APPLYING *PEREIRA* (AS OF 2019)

Summary of relevant case law:

***Pereira v. Sessions*, 138 S.Ct. 2015 (US 2018)** – June 21, 2018

- A defective NTA is not an NTA for purposes of stop-time rule in cancellation of removal of non-LPR respondents.

***Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018)** – August 28, 2018

- A defective NTA still gives an IJ jurisdiction over a case IF a notice of hearing specifying the missing information is later sent to the alien.

***Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019)** – May 1, 2019

- A defective NTA is cured by a subsequent hearing notice with the missing information, AND that hearing notice triggers the stop-time rule.

***Lorenzo Lopez v. Barr*, No. 15-72406 (9th Cir. 2019)** – May 22, 2019

- An NTA that is defective under *Pereira* cannot be cured by a subsequent notice of hearing and therefore does not trigger the stop-time rule.

PRACTICE POINTERS RE. APPLYING *PEREIRA*:

CLINIC (8/2018)

- After *Bermudez-Cota*, 27 I&N Dec. 441 BIA 2018
    - According to *Pereira*, defective NTA does not give jurisdiction to IJ.
    - Defective NTA can be "cured" by a subsequent hearing notice with specific date, time, place

- However:
  A hearing notice does not "cure" a deficient NTA. A subsequent hearing notice, properly served on an individual, that provides notice of the time and place of removal proceedings cannot cure a defective NTA **because it is not a "charging document" that can "vest jurisdiction" under 8 C.F.R. §§ 1003.13 and 1003.14.**
  Moreover, issuance of NTAs is exclusively delegated to DHS, see 8 C.F.R. §§ 239.1 and 1239.1, whereas issuance of hearing notices is delegated to EOIR. Regulations that apply only to DHS do not authorize immigration courts to take action.45 One could argue that EOIR cannot vest jurisdiction upon itself by issuing a subsequent notice of hearing, because the issuance of the notice of hearing depends upon jurisdiction already existing with the immigration court.46
  The BIA addresses this exact issue in Bermudez-Cota, holding that a proper hearing notice combined with the defective NTA satisfies 8 C.F.R. §§ 1003.13 and 1003.14 and thereby vests the immigration court with jurisdiction. **As discussed below, practitioners still can argue that to the extent the regulations are inconsistent with the statute, they are ultra vires.** Moreover, most circuit court decisions that address this issue all pre-date Pereira. 47 In addition, the circuit courts now are bound by the Pereira Court's holding that 8 U.S.C. § 1229(a)(1)(G)(i) is unambiguous and, therefore, they are not required to defer to agency interpretations of that provision.

- Other notes:
    - In some cases, including where Pereira renders a client without other relief options eligible for cancellation or post conclusion voluntary departure, not raising a Pereira-based argument likely constitutes ineffective assistance of counsel

    - In other cases, this strategic decision may be more nuanced. For example, with respect to seeking termination of removal proceedings, IJs and the BIA are bound by Bermudez-Cota, and therefore, cannot terminate proceedings based on an NTA that does not include the time and place if the noncitizen subsequently received a proper hearing notice. Nonetheless, as discussed above, the jurisdictional issue will have to be resolved by circuit courts, and possibly the Supreme Court, so if termination is the best outcome for a particular client, practitioners should continue to preserve the Pereira arguments.

    - Individuals currently in removal proceedings before an IJ may raise a Pereira-based argument orally in court and/or in a brief. Following BermudezCota, IJs cannot

terminate proceedings based on a defective NTA if the individual subsequently received a proper hearing notice. Nonetheless, practitioners may choose to make the argument, preferably by written motion, to preserve the issue for appeal.

Jeffrey Chase Blog June 3 2019

https://www.jeffreyschase.com/blog/2019/6/3/latest-pereira-developments

Not content with its ruling on the jurisdictional issue, the BIA returned to the narrower issue in *Pereira* in a May 1 precedent, *Matter of Mendoza-Hernandez and Capula-Cortez*, in which the Board held that the two-step rule rejected in *Pereira* is not only sufficient for broader jurisdictional purposes, but remarkably, is also sufficient to trigger the stop-time rule. The degree of *chutzpah* involved in reaching a decision directly at odds with the Supreme Court's holding was so great that a sharply-divided Board made the case its first *en banc* decision in 10 years, revealing a 9 to 6 split among its permanent judges.

The Ninth Circuit took only three weeks to reverse the Board's decision. [Lorenzo Lopez v. Barr] The circuit court ruled to the contrary that a subsequent hearing notice does not trigger the stop-time rule. The court also held that it owes no deference to the BIA's interpretation of Supreme Court decisions; that the BIA ignored the plain text of the statute it claimed to be interpreting; and that the BIA relied on case law that could not be reconciled with the Supreme Court's decision in *Pereira*. As the BIA will undoubtedly continue to apply its erroneous decision outside of the Ninth Circuit, it is hoped that the other circuits will quickly follow the Ninth Circuit's lead. Sadly, the majority of the BIA's judges have signaled that they will not act as neutral arbiters and afford due process. It is left to the circuit courts to provide the necessary correction.