

Niz-Chavez Roundtable Presentation—Dr. Alicia Triche
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Issue:

our scenario includes those instances where ten years of continuous physical presence has accrued after an unexecuted removal order has become final.

forced to concede that the NTA did not stop-time under *Niz-Chavez*, OIL and the BIA have begun to assert “physical presence or residence only continues to accrue until the entry of a final administrative decision of removal.”

1. Statute and concepts:

ten years requirement: 8 U.S.C. § 1229b(b)(1)(A)/INA 240A(b)(1)(A): applicant must have “been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application.”

stop time and breaks are at 8 U.S.C. § 1229b(d)/INA 240A(d). The title is

(d)Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) 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 under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

(2) Treatment of certain breaks in presence

An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

2. Historical and related forms of relief

Prior to IIRIRA, cancellation-like relief consisted of seven year suspension under former INA §244(a)(1)/8 U.S.C. §1254(a), and 10 year suspension (for serious criminal backgrounds) under §244(a)(2). This required only 7/10 years, extreme hardship to a Q/R, and GMC.

3. Jurisprudence on Pre-IIRIRA stop-time approach in suspension context

§244 was silent as to stop-time, so case law found that time continued to accrue during any non-frivolous appeal—EVEN circuit court appeals. *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Cipriano v. INS*, 24 F.3d 763 (5th Cir. 1994)

4. Legislative developments: replacement of suspension with cancellation and subsequent passage of NACARA

H.R. Rep. No. 104-828 (1996), 1996 WL 563320—for replacement of suspension w/cancellation

H.R. Rep. No. 104-469(I) (1996) 1996 WL 168955—also for replacement of suspension

for history of NACARA cancellation, see *Matter of Garcia*, 24 I. & N. Dec. 171 (BIA 2007)

5. Post-IIRIRA jurisprudence on stop-time

Matter of Ortega-Cabrera, 23 I. & N. Dec. 793 (BIA 2005)

Matter of Mendoza-Sandino, 22 I. & N. Dec. 1236 (BIA 2000)

6. Post-Pereira/Niz-Chavez jurisprudence: the attempted resurrection of the jilted final-order approach

Matter of Garcia, 24 I. & N. Dec. 171 (BIA 2007)

Matter of Romalez-Alcaide, 23 I& N Dec. 423,426 (BIA 2002) (“An order of removal is intended to end an alien’s presence in the United States”)

7. Cases regarding executed removal and/or departures under threat of removal

Landin-Zavala v. Gonzales, 488 F.3d 1150 (9th Cir. 2007)

Matter of Romalez-Alcaide, 23 I& N Dec. 423 (BIA 2002)

Mrvica v. Esperdy, 376 U.S. 558 (1964)

8. Argument 1: to be a “break” under (d)(2), there has to be a departure

plain language of the statute is unambiguous and cases involving executed, actual departures are not “existing background principle” that can change the plain language of the statute

9. Argument 2: an unexecuted order cannot otherwise stop time under (d)(1)

(d)(1) is an exhaustive list of stop-time events; even if it isn't, it was demonstrably designed to replace the “final order” approach to calculation

10. Alternative argument for PD/IJ/BIA cases: if discretion is exercised to re-open cases, then a final removal order no longer exists