62.
84. Chapman, *supra* note 58, at 1545.
85. 8 U.S.C. § 1229a(c)(4)(A).
86. Chapman, *supra* note 58, at 1545.
87. Requirements for cancellation of removal differ between LPRs and non-LPRs. For LPRs, relief may be available if the LPR:
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. 8 U.S.C. § 1229b(a).
88. *Id.* §§ 1229b(a), 1229b(b).
89. Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 529 (2015) (quoting HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 80–114 (1st ed. 2006)) (recognizing that certain noncitizens have sunk roots or "established affiliation" in the United States). This affiliation is based on the contributions of certain noncitizens as productive members of the community, e.g., work, taxes, civic participation. Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 376 (2012).

> 1) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;
>
> 2) has been a person of good moral character during such period;
>
> 3) has not been convicted of an offense under [§§] 1182(a)(2), 1227(a)(2), or 1227(a)(3) . . . and;
>
> 4) 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.[90]

Cancellation of removal is based on a determination by Congress that "some noncitizens should be allowed to remain in the United States, despite being technically deportable, because they possess qualities desirable in residents and because deportation would create an exceptional and extremely unusual hardship on the persons whom the noncitizen left behind in the United States."[91]

Cancellation of removal is the most generous form of relief available to a noncitizen,[92] given that a successful applicant not only wins his or her deportation case, but, in the case of non-LPRs, the government will also adjust the non-LPR's status to that of an LPR.[93] Additionally, a successful applicant later receives the opportunity for naturalization when the applicant meets the statutory requirements.[94] Because cancellation of removal is such a generous form of relief, it is available in only "truly exceptional cases."[95]

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90. 8 U.S.C. § 1229b(b)(1). The prohibited convictions relate to offenses such as crimes involving moral turpitude and controlled substances, as well as falsification of documents. *Id.* §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3).

91. Chapman, *supra* note 58, at 1548 (citing E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, 558–59, 574 (1981)).

92. *Id.*

93. 8 U.S.C. § 1229b(b).

94. *Id.* § 1427. Naturalization refers to "conferring of nationality of a state upon a person after birth, by any means whatsoever. *Id.* § 1101(a)(23). Statutory requirements for naturalization include, among others, continuous permanent residence within the United States for at least five years after being lawfully admitted for permanent residence; good moral character; an understanding of the English language; and a knowledge of the fundamentals of the history and form of government of the United States. *Id.* §§ 1423, 1427.

95. H.R. REP. NO. 104-828, at 213–14 (1996). For example, in In Re Gonzalez Recinas, 23 I. & N. Dec. 467 (B.I.A. 2002), the BIA granted cancellation of removal to a Mexican native who was a single mother and who served as the sole provider for her United States citizen children (ages 5, 8, 11, and 12). *Gonzalez Recinas*, 23 I. & N. Dec. at 467. The noncitizen's entire immediate family was lawfully residing in the United States, and so she would be unable to receive any assistance in caring for her children if compelled to return to Mexico. *Id*. Additionally, her children were unfamiliar with the Spanish language, which would result in further hardship. *Id*. The BIA stated that these factors "combine[d] to

Cancellation of removal is also a discretionary form of relief, in which an immigration judge *may* cancel the removal of a qualified individual.[96] In other words, even if the noncitizen meets all of the statutory requirements for eligibility, the immigration judge is not obligated to cancel removal.[97]

D. Stop-Time Rule

A particular provision within the INA referred to as the stop-time rule affects the continuous residence requirement and, ultimately, eligibility for cancellation of removal.[98] The portion of the INA referred to as the stop-time rule states:

> [A]ny period of continuous residence or 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 this title, or . . . 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 . . . .[99]

Simply put, continuous residence ends when a noncitizen is served an NTA or when he commits certain acts rendering him inadmissible or deportable, whichever comes first.[100]

The § 1229(a) provision invoked in the stop-time rule indicates that the written notice given to the alien to initiate removal proceedings must specify information such as the nature of the proceedings against the alien and the time and place at which the proceedings will be held.[101]

E. Circuit Split Regarding NTA

The United States Courts of Appeals have recently split on whether an NTA which does not contain all the information speci-

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render the hardship in this case well beyond that which is normally experienced in most cases of removal." *Id.* at 471.

96. *See* 8 U.S.C. §§ 1229b(a), 1229b(b).

97. Matter of Marin, 16 I. & N. Dec. 581, 583 (B.I.A. 1978) (affirming that the alien's 12 years of residence in the United States did not sufficiently offset his conviction as a drug offender to warrant relief, especially given his failure to advance substantial equities because he was single, childless, and had no relatives in the country).

98. *See* 8 U.S.C. § 1229b(d)(1).

99. *Id.*

100. *See id.*

101. *Id.* § 1229(a). The other information that must be specified in the notice includes the following: "the legal authority under which the proceedings are conducted," the alleged violations of the law, "[t]he charges against the alien," that the alien is permitted to secure legal representation, contact information requirements, and the consequences of failing to appear at the proceedings. *Id.*

fied in the INA activates the stop-time rule and effectively ends the period of continuous residence.[102] In deference to the BIA, the First, Second, Fourth, Sixth, Seventh, and Ninth circuits have held that continuous residence stops accruing when the individual receives an NTA, regardless of whether the notice includes the date and time of the removal hearing.[103] The Third Circuit has declined to defer to the BIA, instead holding that the statute is unambiguous and that an NTA must specify the date and time of the removal hearing to activate the stop-time rule.[104]

1. The Seminal Decision of the Board of Immigration Appeals

a. Key Facts

In *Camarillo*, Judith Elma Camarillo, a Guatemalan citizen who had been an LPR since 2000, received an NTA on August 29, 2005.[105] The NTA indicated that the hearing time was yet to be determined.[106] The NTA was later filed with an Immigration Court, which issued a notice of hearing on November 9, 2007.[107]

The immigration judge found Camarillo removable based on her conviction for alien smuggling but granted her application for cancellation of removal.[108] The immigration judge concluded that Camarillo had accrued the required seven years of continuous residence beginning from the adjustment of her status to LPR on August 7, 2000 to her receipt of the notice of hearing on November 9, 2007 (as opposed to her receipt of the NTA in 2005).[109] The DHS appealed, contending that Camarillo was ineligible for cancellation of removal because § 1229b(d)(1) of the INA, i.e., the stop-time rule, "provides that any period of continuous residence ends 'when the alien is served a [NTA].'"[110] Thus, even without the date and time of the hearing in the NTA, Camarillo's continuous residence should have ended when the government served the NTA on August 29, 2005.[111] The BIA found for the DHS.[112]

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102. *See infra* Part II.E.3.
103. *See infra* Part II.E.2.
104. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 84 (3d Cir. 2016); s*ee infra* Part II.E.3.
105. Matter of Camarillo, 25 I. & N. Dec. 644, 644 (B.I.A. 2011).
106. *Id.*
107. *Id.* at 645.
108. *Id.*
109. *Id.*
110. *Id.*
111. *See id.*
112. *Id.*

b. Determination of Ambiguity

The Board's analysis in *Camarillo* involved first determining whether the language at issue, specifically § 1229(b)(d)(1) and § 1229(a)(1), had a plain and unambiguous meaning.[113] In reference to principles of statutory construction, the Board stated that it would determine the meaning of the language by relying upon the "language itself, the specific context in which that language [was] used, and the broader context of the statute as a whole."[114]

The Board stated that, although the immigration judge's reading was plausible, an "equally plausible reading" was that the reference in § 1229b(d)(1) to an NTA "under section [1229(a)]" was simply definitional and functioned only to clarify to what "notice to appear" referred.[115] In other words, the reference to § 1229(a) was meant only to identify the document the DHS must serve "to trigger the 'stop-time rule' and does not impose substantive requirements for a [NTA] to be effective in order for that trigger to occur."[116] In light of these multiple possible readings of § 1229b(d)(1) and § 1229(a), the Board found the statute to be ambiguous.[117]

c. Section 1229(a) as the Primary Reference to the NTA

The Board determined that the best reading of § 1229(a) was that Congress intended the phrase "under section [1229(a)]" to serve as a definition and "specify the document the DHS must serve on the alien to trigger the 'stop-time rule.'"[118] The Board also held that, "Section [1229(a)] is the primary reference in the Act to the [NTA]," thus defining the written notice that must be served on the alien to place him or her in removal proceedings.[119]

d. Breadth of Reference to Section 1229(a)

The Board cited the reference to the entirety of § 1229(a) as support for the definitional reading of the stop-time rule.[120] Section 1229(a)(1) describes the notice of the date and time of hearing, which are often subject to change.[121] Section 1229(a)(2) addresses

113. *Id.* at 646.
114. *Id.* at 646 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).
115. *Camarillo*, 25 I. & N. Dec. at 647.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*

this indefiniteness, establishing the procedure for providing notice in case of such changes.[122] The Board stated that § 1229(a)(2) indicated that "Congress envisioned that circumstances beyond the control of the DHS would require a change in the hearing date and specifically provided that such notification could occur after the issuance of the [NTA]."[123]

e. Agency Regulations

As additional support, the Board looked to DOJ regulations, which provided that the date and time of removal proceedings would be specified in the NTA only "where practicable."[124] In those cases where the date and time were yet to be determined and not listed in the NTA, the Immigration Court would schedule the hearing and provide notice accordingly.[125]

f. Legislative History

The Board also referred to legislative history behind the stop-time rule, which was enacted through IIRIRA, showing that the stop-time rule was established to address "perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of a charging document."[126] The Board found that Congress intended to "prevent aliens from being able to 'buy time,' during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated."[127]

Further guidance was found in the Congressional Record, specifically in an explanatory memorandum prepared by the Senate Committee on Appropriations:

> Under the rules in effect before [enactment of the "stop-time" rule], [an] otherwise eligible person could qualify for suspension of deportation if he had been continuously physically present in the United States for seven years, regardless of whether or when the Immigration and Naturalization Service had initiated deportation proceedings against the person through the issuance of an order to show cause . . . to that person.[128]

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122. *Id.* at 647–48.
123. *Id.* at 648.
124. *Id.* at 648 (quoting 8 C.F.R. § 1003.18(b) (2011)).
125. *Camarillo*, 25 I. & N. Dec. at 648.
126. *Id.* at 649.
127. *Id.* (quoting Matter of Cisneros, 23 I. & N. Dec. 668, 670 (B.I.A. 2004)).
128. *Id.* at 649–50 (quoting Matter of Nolasco, 22 I. & N. Dec. 632, 640–41 (B.I.A. 1999)).

The BIA stated that this legislative history supported Congressional intent "for the 'stop-time rule' to break an alien's continuous residence or physical presence in the United States" upon issuance of the charging document.[129] The Board reasoned that scheduling information, such as the date and time of the hearing, was not information required to accomplish the key purpose of an NTA, which was to provide notice to an alien that the government intended to initiate removal proceedings and remove the alien from the country.[130]

g. Division of Responsibilities between the DHS and Immigration Court

Finally, the Board relied on the delineation of responsibilities between the DHS and Immigration Court.[131] The DHS frequently serves NTAs where there is "no immediate access to docketing information" and thus with no hearing date and time specified in the NTA.[132] The Immigration Court is responsible for sending a subsequent notice of hearing to notify the noncitizen of the hearing date and time.[133] Nothing indicated that "Congress would have expected that scheduling delays . . . or other administrative issues would affect when an alien's continuous residence or physical presence [ended] for purposes of eligibility for relief from removal."[134]

2. The Majority Approach

a. Fourth Circuit

In *Urbina v. Holder*,[135] a citizen of Nicaragua entered the United States on October 4, 2000 on a tourist visa and overstayed its expiration.[136] Just before ten years could accrue to meet the residence requirement, the DHS served Urbina with an NTA in December 2009.[137] However, the charges noted on the NTA were related to illegal entry under 8 U.S.C. § 1182(a),[138] and not illegal

129. *Id.* at 650.
130. *Id.*
131. *Id.*
132. *Id.* at 648 (citing Dababneh v. Gonzales, 471 F.3d 806, 809 (7th Cir. 2006)).
133. *Id.*
134. *Id.*
135. Urbina v. Holder, 745 F.3d 736 (4th Cir. 2014).
136. *Id.* at 736.
137. *Id.* at 738.
138. Urbina was charged with entering the country without being admitted, which was apparently based on his prior applications for temporary protected status in which he asserted that he had entered the country in 1998. *Id.* Admission

presence, which would have been the correct charge.[139] Similar to the NTA in *Camarillo*,[140] the NTA also noted that the date and time for the hearing were "to be set."[141]

At the removal hearing, Urbina asserted that he had entered the United States legally in 2000 on a tourist visa, and so the correct charge was illegal presence, not illegal entry.[142] He then requested the DHS to amend the NTA with the correct charge, which the DHS eventually did at a later hearing after Urbina produced his passport and visa.[143] Urbina responded to the amended NTA by stating that his original NTA was invalid.[144] He contended that "only the newly substituted [correct] charge stopped the clock, and it did so after he had reached the ten-year mark, making him eligible for cancellation of removal."[145] Additionally, he noted that the date and time were not specified in the NTA, as required by 8 U.S.C. § 1229(a)(1).[146] The immigration judge found for the DHS, and the BIA dismissed Urbina's appeal.[147]

The Fourth Circuit referred to the BIA's decision in *Camarillo*, analyzing the Board's interpretation in accordance with the *Chevron* doctrine.[148] The court agreed with the BIA that the relevant statutory provision was ambiguous in that both the BIA's and Urbina's readings were plausible.[149] Given this finding of ambiguity, the court proceeded to the second step under *Chevron* and determined that the BIA's interpretation in *Camarillo* was plausible based on the reasons provided by the agency.[150] Applying this interpretation to Urbina's original NTA, the court held that the no-

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refers to "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(13)(A) (2012).

139. *Urbina*, 745 F.3d at 738.

140. Matter of Camarillo, 25 I. & N. Dec. 644, 644 (B.I.A. 2011).

141. *Urbina*, 745 F.3d at 738.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 739.

147. *Id.* at 738.

148. *Id.* at 740 (citing Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984)). The *Chevron* doctrine is applied "when a court reviews an agency's construction of a statute" the agency is responsible for administering. *Chevron*, 467 U.S. at 842. The analysis is a two-step inquiry: 1) determining "whether Congress has directly spoken to the precise question at issue," which requires the court and agency to give effect to the "unambiguously expressed intent" of Congress; and 2) if the statutory text is silent or ambiguous, determining "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43.

149. *Urbina*, 745 F.3d at 740.

150. *Id.*

tice nevertheless triggered the stop-time rule even with the incorrect charge and missing date and time.[151]

b. Seventh Circuit

In *Yi Di Wang v. Holder*,[152] Wang, a Chinese citizen, was smuggled into the U.S. Virgin Islands on September 27, 1999.[153] Immigration authorities took him into custody two days later on September 29, 1999 and subsequently served him with an NTA with the hearing date and time "to be set later."[154]

The Immigration Court made two attempts to notify Wang of his hearing schedule, with neither notice being properly served.[155] Wang ultimately failed to appear for his hearing and, a few months later, in November 1999, the government requested the immigration judge to administratively close the case.[156]

In October 2009, after ten years of avoiding immigration authorities in the United States, Wang voluntarily requested the Immigration Court to reschedule his removal proceedings.[157] At a hearing in March 2010, Wang conceded removability.[158] At a later hearing, in November 2012,[159] Wang then submitted an application for cancellation of removal.[160] The immigration judge denied that application because Wang "lacked the required 10 years of continuous presence in the United States."[161] The judge ruled that Wang's "qualifying time ended . . . when he was served with a [NTA] just two days after his arrival."[162] Wang appealed to the BIA, which relied on *Camarillo* in dismissing the appeal.[163]

Wang's primary argument before the Seventh Circuit was that the Board erred in relying "on a defective [NTA] to cut off his continuous presence in the United States" in concluding that he was

151. *Id.*
152. Yi Di Wang v. Holder, 759 F.3d 670 (7th Cir. 2014).
153. *Id.* at 671.
154. *Id.*
155. *Id.* at 671–72.
156. *Id.* at 672.
157. *Id.*
158. Wang also stated that he planned to seek a U Visa (available to noncitizens who are victims of certain crimes and likely to be helpful in the prosecution and investigation of those crimes), as well as asylum and relief under the Convention Against Torture. *Id.*
159. Another hearing was held between March 2010 and November 2012, in which the immigration judge allowed Wang additional time to continue pursuing a U Visa and decide on other forms of relief. *Id.*
160. *Id.*
161. *Id.*
162. *Wang*, 759 F.3d at 672.
163. *Id.*

ineligible for cancellation of removal.[164] The court noted that *Chevron* deference applied because Wang was challenging "the Board's authoritative interpretation of immigration laws."[165]

As a starting point, under *Chevron's* first step of determining ambiguity, the court agreed with the Fourth Circuit's decision in *Urbina*, which had already determined that § 1229b(d)(1) did not resolve "whether an alien's continuous presence in the United States [could] be halted by a [NTA] that [lacked] the date and time of a hearing."[166] The court agreed that the statute contained "nothing about whether a[n] [NTA] . . . must include the date and time of a hearing" to trigger the stop-time rule, and so the interpretations advanced by both Wang and the government were plausible.[167] Because of this ambiguity, Wang could not prevail under *Chevron*'s first step.[168] Proceeding to *Chevron*'s second step, the court reiterated the reasons provided by the BIA for its interpretation that an NTA that did not specify the hearing date and time still triggered the stop-time rule.[169] The court concluded that this was a "permissible construction of the statute" that required deference under *Chevron*, and ultimately denied Wang's petition.[170]

c. Sixth Circuit

In *Gonzalez-Garcia v. Holder*,[171] Jorge Alberto Gonzalez-Garcia ("Gonzalez"), a Mexican citizen, lawfully entered the country with a temporary-visitor visa on September 25, 1999.[172] In June 2009, three months prior to his ten-year anniversary in the country, police arrested Gonzalez for driving without a license.[173] An immigration enforcement agent at the county sheriff's office, reporting that Gonzalez had crossed the border illegally,[174] served Gonzalez with an NTA.[175] The NTA did not provide any information as to the location, date, and time of the removal proceedings.[176]

164. *Id.* at 673.
165. *Id.*
166. *Id.* at 674.
167. *Id.*
168. *Id.*
169. *Id.* at 674–75.
170. *Id.* at 675.
171. Gonzalez-Garcia v. Holder, 770 F.3d 431 (6th Cir. 2014).
172. *Id.* at 432.
173. *Id.* at 433.
174. The government initially charged Gonzalez with illegal entry, which Gonzalez later disputed. The government then responded with "additional charges of inadmissibility/deportability" on January 12, 2011, stating that Gonzalez had overstayed his visa. *Id.*
175. *Id.*
176. *Id.*

After the immigration judge found that Gonzalez had overstayed his visa, Gonzalez applied for cancellation of removal.[177] His application asserted that his NTA had two defects: it had not specified the time and place of the proceedings in violation of § 1229(a), and the government could not sustain its charge of illegal entry therein.[178] Gonzalez contended that these defects rendered the NTA invalid; thus, it was not until January of 2011, when the notice was corrected, that the stop-time rule was triggered.[179] The immigration judge, and later the BIA, relied on *Camarillo* and found for the DHS, stating that these defects did not block the stop-time rule.[180]

Under *Chevron*, the Sixth Circuit recognized that Gonzalez's interpretation was not the only possible interpretation of the statutory provision.[181] Proceeding to the next step of the analysis, the court stated that the BIA's interpretation of the provision was reasonable based on the agency's reasoning in *Camarillo*.[182] Thus, the court dismissed Gonzalez's petition for review, finding that the DHS had served the NTA within the required period of time to trigger the stop-time rule, regardless of the defects cited by Gonzalez.[183]

d. Second Circuit

In *Guaman-Yuqui v. Lynch*,[184] Klever Bolivar Guaman-Yuqui ("Guaman"), a citizen of Ecuador, improperly entered the United States (i.e., without inspection) on January 14, 2001.[185] On March 15, 2010, the DHS served him with an NTA for removability.[186] The notice indicated that his hearing would be held "on a date to be set at a time to be set."[187] Following this notice, the Immigration Court sent Guaman a notice of hearing on April 30, 2010.[188] However, Guaman was not present at the hearing, and the immigration judge ordered him removed *in absentia*.[189]

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Gonzalez-Garcia*, 770 F.3d at 434.
182. *Id.*
183. *Id.* at 435.
184. Guaman-Yuqui v. Lynch, 786 F.3d 235 (2d Cir. 2015).
185. *Id.* at 237.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*

Guaman filed a motion to reopen a few months later, and the BIA reopened the hearing based on evidence that the NTA had been mailed to an incorrect address.[190] In September of 2011, the Immigration Court served Guaman with a new notice of hearing indicating the date and time for his appearance.[191] At his proceedings, Guaman applied for cancellation of removal.[192]

The immigration judge denied Guaman's application, finding that he was ineligible for relief because he had not satisfied the ten-year requirement for continuous physical presence in the United States.[193] This finding was based on Guaman's entry into the country on January 14, 2001 and his receipt of the NTA and notice of hearing on March 15, 2010 and April 30, 2010, respectively.[194] Guaman subsequently filed an appeal with the BIA, which relied on *Camarillo*, concluding that the stop-time rule was triggered when the DHS served Guaman with the NTA on March 15, 2010.[195]

Similar to the approach used in three sister circuits, the Second Circuit found the statute ambiguous due to its multiple possible readings, thus deferring to the BIA's construction in *Camarillo* under the *Chevron* doctrine.[196] The court found that the reasons provided by the BIA reasonably supported its interpretation of § 1229b(d)(1), "respecting both the broader structure of the INA and the extensive evidence of legislative intent."[197]

e. Ninth Circuit

In *Moscoso-Castellanos v. Lynch*,[198] Jorge Mario Moscoso-Castellanos ("Moscoso"), a Guatemalan citizen, entered the United States in April 1997.[199] On April 7, 2005, the DHS served him with an NTA, which indicated that the proceedings would be held "on a date to be set at a time to be set."[200] Moscoso later received the hearing notice with the scheduling information and appeared before an immigration judge on April 20, 2005.[201] The DHS served Moscoso with a corrected NTA in 2008.[202] Moscoso later filed an

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Guaman-Yuqui*, 786 F.3d at 237.
195. *Id.*
196. *Id.* at 238.
197. *Id.* at 240.
198. Moscoso-Castellanos v. Lynch, 803 F.3d 1079 (9th Cir. 2015).
199. *Id.* at 1081.
200. *Id.* at 1081–82.
201. *Id.* at 1082.
202. *Id.*

application for cancellation of removal on August 24, 2011.[203] The immigration judge found Moscoso ineligible for relief given that only eight years had elapsed between his arrival in 1997 and service of the NTA in 2005.[204] The BIA affirmed the immigration judge's finding, relying once again on *Camarillo*.[205]

On appeal, Moscoso asserted that *Camarillo* was not controlling, and that he had accrued continuous physical presence in the United States until he was issued the corrected NTA in 2008.[206] Moscoso relied on *Garcia-Ramirez v. Gonzales*[207] for the proposition that "an NTA triggers the stop-time rule only if it includes the date and location of the removal hearing."[208]

The Ninth Circuit stated that it was bound to the BIA's interpretation of an ambiguous statute, "even if that interpretation conflicts with [the court's] earlier interpretation of the same provision."[209] The court thus proceeded under *Chevron*, first finding that the provision was subject to multiple interpretations and was consequently ambiguous.[210] Under the second step of the court's *Chevron* analysis, the court found that the interpretation of the stop-time rule and the underlying reasoning provided in *Camarillo* were reasonable.[211] The court specifically recognized that it was joining several of its sister circuits in deferring to the BIA's interpretation of the stop-time rule.[212]

Applying the BIA's reading to Moscoso's case, the court found that Moscoso stopped accruing physical presence on April 7, 2005 upon service of the original NTA.[213] He had accumulated only eight years of physical presence at that point, and so he was statutorily ineligible for cancellation of removal.[214]

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Garcia-Ramirez v. Gonzales, 423 F.3d 935 (9th Cir. 2005).

208. *Moscoso-Castellanos*, 803 F.3d at 1082 (citing *Garcia-Ramirez*, 423 F.3d at 937).

209. *Id.* (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984–85 (2005)).

210. *Id.* at 1083.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

f. First Circuit

In *Pereira v. Sessions*,[215] Wescley Fonseca Pereira ("Pereira"), a Brazilian citizen, overstayed his non-immigrant visitor visa.[216] He had been admitted to the United States in June 2000, and was authorized to stay only until December 21, 2000.[217] In 2006, Pereira was served with a notice to appear, which did not specify the date and time of his removal hearing.[218] In 2007, over a year later, the Immigration Court mailed a notice to Pereira setting his removal hearing for October 31, 2007.[219] However, Pereira never received the notice because it was sent to his street address on Martha's Vineyard instead of his post office box.[220] Pereira failed to appear at his hearing, and the immigration judge ordered his removal *in absentia*.[221]

However, Pereira was not removed from the country.[222] In 2013, over five years later, Pereira was arrested for a motor vehicle violation and subsequently detained by the DHS.[223] By this point, he had been in the United States for about 13 years.[224] Pereira had his removal proceedings reopened, claiming he had not received the hearing notice from 2007.[225]

At the hearing, Pereira conceded removability, seeking cancellation of removal based on the "defective" notice.[226] The immigration judge found Pereira ineligible for relief because he could not establish the requisite ten years of continuous physical presence.[227] On appeal, Pereira conceded to the BIA that "*Camarillo* foreclosed his argument that the stop-time rule did not cut off his period of continuous physical presence until 2013, but argued that *Camarillo* should be reconsidered and overruled."[228] The BIA declined, instead affirming the immigration judge's decision.[229]

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215. Pereira v. Sessions, 866 F.3d 1 (1st Cir. 2017) *cert. granted*, No. 17-459, 2018 WL 386567 (U.S. Jan. 12, 2018).

216. *Id.* at 2.

217. *Id.*

218. *Id.* The notice to appear merely stated that Pereira was to appear at an immigration court in Boston "on a date to be set at a time to be set." *Id.*

219. *Id.*

220. *Id.* at 2–3.

221. *Id.* at 3.

222. *Id.*

223. *Id.*

224. *Id.* at 2–3.

225. *Pereira*, 866 F.3d at 3.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

In Pereira's subsequent appeal, the First Circuit, like its sister circuits, applied the *Chevron* doctrine.[230] For the first step of determining whether the statute is ambiguous as to whether an NTA that lacks all the elements listed in the statute interrupts a noncitizen's physical presence in the country, Pereira relied on a Third Circuit case decided in 2017, *Orozco-Velasquez v. Attorney-General of the United States*.[231] The First Circuit disagreed with the Third Circuit's holding that the stop-time rule unambiguously states that an NTA with omitted information cuts off a noncitizen's continuous physical presence.[232] The First Circuit reasoned:

> It is undisputed that § 1229(a)(1) creates a duty requiring the government to provide an alien with the information listed in that provision. But whether a notice to appear that omits some of this information nonetheless triggers the stop-time rule is a different question. As the Seventh Circuit has observed, even if such an omission renders a notice to appear defective, "a defective document [may] nonetheless serve[ ] a useful purpose."[233]

Thus, finding the statute ambiguous under the first step of *Chevron*, the First Circuit proceeded to the second step—determining whether the BIA's interpretation in *Camarillo* was permissible.[234] The First Circuit agreed with the thrust of the BIA's reasoning, finding that "[i]n light of the relevant text, statutory structure, administrative context, and legislative history, the BIA's construction of the stop-time rule is neither arbitrary and capricious nor contrary to the statute."[235] In doing so, the First Circuit acknowledged it was joining the five other circuits that had deferred to the BIA's interpretation in *Camarillo*.[236] In deferring to the BIA, the court affirmed that Pereira was ineligible for cancellation of removal.[237]

3. The Lone Third Circuit

Breaking from its sister circuits, the Third Circuit, in *Orozco-Velasquez*, held that an NTA which failed to provide a correct ad-

230. *Id.* at 4.

231. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78 (3d Cir. 2016); *see infra* Part II.E.3.

232. *Pereira*, 866 F.3d at 5.

233. *Id.* (citing Wang v. Holder, 759 F.3d 670, 674 (7th Cir. 2014)).

234. *Id.*

235. *Id.* at 8.

236. *Id.*

237. *Id.*

dress for the Immigration Court did not trigger the stop-time rule.[238]

a. Key Facts

In September 1998 or February 1999, Milton Orozco-Velasquez ("Orozco"), a Guatemalan citizen, entered the United States without being admitted or paroled.[239] The DHS served him with his NTA on May 9, 2008, which provided that the date and time of proceedings were "to be set," and that the proceedings would be in Elizabeth, New Jersey.[240] On April 7, 2010, the DHS mailed another NTA, correcting the location of the proceedings to Newark, New Jersey.[241] On April 12, 2010, Orozco was served with a notice of hearing, which indicated the date and time of his hearing.[242] On May 14, 2010, Orozco applied for cancellation of removal and moved to terminate removal proceedings.[243]

Orozco contended that the NTA from April 2010 superseded the NTA from May 2008, and so he had accrued the required ten years of continuous residence in the United States.[244] However, the immigration judge agreed with the government that the subsequent NTA from April 2010 did not supersede the earlier NTA and, therefore, ordered Orozco's removal.[245] The BIA dismissed the ensuing appeal, once again relying on *Camarillo*.[246] While the BIA acknowledged that the *Camarillo* defect, i.e., the omission of the date and time of the hearing, was different from providing an incorrect court address, the BIA nevertheless applied *Camarillo* to bar Orozco's application for relief.[247] The BIA also cited a DOJ regulation in support of its determination that an NTA was not defective based merely on the omission of the date, time, or place of the proceedings.[248] The DOJ regulation provided for an NTA amendment to "add[ ] or substitute[ ] charges of inadmissibility and/or deportability and/or factual allegations".[249]

238. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 82 (3d Cir. 2016).
239. *Id.* at 79. The earlier date of entry was provided by Orozco-Velasquez; the later one was identified by the immigration judge, but described by the BIA as "perhaps an incorrect date." *Id.* at 85 n.4.
240. *Id.* at 79.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 79–80.
245. *Id.* at 80.
246. *Id.*
247. *Id.*
248. *Orozco-Velasquez*, 817 F.3d at 80.
249. *Id.* (quoting 8 C.F.R. § 1240.10(e) (2015)).

On appeal, the Third Circuit determined that the BIA's conclusion, i.e., failing to specify the time or place of proceedings in an NTA did not render it ineffective, conflicted with the INA's plain text and was thus not entitled to *Chevron* deference.[250] Finding no ambiguity and relying primarily on the plain text of the statute, as well as other textual and policy considerations, the Third Circuit held that an NTA served under § 1229(a) triggers the stop-time rule "only when it includes each of the items that Congress instructs 'shall be given in person to the alien.'"[251]

b. Plain Text of § 1229(a)

The court explained that the stop-time rule specifically incorporates the requirements listed under 8 U.S.C. § 1229(a) using the word "shall,"[252] which the court characterized as "the language of command."[253] The court referenced Black's Law Dictionary, which defines "shall" as "a duty to; more broadly, is required to," and characterized this "most common usage" as "the mandatory sense that drafters typically intend[,] and that courts typically uphold" in statutes.[254] In the absence of a conflict with a canon of statutory construction, the court thus presumes that when Congress uses "shall," the language is a mandatory instruction.[255] The court concluded that, "an alien's period of continuous residence is interrupted, that is, *time stops*, only when the government serves an NTA complying with the listed requirements under 8 U.S.C. § 1229(a)."[256]

c. Incorporation of § 1229(a) in its Entirety

The court also recognized that the stop-time rule encompasses more than just the NTA requirements listed in § 1229(a)(1),[257] which the BIA had relied on in its reasoning to support its definitional reading of the stop-time rule in *Camarillo*.[258] However, the court did not view this additional inclusion as diminishing "the clear-cut command set out in § 1229(a)(1) that notice 'shall be

250. *Id.* at 81–82.
251. *Id.* at 83 (quoting 8 U.S.C. § 1229(a)(1) (2012)).
252. *Id.* at 82 (quoting 8 U.S.C. § 1229b(d)(1)).
253. *Id.* at 83 (quoting Alabama v. Bozeman, 533 U.S. 146, 153 (2001)).
254. *Id.* (quoting *Shall,* BLACK'S LAW DICTIONARY (9th ed. 2009)).
255. *Id.*
256. *Id.* at 83.
257. *Id.* at 82.
258. *See supra* Part II.E.1.

given in person to the alien . . . specifying,' *inter alia*, '[t]he time and place at which the proceedings will be held.'"[259]

d. Policy Considerations

Finally, the court noted that the NTA's purpose is to provide an alien with notice of the charges against him and fundamental information on related proceedings.[260] In taking the government's "counter-textual mode of providing notice" to its logical conclusion, the court determined that the BIA's approach may treat even an NTA "containing no information whatsoever as a 'stop-time' trigger, permitting the government to fill in the blanks (or not) at some unknown time in the future."[261]

III. ANALYSIS

The Third Circuit in *Orozco-Velasquez* emphasized that "[u]nder *Chevron*, the statute's plain meaning controls, whatever the [BIA] might have to say," unless the law does not speak clearly on the issue, in which case a court must defer to the BIA's reasonable interpretation.[262] The analysis begins with the plain text of the relevant statutory provisions, followed by statutory context, and finally, policy considerations.

A. Plain Meaning of Statutory Text

When interpreting a statute,[263] the starting point is "the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[264] Revisiting the stop-time rule in the INA, the relevant text states:

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259. *Orozco-Velasquez*, 817 F.3d at 83 (quoting 8 U.S.C. § 1229(a)(1)(G)(i) (2012)).

260. *Id.* at 84.

261. *Id.*

262. *Id.* at 81 (citing Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014)).

263. Statutory interpretation involves reading "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006). Interpretation involves the use of canons "developed by the judiciary that focus on word usage, grammar, syntax[,] and the like." LARRY M. EIG, CONG. RES. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2011). Courts can also consider "various presumptions that reflect broader judicial concerns and can more directly favor particular substantive results[,]" as well as legislative history. *Id.*

264. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Using statutory text as a starting point highlights the "primacy of

> [A]ny period of continuous residence or 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 this title . . . .[265]

Section 1229(a) referenced in the text above encompasses subsections relating to the NTA,[266] notice of change in time or place of proceedings,[267] and maintenance of central address files.[268] Section 1229(a)(1) states that:

> In removal proceedings under [section 1229a], written notice . . . *shall* be given in person to the alien . . . specifying the following: [t]he nature of the proceedings against the alien . . . [t]he charges against the alien and the statutory provisions alleged to have been violated . . . [t]he time and place at which the proceedings will be held (emphasis added).[269]

The use of "shall" in both §§ 1229b(d)(1) and 1229(a)(1) conveys a mandatory instruction consistent with the ordinary usage of the word[270] and comports with the Third Circuit's reasoning in *Orozco-Velasquez*.[271]

While the stop-time rule does incorporate the entirety of § 1229(a), as opposed to incorporating only § 1229(a)(1) which encompasses NTAs, this incorporation does nothing to diminish the government's duty to specify the information listed in the statute as part of providing appropriate notice to the noncitizen of the removal proceedings.[272] The reference to § 1229(a) compels the government to comply with each of the NTA requirements specifically listed, while recognizing that the schedule of removal proceedings is subject to change and subsequently accommodates that change.[273] Yet nothing in the stop-time rule itself supports the position that

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text" as expressed in the plain meaning rule, which states that "where the language of a statute is plain, the sole role of the courts is to enforce it according to its terms." Eig, *supra* note 264, at 41.

265. 8 U.S.C. § 1229b(d)(1) (2012) (emphasis added).

266. *Id.* § 1229(a)(1).

267. *Id.* § 1229(a)(2).

268. *Id.* § 1229(a)(3).

269. *Id.* § 1229(a)(1) (emphasis added).

270. "[The] mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

271. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 83 (3d Cir. 2016) (citing *Shall*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

272. *Id.*

273. *Id.*

serving an NTA that does not provide the hearing date altogether still suspends the noncitizen's accrued continuous residence.

Furthermore, the provision allowing for "any change or *postponement* in the time and place of [removal] proceedings," requires a written notice specifying "the *new* time or place of the proceedings."[274] Use of the words "postponement" and "new" presupposes that the scheduling information was initially provided. Black's Law Dictionary defines "postpone" as "to change the date or time . . . to a later one."[275] Similarly, "new" is defined as "changed from the former state."[276] In other words, if one is changing or postponing an event and rescheduling it for a different date, the new date replaces the earlier date provided. One cannot be said to *postpone* an event or provide a *new* date if no earlier date was initially provided.

The NTAs provided to the noncitizens in the cases applying the majority approach did not even specify a time in the first instance, merely stating that the time remained to be determined.[277] Omitting the time of proceedings is altogether different from providing an initial time and subsequently updating it due to scheduling considerations. Reading the stop-time rule along with the sections referenced therein supports the interpretation that, in order to interrupt a noncitizen's period of continuous residence, notice must be provided such that the listed statutory requirements are met.

B. Statutory Context

1. Other Sections of the Statute

Looking to other portions of the statute[278] related to removal and removal proceedings, certain provisions employ the word "practicable" for some allowance in certain areas and have expressed it accordingly. For instance, when initiating removal proceedings, § 1229 states that, "In removal proceedings under § 1229a of this title, 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) . . . ."[279] Similar language is employed in the statute where notice must be sent re-

274. 8 U.S.C. § 1229(a)(2) (emphasis added).

275. *Postponement*, BLACK'S LAW DICTIONARY (10th ed. 2010)).

276. *New*, BLACK'S LAW DICTIONARY (10th ed. 2010)).

277. *See supra* Part II.E.

278. The whole act rule of statutory construction urges "look[ing] to the provisions of the whole law, and to its object and policy," rather than examining a particular section "in isolation from the context of the whole [statute]." United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) (quoting Richards v. United States, 369 U.S. 1, 11 (1962)).

279. 8 U.S.C. § 1229(a)(1) (emphasis added).

garding a change in the time or place of proceedings.[280] Additionally, in the context of removing criminal noncitizens, the statute states that the Attorney General "shall, to the maximum extent *practicable*, detain [an alien convicted of an aggravated felony who is taken into custody by the Attorney General] at a facility at which other such aliens are detained."[281]

Congress could easily have used similar language to recognize that including hearing scheduling information as part of providing notice to the noncitizen may not always be practicable,[282] and so an NTA without it could still trigger the stop-time rule and effectively end the noncitizen's period of continuous residence in the country. Congress could have expressed that intent, as it did in other provisions of the statute, and yet it did not.[283]

2. Legislative History

Referring to legislative history,[284] the Third Circuit pointed out that the only legislative history the *Guaman-Yuqui* court identified (which the BIA relied on in deciding *Camarillo*[285]) was an explanatory memorandum submitted by five senators to accompany an omnibus appropriations bill amending the 'stop-time' rule:[286]

> The memorandum . . . purports to explain why Congress enacted the "stop-time" provision in the first place (to alter a status quo in which "people were able to accrue time toward the [then-]seven-year continuous physical presence requirement after they already had been placed in deportation proceedings"), but no-

280. *Id.* § 1229(a)(2).

281. *Id.* § 1228 (emphasis added).

282. Matter of Camarillo, 25 I. & N. Dec. 644, 650 (B.I.A. 2011).

283. *E.g.,* Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252 (2010) (comparing two ERISA provisions on attorney's fees, where one used the words "prevailing party" and the other did not, and finding that "the contrast between these two paragraphs makes clear that Congress knows how to impose express limits on the availability of attorney's fees in ERISA cases"); Meghrig v. KFC W., Inc., 516 U.S. 479, 485 (1996) (comparing CERCLA and RCRA citizen suit provisions, where CERCLA expressly permitted the recovery of any "necessary costs of response, incurred by any . . . person" and RCRA did not, and concluding that Congress "demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs" but chose not to provide for that remedy under RCRA).

284. Reliance on legislative history varies among courts, and may depend on factors such as the nature of the issue, the clarity and complexity of a statute, and surrounding circumstances of the statute's passage. Eig, *supra* note 264, at 44. While recognizing that legislative history does play a role in statutory interpretation to the extent that it sheds light on congressional intent, the Supreme Court has expressed that "the authoritative statement is [still] the statutory text." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

285. *Camarillo*, 25 I. & N. Dec. at 649.

286. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 85 n.33 (3d Cir. 2016).

> where addresses whether service of a defective NTA bears the same "stop-time" consequences as a NTA that complies with § 1229(a)(1).[287]

The BIA in *Camarillo* also relied on legislative history reflecting that the stop-time rule was established to address "perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of a charging document."[288] These abuses included noncitizens in deportation proceedings "knowingly fil[ing] meritless applications for relief" and "exploit[ing] administrative delays in the hearing and appeal processes" to "buy time" and eventually qualify for relief that was not previously available.[289] However, delays may also arise from other factors unrelated to the noncitizen's conduct, such as errors on the part of the government, as in some of the cases described earlier.[290]

For instance, Guaman was initially ordered removed after failing to appear at his hearing, but the BIA later reopened his case on evidence that the notice of hearing[291] had been sent to an incorrect mailing address and subsequently returned as undeliverable.[292] The Immigration Court later sent Guaman a new notice of hearing, at which point he had already accrued the required continuous residence period but through no improperly motivated conduct of his own.[293]

In other sections, the statute addresses the situation in which a noncitizen fails to provide address information with the possible intent of delaying proceedings and evading receiving notice in order to accrue the required period of continuous residence.[294] The statute states that the NTA shall specify:

> a) 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 [removal] proceedings under section 1229a.[295]

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287. *Id.* (citation omitted).
288. *Camarillo*, 25 I. & N. Dec. at 649.
289. In re Cisneros-Gonzalez, 23 I. & N. Dec. 668, 670 (B.I.A. 2004).
290. *See supra* Part II.E.2.
291. The notice of hearing supplemented the NTA, which had indicated only that the hearing was "on a date to be set at a time to be set." Guaman-Yuqui v. Lynch, 786 F.3d 235, 236 (2d Cir. 2015).
292. *Id.*
293. *Id.*
294. *See* 8 U.S.C. §§ 1229(a)(1)(F)(i)–(iii) (2012); *id.* § 1229a(b)(5)(B).
295. *Id.* § 1229(a)(1)(F)(i) (emphasis added).

> b) 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.[296]
>
> c) The consequences . . . of failure to provide address and telephone information.[297]

Failure by a noncitizen to attend a proceeding after receiving notice will result in an order for removal if the government can establish that the written notice was provided,[298] and that the noncitizen is removable.[299] In other words, if a noncitizen fails to provide or update his contact information as required by the statute, written notice will no longer be required.[300] Given that the issues Congress was purportedly seeking to resolve, i.e., minimize potential dilatory practices by noncitizens, are addressed in these other sections of the statute, allowing NTAs with missing information to trigger the stop-time rule would be erroneous.

C. Policy Considerations

Consistent with the Third Circuit's policy argument, the NTA's primary purpose is "to provide an alien with notice of the charges against him" as well as the fundamental information on the proceedings in relation to those charges.[301] The approach adopted by the BIA and other circuits condones the government's "countertextual mode of providing notice" and, taking it to its logical conclusion, would allow the government to treat an NTA "containing no information whatsoever as a 'stop-time' trigger," allowing the government to supply the missing information (or not) "at some unknown time in the future."[302]

Furthermore, the approach adopted by the Third Circuit to require NTAs to contain all the elements listed under the INA, including the date and time of the hearing, serves the public policy of encouraging both the DHS and Immigration Courts to schedule and initiate removal proceedings in a timely manner. This comports with the Executive Office of Immigration Review's primary mission to "adjudicate immigration cases by fairly [and] expedi-

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296. *Id.* § 1229(a)(1)(F)(ii).
297. *Id.* § 1229(a)(1)(F)(iii); *id.* § 1229a(b)(5)(B).
298. *Id.* § 1229a(b)(5)(A). The written notice will be considered sufficient if it was sent to the most recent address provided by the alien under § 1229(a)(1)(F). *Id.*
299. *Id.*
300. *Id.* § 1229a(b)(5)(B).
301. Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 84 (3d Cir. 2016).
302. *Id.*

tiously . . . administering the Nation's immigration laws,"[303] as well as the DHS's interest in national security and protecting the integrity of our borders.[304] While the government need not hold the hearing immediately, scheduling the hearing and providing notice to noncitizens facing the possibility of removal poses a minimal administrative burden.

Finally, providing noncitizens with timely and complete information regarding removal proceedings provides two primary benefits to noncitizens, specifically allowing them to: a) prepare for such proceedings in the interest of fairness; and b) plan their lives with greater certainty with respect to their families, property, and employment—and make arrangements accordingly. Removal imposes "a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[305] For instance, one way to ensure fairness is by guaranteeing that noncitizens "have the opportunity to be represented by counsel," and providing reasonable time to noncitizens to seek counsel and "permit counsel to prepare for the hearing."[306] In the interest of fairness, full notice must therefore be given as specified under the INA to permit the noncitizen to better prepare for removal proceedings.

Being given full notice of removal proceedings also allows noncitizens to make necessary arrangements pertaining to their families, property, employment, and other areas of their lives, in order to lessen the harsh consequences associated with removal. In *Camarillo* and *Orozco-Velasquez*, for instance, two years had lapsed between the service of NTA and issuance of a subsequent document containing the hearing date and time.[307] Over the course of that time, noncitizens would be unable to consider timing in getting their affairs in order in anticipation of removal proceedings and possible removal.

D. Recommendation

Courts should adopt the approach of the Third Circuit such that only an NTA (or NTA and a subsequent document to provide

303. *EOIR Home*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir (last visited Sept. 3, 2017).

304. *See* 6 U.S.C. §§ 111, 251 (2012).

305. *See* Bridges v. Wixon, 326 U.S. 135, 154 (1945) (recognizing the hardship imposed on an individual by deportation).

306. Biwot v. Gonzales, 403 F.3d 1094, 1098–99 (9th Cir. 2005).

307. Matter of Camarillo, 25 I. & N. Dec. 644, 644 (B.I.A. 2011); Orozco-Velasquez v. Att'y Gen., 817 F.3d 78, 79 (3d Cir. 2016).

any omitted information)[308] containing all the information explicitly identified in the statute would be sufficient to suspend a noncitizen's continuous residence period. Requiring an NTA to contain all of the information listed in the statute comports with the plain meaning of the text, statutory context, and policy considerations.

IV. CONCLUSION

The Third Circuit correctly held that an NTA must contain all of the information listed in the INA in order for it to trigger the stop-time rule and suspend a noncitizen's continuous residence period. The statute's text, including the specific provisions at issue and other provisions throughout the statute, as well as legislative history, support this conclusion. While the INA provides for the removal of noncitizens based on a determination of inadmissibility or deportability, it also mandates specific procedures for executing this process of removal. The DHS must conform with the procedures plainly established by Congress.

Allowing the DHS to omit information from the NTA that has been explicitly required by the INA adversely affects noncitizens in preparing for their removal proceedings and managing their affairs in anticipation of possible removal. Additionally, it opens the door for bare NTAs with minimal information to trigger the stop-time rule, allowing the government to supply the missing information at an uncertain time, ultimately depriving the noncitizen of full notice of the impending proceedings. Thus, courts confronted with this issue should consider the stop-time rule triggered and, subsequently, the noncitizen's continuous residence period suspended, only if the NTA complies with the statutory requirements.

308. *See Camarillo*, 25 I. & N. Dec. at 645 (where the immigration judge considered continuous residence suspended upon noncitizen's later receipt of notice of hearing, which, together with the earlier NTA, provided all the information listed under the INA).