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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. 20-04-09 Notice and Due Process Issue	**Amicus Invitation No. 20-04-09**

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. 20-04-09 (BIA 2020). 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 *Dep't of Homeland Sec. v. Thuraissigiam*, 19-161 (U.S.), *Gomez v. Trump*, 1:20-cv-01419 (D.D.C.), *Make the Road New York v. Cuccinelli*, 0:19-03595 (2nd Cir.); 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.

ISSUE PRESENTED

The issue presented in this case is:

"Where the Migrant Protection Protocol (MPP) notice and advisal sheets are not signed nor otherwise acknowledged by the respondent on the record, and the record contains no specific attestation of any kind, from either party, that the respondents received specific advisals adequate to allow them to appear at the scheduled hearing from their location in contiguous territory, is notice of the hearing adequate to satisfy due process?"

SUMMARY OF THE ARGUMENT

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 307, 70 S. Ct. 652, 654 (1950) affirms that due process requires notice "reasonably calculated" to apprise parties of the pendency of the action and the opportunity to present objections. The notice must convey the required information such as: time, date, location of hearing, and the allegations, to provide sufficient due process, and "it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Id*. There is no legal requirement for the Department of Homeland Security (DHS) to go beyond that which is settled in both the Immigration and Nationality Act (INA) and case law. Further, Respondents received specific advisals, which included the time and date of their removal hearings, with a signed Certificate of Service. The burden of proof for lack of service was not met by Respondents. There is no dispute that notice was received but rather Respondents allege (1) that the accompanying tear sheets did not identify Respondents and (2) that there was no specific attestation of any kind by either party. Where an initial Notice to Appear (NTA) contained a completed Certificate of Service, DHS has met its burden to provide notice. *See*, *Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019), (finding service was sufficiently met for respondent's initial 2007 NTA). Therefore, DHS' proof of service was complete. Respondents were served with adequate notice of the hearing's date, time and location along with instructions as to how, when, and where to report from Mexico or access to their scheduled hearing. The statutory requirements for notice are therefore met and it was each Respondent's responsibility to inquire about specific information to report for transportation to their hearing.

To require more than the most basic notice requirements that already comport with constitutional due process is both unnecessary and overly burdensome. The DHS's NTA form and the Migrant Protection Protocol Form I-862 ("MPP") instruction tear sheets provided Respondents notice "reasonably calculated" to provide sufficient information to appear and present their objections. *Mullane*, supra. While

page two of the NTA did not include "any information that identifies them…" it had a signed "Certificate of Service" and was attached to page one of the NTA which did identify each Respondent. The *Perez-Sanchez* court emphasized that failure to specify necessary information like the time and place of removal proceedings deprived proper notice. In fact, "[t]he omission of that information, as the Supreme Court saw it, was not "some trivial, ministerial defect" that could be cured later." *Perez-Sanchez v. United States AG*, 935 F.3d 1148, 1153-54 (11th Cir. 2019) (internal quotation marks omitted). Not identifying each Respondent on the tear sheet that is attached to the completed NTA would be viewed by courts as a trivial, ministerial defect that did not deprive Respondents of their rights.

ARGUMENT:

I. Mullane affirms the notion that due process does not require actual notice but merely notice "reasonably calculated" to apprise Respondent of the pendency of the action and the opportunity to present objections.

The Respondents in the case were all personally served with both the NTA and the accompanying MPP instruction tear sheet that contained a signed "Certificate of Service". As the *Mullane* court opined,

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time *for those interested to make their appearance*. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, *the constitutional requirements are satisfied*. (emphasized added)"

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 307 (1950). The MPP instructions met this standard because they provided sufficient explanation how, when, and where to appear at a port of entry.

As the First Circuit court noted in *Pereira v. Sessions*, regarding section 239(a) of the INA

> "The referenced provision, §1229(a), contains three subsections, the first of which states in part: In removal proceedings under section 1229a of this title, written notice (in this section referred to as a "notice to appear") 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) …Id. § 1229(a) (1)". That subsection goes on to specify ten items, including the charges

> against the alien, the alien's alleged illegal conduct, and "[t]he time and place at which the proceedings will be held…"

Pereira v. Sessions, 866 F. 3d 1, 4 (1st Cir. 2017). While the issue in *Pereira* concerned the "stop-time rule" which is not relevant here, the Court addressed the required due process elements of an NTA, which is applicable to the issue in this case. Therefore, the Respondents were provided notice in accordance with the INA and their constitutional due process rights.

The Immigration Judge erred in interpreting 8 U.S.C. §1252(b)(1) included in the Judge's Opinion stating that, "[t]he Immigration and Nationality Act requires that, [t]he alien shall be given notice reasonable under all circumstances of the nature of the charges against him and at the time and place at which the proceedings will be held." IJ Op. at 4 (In re: 20-04-09) (internal quotation marks omitted). All of the necessary INA requirements were provided to Respondents in the NTA and the accompanying instructions. Despite the IJ's finding to the contrary, neither the INA nor case law requires Respondents to be served with "instructions as to how, when, and where to report from Mexico or access to their scheduled hearing the United States." *Id*. As the IJ noted "[p]er the instruction sheet, or tear sheet, the respondent must present himself at a port of entry at a designated time in advance of their scheduled hearing and await DHS transportation to the hearing".

An NTA is not a unilateral transaction as respondents must be proactive in preserving their right to bring objections at their hearing. As stated by the Ninth Circuit,

> "…since the NTA and the hearing notice combined provided her with the time and place of her hearing, (2) the NTA met the requirements of § 1229(a)(1)(F)(ii) since the NTA advised her of her responsibility to update the Immigration Court of any change in address, and (3) the in absentia removal proceedings did not violate her due process rights under the Fifth Amendment since the notice of her hearing was mailed to her last provided address."

Popa v. Holder, 571 F.3d 890, 892 (9th Cir. 2009).

Further, the instruction sheet provided to Respondents stated where information about transportation can be obtained at either a DHS office and/or the DHS website, and their forms were

provided to them in Spanish. In the *Matter of Camarillo*, the agency began its analysis by examining the structure of the INA and, more specifically, the relevant provisions. It noted that § 1229(a) is "the primary reference in the [INA] to the notice to appear," and it defines the written notice that is given…a "notice to appear." *Matter of Camarillo*, 25 I&N Dec. at 644 at 647 (BIA 2014). Upon service of the NTA, Respondents were in possession of the required information to determine the most convenient location along a port of entry to obtain transportation to the hearing. There is no mandate in the INA that an NTA must state the identity of the party, or any other statutorily required information on the tear sheet. For example, the government need not include "every possible ground for removability in the original NTA." *Ka Cheng v. Holder*, 678 F. 3d 66, 70 (1st Cir. 2012). As long as the required information is included somewhere in the NTA (or subsequent Notice of Hearing ("NOH")), the government has satisfied its notice requirements. *Garcia-Romo v. Barr*, 940 F.3d 192, 201 (6th Cir. 2019) (holding that written notice can be completed "through service of more than one written communication…if those multiple installments collectively give the …information required to be provided by §1229(a)(1(A)-(G))". It is the content of the notice, and not the form that matters, and in this case it is clear that Respondents were provided all of the statutorily required information, and also were apprised of how to report for the hearing.

II. A signed and completed Certificate of Service is sufficient evidence that Respondents received timely notice of hearing.

Respondents were served NTAs and specific advisals with a signed Certificate of Service. The burden of proof for lack of proper service is on the Respondents. There is no dispute that notice was received but rather Respondents allege (1) that the accompanying tear sheets did not identify Respondents and (2) that there was no specific attestation of any kind by either party. In *Martinez v. Barr*, 941 F.3d 907, 923 (9th Cir. 2019), the Court noted the initial NTA contained a completed Certificate of Service that the Court determined was sufficient proof of service, which is applicable to this matter. The Court held that the *amended NTA* did not have a completed Certificate of Service, which was required. In this matter,

the Certificate of Service was completed for each Respondent. It is irrelevant that the advisal sheets were not signed nor otherwise acknowledged by the Respondent on record.

A "custom" notice is not required for proof of service.

> "Petitioner's argument that he was denied notice of the hearing is unpersuasive. Respondents have submitted records showing that Petitioner was served with notice of the hearing. Further, Petitioner acknowledged at the bond hearing that he had received this notice, though he went on to complain that he did not receive a custom" notice directly from the immigration court. There is also no evidence in the record before the Court that Petitioner requested a continuance…"

Adejola v. Barr, 439 F. Supp. 3d 120, 130 (W.D.N.Y. 2020) (internal citation omitted). Likewise in this matter, Respondents did not dispute they received notice but rather that the tear sheets on page two of the NTAs did not identify Respondents. A "custom" notice is not required when the first page of the NTAs includes Respondent's identifying information.

It is clear that "Section 1229(a) speaks in definitional terms." *Pereira v. Sessions*, 138 S. Ct. at 2108-09. *See also, Martinez*, 941 F.3d at 923 ("Section 1229(a)…is a definitional statute."). The statute explains what information must be included in addition to the time and place of the hearing. *See,* 8 U.C.S. §1229(a)(1)(A)-(G). *See also, Martinez*, 941 F.3d at 923 ("the NTA must include the nature of the proceedings…the legal authority under which the proceedings are conducted, acts or conduct alleged to be in violation of law, and charges against the alien and statutes provisions alleged to have been violated.") (internal quotations omitted).

As previously stated, Respondents were personally served with timely notice and an opportunity to present objections. DHS met the requirements of notice and provided a signed Certificate of Service as proof of service required by statute and case law.

A signed and completed Certificate of Service is evidence of proof of service. Neither a "custom" notice nor specific attestation by either party is required. Therefore, Respondents have failed to meet the burden of proof to show that they were not properly served. This was a misinterpretation of the statutes by the IJ.

CONCLUSION

For the forgoing reasons, the judgment of the Immigration Judge should be reversed.

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