

APPENDIX B

SAMPLE STATUTORY MOTION TO RECONSIDER TO RECONSIDER AND REMAND FOR HEARING ON APPLICATION FOR CANCELLATION OF REMOVAL IN LIGHT OF *PEREIRA v. SESSIONS* (FOR FILING WITH THE BIA)

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

This motion is applicable to:

Cases in which a putative notice to appear (NTA) that did not contain the time or place information about the initial hearing before the Immigration Court was found to interrupt the requisite period of continuous presence or residence for the Respondent to qualify for cancellation of removal under INA §§ 240A(a) or (b)(1) and, as a result of *Pereira v. Sessions*, the person is now eligible for cancellation of removal.

Accordingly, the motion seeks reconsideration and remand to the Immigration Court for a hearing on an application for cancellation of removal.

This sample motion is intended for filing with the Board of Immigration Appeals (BIA). If the person did not appeal to the BIA, the motion should be filed with the Immigration Court and different regulations apply.

[If applicable: DETAINED]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:)
)
_____,) A Number: _____
)
Respondent.)
)
In Removal Proceedings.)
_____)

**STATUTORY MOTION TO RECONSIDER AND
REMAND FOR HEARING ON APPLICATION
FOR CANCELLATION OF REMOVAL IN LIGHT
OF PEREIRA V. SESSIONS**

I. INTRODUCTION

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration in light of the Supreme Court’s recent precedent decision in *Pereira v. Sessions*, No. 17-459, -- U.S. -- (June 21, 2018). In *Pereira*, the Supreme Court held that a document styled as a notice to appear in removal proceedings that does not contain the time or place of the first hearing does not interrupt the requisite period of continuous presence or residence for a noncitizen to be eligible for cancellation of removal. Here, as in *Pereira*, the BIA improperly pretermitted the Respondent’s application for cancellation of removal.

The Board should reconsider its decision and remand Respondent’s removal proceedings for a hearing on [his/her] application for cancellation of removal because the Court’s decision in *Pereira* controls this case.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) charged the Respondent as removable under Section § _____ of the INA. *See* Notice to Appear, dated ____.

On _____, the Immigration Judge (IJ) found Respondent removable as charged and ineligible for cancellation of removal. *See* IJ Decision. This Board affirmed the IJ’s decision on _____ . *See* BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

_____. The proceeding took place on:_____.

The outcome is as follows _____.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is:_____.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.2(b)(1). In general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA’s decision] The Board issued its decision in Respondent’s case on_____. This motion is timely filed within 30 days of the date of that

decision].

[If more than 30 have elapsed since the date of the Board’s decision] The Board issued its decision in Respondent’s case on ___. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. See § IV.B., *infra*.¹

IV. **ARGUMENT**

A. **As a Matter of Law, the Board Erred in Finding the Respondent Statutorily Ineligible for Cancellation of Removal**

In *Pereira v. Sessions*, the Supreme Court held that “[i]f the Government serves a noncitizen with a document that is labeled “notice to appear,” but the document fails to specify either the time or place of the removal proceedings,” the document “does [not] trigger the stop-time rule” under INA § 240A(d)(1)(A). *Pereira*, slip op. 2. “A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a “notice to appear under section [239(a)]” and therefore does not trigger the stop-time rule.” *Id.* In the Respondent’s case, under *Pereira* the putative notice to appear issued against [him/her] does not interrupt [his/her] period of continuous presence required to qualify for cancellation of removal, and thus [he/she] is eligible for cancellation of removal.

Each form of cancellation of removal requires that the applicant have either resided or been physically present in the United States for a specified number of years prior to the date of application in order to be statutorily eligible to apply. See INA §§ 240A(a)(2) (for lawful permanent residents, seven years), 240A(b)(1)(A) (for certain nonpermanent residents, ten years). See also *Pereira*, slip op. at 2. Under INA § 240A(d)(1)(A), “any period of continuous residence

¹ See also 8 C.F.R. § 1003.1(d)(1)(ii) (“a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.”).

or continuous physical presence in the United States shall be deemed to end ... when the alien is served a notice to appear under section 239(a)” of the INA.” *See Pereira*, slip op. at 2-3. INA § 239(a), in turn, specifies the information that must be contained in a notice to appear, including “the time and place at which the [removal] proceedings will be held.” *Pereira*, slip op. at 3-4 (quoting INA § 239(a)(G)(i)) (internal quotations omitted; brackets original).

In *Pereira*, the noncitizen was served with a document that was styled as a notice to appear (i.e., a “putative notice”), but that “did not specify the date and time of [his] removal hearing.” *Pereira*, slip op. at 6. “Pereira then applied for cancellation of removal” under INA § 240A(b)(1), but the Immigration Judge (IJ) pretermitted his application, finding issuance of the notice to appear triggered the “stop-time” rule at INA § 240A(d)(1) and thus interrupted his required ten years of physical presence to render him eligible for cancellation. *Pereira*, slip op. at 6-7. This Board affirmed the IJ’s decision, citing to its prior decision in *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011). *Pereira*, slip op. at 7. The First Circuit affirmed, deferring to the BIA’s decision in *Camarillo* and its application in Mr. Pereira’s case. *Id.*

The Supreme Court reversed, holding that “[a] putative notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a “notice to appear under section [239(a)],” and so does not trigger the stop-time rule.” *Pereira*, slip op. at 9. The Court found that the “plain text, the statutory context, and common sense all lead inescapably and unambiguously to that conclusion.” *Pereira*, slip op. at 2.

Like the noncitizen in *Pereira*, the Respondent was found removable and precluded from applying for cancellation of removal because [his/her] putative notice to appear was found to trigger the stop-time rule at INA §240A(d)(1)(A). *See* BIA Decision at p. . In light of the Supreme Court’s decision in *Pereira*, the Board should grant reconsideration and remand the Respondent’s removal proceedings for a hearing on an application for cancellation of removal.

[If more than 30 days have elapsed since the BIA's decision, insert section B]

B. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS.

1. Standard for Equitable Tolling

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), or, under the doctrine of equitable tolling, as soon as practicable after finding out about an extraordinary circumstance that prevented timely filing.

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is “entitled to equitable tolling.” *See, e.g., Holland v. Florida*, 560 U.S. 631, 632 (2010). Specifically, an individual must show “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with “reasonable diligence,” but they need not demonstrate “maximum feasible diligence.” *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court also has recognized a rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland*, 560 U.S. at 631. Thus, ten courts of appeals have recognized that motion deadlines in immigration cases are subject to equitable tolling. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85

(9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1363 n.5 (11th Cir. 2013) (en banc); cf. *Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (“Notably, every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen.”). [If applicable] Similarly, federal courts recognize that the numeric limit on motions is subject to tolling. See *Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) Thus, the time and numeric limitations on motions to reconsider at issue in this case are subject to equitable tolling.

2. Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary Circumstances Prevented Timely Filing of this Motion.

The Supreme Court’s decision in *Pereira* constituted an extraordinary circumstance that prevented Respondent from timely filing a motion to reconsider and he/she pursued his/her case with reasonable diligence. Equitable tolling of the motion to reconsider deadline is warranted in this case.

The Supreme Court’s decision in *Pereira* abrogates the Board’s erroneous finding that the putative notice to appear issued in his/her case triggered the stop-time rule and rendered him/her ineligible for cancellation of removal. This extraordinary circumstance prevented Respondent from timely filing his/her motion to reconsider.

Pereira was decided on June 21, 2018. Respondent has exhibited the requisite diligence both before and after learning of the decision. She/he first learned of the decision on _____ when _____. See Declaration of Respondent. She/he is filing the instant motion to reopen within ____ days of discovering that [she/he] is eligible for cancellation of removal [insert if true] and within 30 days of the Supreme Court decision. As set forth in Respondent’s accompanying declaration, Respondent attempted to challenge the

Immigration Judge’s decision by appealing the decision to this Board, [if applicable] and later via Petition for Review to the U.S. Court of Appeals for the ____ Circuit. [If Respondent did not seek circuit review, explain the reason why and support claims with corroborating evidence if possible; If Respondent sought review, explained what happened]. [Include any other steps Respondent took to pursue case prior to the *Pereira* decision including contacting attorneys.]

Respondent is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing his/her rights.

C. IN THE ALTERNATIVE, THE BOARD SHOULD RECONSIDER RESPONDENT’S REMOVAL ORDER SUA SPONTE.

An immigration judge or the Board may reopen or reconsider a case on its own motion at any time. *See* 8 C.F.R. §§ 1003.23(b)(1); 1003.2(a). The Board invokes its authority to reopen or reconsider a case following fundamental changes in law. *See Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999). The Supreme Court’s decision in *Pereira* amounts to a fundamental change in law warranting sua sponte reopening or reconsideration. *See supra* Section IV.A. Reconsideration is especially warranted in this case because [include other equitable factors]. *See Respondent’s Declaration.*

V. CONCLUSION

The Board should reconsider its prior decision in this case and remand Respondent’s removal proceedings.

Dated: _____

Respectfully submitted,

[Attach proof of service on opposing counsel]