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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of

Amicus Invitation No. 23-01-08

Amicus Invitation: 23-01-08

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE ATTORNEYS UNITED FOR A SECURE AMERICA

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REQUEST TO APPEAR AS AMICUS CURIAE

Attorneys United for a Secure America (AUSA), respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 23-01-08 (BIA 2023). The *amicus curiae* brief is submitted with this request.

INTEREST OF AMICUS CURIAE

AUSA is a nationwide network of attorneys, law students, and paralegals who support strong immigration law enforcement. AUSA is a project of the Immigration Reform Law Institute (IRLI), a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. AUSA members have filed briefs in many immigration-related cases before federal courts and administrative bodies, including *State of Texas v. United States of America*, 6:21-cv-00003 (S.D. Tex.), *State of Texas, Missouri v. Biden*, 21A21 (U.S.), 21-10806 (5th Cir.), 2:21-cv-00067 (N.D. Tex.), *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020), *Gomez v. Trump*, 1:20-cv-01419 (D.D.C.), and *Matter of Reyes*, 28 I&N Dec. 52 (B.I.A. 2020). AUSA believes immigration policies must be reformed to serve the national interest. Specifically, AUSA seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. Therefore, AUSA respectfully requests leave to file the brief accompanying this motion to assist the Board with the issue presented.

ISSUES PRESENTED

Pursuant to *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022):

1. Should an Immigration Judge allow DHS to remedy a non-compliant Notice to Appear?

2. To remedy a non-compliant Notice to Appear, is either (1) issuing an I-261, or (2) amending the Notice to Appear, permitted by the regulations, and would either comport with the single document requirement emphasized by the United States Supreme Court in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)? If not, how can a non-compliant Notice to Appear be remedied?

SUMMARY OF THE ARGUMENT

Immigration judges have the authority to perform a number of functions that include to adjudicate, make determinations and take other actions consistent with applicable laws and regulations that promote efficiency of the courts' time and resources. Since Section 239(a)(1) of the Immigration and Nationality Act is a claim processing rule, the IJ retains jurisdiction over the proceedings and also has the authority to remedy a non-compliant Notice to Appear without terminating the proceedings.

Issuing an I-261 is not an appropriate remedy as that form is only intended to amend or add charges of inadmissibility or removability. In an unpublished BIA opinion, *Matter of X*, the court ruled that DHS may not remedy a non-compliant NTA by filing a Form I-261as its intended use, per 8 C.F.R. § 1003.30, is to add or amend charges of inadmissibility or removability. The regulation specifically states that "[a]t any time during deportation or removal proceedings, additional or substituted charges of deportability and/or factual allegations…" can be done by filing out Form I-261. 8 C.F.R. § 1003.30. See also *Matter of X*, 6-9-23 (BIA 2023).

An Immigration Judge may allow DHS to amend the Notice to Appear and have the Respondent served with a compliant form containing the required information. In *Matter of Fernandes*, the court held that since the regulations for a Notice to Appear form are a claim-

processing rule an Immigration Judge may allow DHS to amend the form, after an objection is timely raised, as an appropriate remedy.

The claim-processing rule in section 239(a)(1) neither provides for remedies nor mandates termination as a consequence for violating that rule. *In fact, in Matter of Herbert-Sanchez,* 26 I&N 43, 45 (BIA 2012), the court held that termination should be used in limited circumstances.

An Immigration Judge has the authority and discretion to allow DHS to amend the non-compliant Notice to Appear to be consistent with the statutory requirements and *Niz-Chavez.* Therefore, an Immigration Judge may allow DHS to remedy a non-compliant Notice to Appear by amending it as termination is only appropriate in limited circumstances that are not procedural violations.

ARGUMENT:

I. IMMIGRATION JUDGES MAY ALLOW DHS TO REMEDY A NON-COMPLIANT NOTICE TO APPEAR

Immigration Judges (IJ) have the authority to adjudicate and make determinations on removability, deportability, and excludability. An IJ may "take any … action consistent with applicable laws and regulation as may be appropriate", including such "actions as ruling on motions, issuing subpoenas, and ordering pre-hearing conferences and statements," Executive Office for Immigration Review, Immigration Court Practice Manual, 1.4(a), available at https://www.justice.gov/eior/reference-materials/chapter-1-4. See also C.F.R §§ 1240.1(a), 1240.31, 1240.41. This would include an IJ's authority to allow DHS to remedy a non-compliant Notice to Appear (NTA) without terminating the proceedings.

Failing to include the date, time and location of the removal hearing on the NTA is not fatal and can be cured as long as the respondent was initially provided an NTA. According to *Matter of Fernandes*, Section 239(a)(1) of the Immigration and Nationality Act is a claim-processing rule that does not interfere with an IJ's jurisdiction over the proceedings. Matter of Fernandes, 28 I&N Dec. 605, 608 (BIA 2022).

Accordingly, BIA has held that an IJ retain jurisdiction over a respondent's removal proceedings, even if an initial NTA does not contain time and place information. See *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021); *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019). Therefore, an IJ may permit a non-compliant NTA be remedied.

Both BIA and several circuit courts have held that neither *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) nor *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) hold that an NTA that lacks date, time or place information required by section 239(a)(1) interferes with subject matter jurisdiction of the immigration court. *Matter of Arambula-Brava*, 28 I&N Dec. at 391. See *United States v. Castillo-Martinez*, 16 F.4th 906, 914 n.3 (1st Cir. 2021), *cert. denied by Jesus L. v. United States, 2022 U.S. LXIS 3865 (U.S. Oct. 3, 2022):* 022); *Chavez-Chilel v. Att'y Gen. U.S.*, 20 F.4th 138, 142–44 (3d Cir. 2021); *Chery v. Garland*, 16 F.4th 980, 987 (2d Cir. 2021); *Ramos Rafael v. Garland*, 15 F.4th 797, 800–01 (6th Cir. 2021); *Tino v. Garland*, 13 F.4th 708, 709 n.2 (8th Cir. 2021) (per curiam); *Maniar v. Garland*, 998 F.3d 235, 242 & n.2 (5th Cir. 2021).

Since §239(a) relates to matters within an IJ's authority, it is logical that an IJ may exercise judgment and discretion to enforce the rule by allowing DHS to amend a non-compliant NTA. *See* 8 C.F.R. § 1003.10(b) (2021) ("[I]mmigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the

[INA] and regulations that is appropriate and necessary for the disposition of such cases."). This is not to say an Immigration Judge may simply ignore or overlook" a violation of the rule, "if timely raised" by the respondent, but rather how to enforce and/or order a remedy for such a violation without having to terminate the case. *Fernandes*, 28 I&N Dec. at 615. See also *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 85 n.9 (2009) (recognizing that an agency "may prescribe and enforce reasonable procedural requirements" for claim-processing rules). In fact, requiring immediate termination for a violation of section 239(a)(1), would "essentially [turn] the time and place requirement for a notice to appear [into] a jurisdictional requirement." *Matter of Nchifor*, 28 I&N Dec. 585-587 n.7 (BIA 2022). Thus, where a respondent timely objects to the sufficiency of his NTA, the IJ may allow DHS to amend the NTA to include the required date, time, and location of the hearing without terminating the proceedings, *Id* at 616.

In the past, both Federal courts and the Board have allowed DHS to remedy a defective service of the NTA and it would be consistent with such practice to permit DHS to amend a non-compliant . For example, in *B.R. v. Garland*, the court "h[e]ld that IJ's do have the authority to allow DHS to cure improper service of an NTA without requiring termination of the proceedings[.]" *B.R. v. Garland*, 26 F.4th 827, 840 (9th Cir. 2022). Instead of termination an IJ "should … grant[] a continuance to give HDS an opportunity to give the DHS an opportunity to effect proper service." See also *Matter of W-A-F-C*, 26 I&N Dec. 880, 882 (BIA 2016).

An NTA is much like a civil or criminal complaint, both of which are allowed to be amended under the applicable federal rules of procedure. See Fed. R. Civ. P. 15 (allowing for amended and supplemental complaint(s): Fed. R. Crim. P. 7(c) ("Unless an additional or

different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding."). This provides

> the parties a remedy for a noncompliant filing that is neither futile nor frivolous. In addition, not allowing a complaint or information to be amended would cause a case to be dismissed and waste judicial and administrative resources. We therefore reject the respondent's argument that termination is the only appropriate remedy for a violation of section 239(a)(1)(G)(i).

Matter of Fernandes, 28 I&N Dec. 605 at 615. The Supreme Court has recognized that "absent congressional guidance regarding a remedy, the remedy for a claim-processing violation is not loss of all later powers to act." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 27, 137 S. Ct. 436, 438 (2016) (citation omitted). *See also Union Pac. R.R. Co. v Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 84 (2009) ("[W]e see no reason why the panel could not adjourn the proceeding pending cure[.]"). Accordingly, "an omission of some of the information required [in an NTA] can be cured and is not fatal." *Aguilar Fermin v. Barr*, 958 F.3d 887, 895 (9th Cir. 2020).

Therefore, an IJ may allow DHS to remedy a non-compliant NTA instead of the immediate termination and refiling of the case.

II. A NON-COMPLIANT NOTICE TO APPEAR CAN BE REMEDIED

A. Form I-261 is not a remedy for a non-compliant Notice to Appear.

Form I-261 is used to amend or add charges of inadmissibility or removability; it is not a remedy for an NTA that is non-compliant due to missing date, time, and place information. Thus, this form may not be used to add or change the absent date and time of a hearing. In an unpublished opinion, *Matter of X*, BIA ruled "that the DHS may not remedy a defective NTA by filing a Form I-261[.]" as its intended use, per 8 C.F.R. § 1003.30. , "[a] Form I-261 can only be used to add or substitute: (1) charges; or (2) factual allegations." *Matter of X*, 6-9-23 (BIA 2023)

(unpub'd). Form I-261 is inappropriate to cure missing date and time information because such information is not a substitute charge or changed factual allegation. Factual allegations are usually the country where the respondent is a citizen, how the respondent came to the United States, and any other pertinent information supporting the charge(s). The date and time that respondent is ordered to appear before an Immigration Judge is not a fact but rather a form of notice of when, what time, and where a respondent is to appear for the hearing. The applicable regulatory language does not state that missing date and time information is the type that can be updated using this form. Rather, I-862 is the Notice to Appear Form be served on a Respondent to provide such information.

In *Matter of X*, DHS personally served the respondent with a notice to appear that ordered the respondent to appear before the . . . Immigration Court at a date and time "to be set." *Id.* The respondent later received an updated NTA changing the location of the hearing and setting the date and time. At that hearing, "the respondent . . . made an oral motion to terminate the[] proceedings without prejudice pursuant to *Matter of Fernandes*, 28 I&N Dec. 605 (BIA 2022) because the notice to appear lacked a date and time of the respondent's initial hearing before the Immigration Judge." *Id.* The motion was granted in part and the IJ terminated the proceedings without prejudice because "DHS' attempt to cure the defect" using Form I-261 was insufficient." *Id.* BIA subsequently "affirm[ed] the Immigration Judge's determination that DHS may not remedy a defective NTA by filing a Form I-261." *Id.*

The Supreme Court in *Niz-Chavez* required the date and time to be on one NTA form (I-862) to trigger the stop-time rule. *Niz-Chavez*, 141 S. Ct. at 1486. To permit DHS to use Form I-261 would result in more than one form and contradict the requirements of *Niz-Chavez*.

B. Curing the Notice to Appear for a procedural violation of section 239(a)(1) can be achieved without terminating a case by amending the NTA.

A non-compliant NTA can be remedied by amending the form and serving the new NTA as a single document according to *Niz-Chavez*. In *Matter of Fernandes*, BIA remanded the case to the immigration court to allow "DHS [to] remedy the noncompliant notice to appear." *Fernandes*, 28 I&N Dec. at 616. The Board did not provide guidance on the proper remedy, explaining that "[t]he precise contours of permissible remedies are not before us at this time. DHS may decide it is best to request dismissal without prejudice and file a new notice to appear." *Id.* BIA also found that "not allowing a complaint or information to be amended would cause a case to be dismissed and waste judicial and administrative resources." *Id.* at 615.

It should be noted that '[a] noncompliant notice to appear is not equivalent to a lack of a notice to appear altogether". *Matter of Fernandes*, 28 I.&N. Dec. at 614. "[I]f the issue is timely raised," an IJ cannot presume the incomplete NTA was "never . . . served or filed." *Id.* citing *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 465–66 (A.G. 2018).

Neither the INA nor the applicable regulations provides for remedies or mandates termination as a sole consequence for failing to provide the statutorily required information in a single document. *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016) (discussing a statutory claim-processing rule that "says nothing . . . about the remedy for a violation of that rule," and concluding that in "the absence of congressional guidance regarding a remedy, '[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act'" (alteration in original) (quoting *United States v. Montalvo-Murillo*, 495 U.S. 711, 718 (1990))).

The Seventh Circuit has ruled that a respondent is entitled to dismissal or termination of the proceedings where the notice to appear was noncompliant and the respondent made a timely objection. *See Arreola-Ochoa*, 34 F.4th 603 at 608 (May 17, 2022). ("[T]he proceeding must be dismissed for failure to comply with a mandatory claims-processing rule."). The *Fernandes* Court, in a notation, emphasized that because this case only bound courts within the Seventh Circuit's jurisdiction it would not be followed. Matter of Fernandes, 28 I&N Dec. 605 n. 3. See also *Matter of U. Singh*, 25 I&N Dec. 670, 672 (BIA 2012) ("We apply the law of the circuit in cases arising in that jurisdiction, but we are not bound by a decision of a court of appeals in a different circuit.").

A defect, such as missing date, time and location of hearing in a document can be corrected by amending the NTA. An IJ has the authority to allow DHS to amend the form so that a Respondent has been notified consistent with the statutory requirements without dismissing proceedings.

CONCLUSION

For the forgoing reasons, an Immigration Judge may allow DHS to amend a non-compliant Notice to Appear without terminating the proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on, August 28, 2023, I submitted the forgoing *amicus curiae* brief the Board of Immigration Appeals via courier service sent three (3) copies for distribution to the parties, to:

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