

APPENDIX A

**SAMPLE
STATUTORY MOTION TO RECONSIDER AND TERMINATE 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 Respondent was ordered removed by the BIA based on a Notice to Appear in Removal Proceedings ("NTA") that did not contain the time and place of the initial hearing before the Immigration Court and, as a result of *Pereira v. Sessions*, the Immigration Court never had jurisdiction over the Respondent's removal proceedings and the Respondent may now move to reconsider and terminate removal proceedings.

Accordingly, the motion seeks reconsideration and termination.

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
TERMINATE IN LIGHT OF PEREIRA V.
SESSIONS**

I. INTRODUCTION

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration and termination 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. In so deciding, the Court stated, “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)].”” *Pereira*, slip op. at 9. The text of the INA and the governing regulations require the filing of a notice to appear, as defined at INA § 239(a), for the Immigration Court to have jurisdiction over a Respondent’s case. Here, the Department of Homeland Security (DHS) never filed a valid notice to appear—the requirements of which

Pereira has now corrected—with the immigration court, and thus neither the immigration court nor this Board had jurisdiction over the Respondent’s case.

Accordingly, under *Pereira* the Board should reconsider its decision and terminate removal proceedings against the Respondent for lack of jurisdiction.

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) ordered the Respondent removed. *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 Jurisdiction over the Respondent’s Removal Proceedings**

In *Pereira v. Sessions*, the Supreme Court stated, “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)].” *Pereira*, slip op. 2. In the Respondent’s case, under *Pereira* the putative notice to appear issued against [him/her] is not a “notice to appear under section [239(a)]” and therefore is insufficient to establish jurisdiction over this matter for either the immigration court or this Board. Accordingly, the Board should reconsider its decision in the Respondent’s case and terminate [his/her] removal proceedings.

Section 239 of the INA is titled “Initiation of removal proceedings,” and lays out various requirements for the government to commence removal proceedings against an individual. See generally INA § 239. Within § 239, INA § 239(a) requires the issuance of a “notice to appear” that contains certain specified information. See INA § 239(a)(1)(A)-(G). The required information includes the time and place of the first hearing before the immigration court. See

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.”).

Pereira, slip op. 3 (citing INA § 239(a)).

The implementing regulations for the commencement and procedures of removal proceedings specify that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.” 8 C.F.R. § 1003.14(a). They further specify that the requisite “charging document” can include a “Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.” 8 C.F.R. § 1003.13. In the Respondent’s case, DHS filed a putative Notice to Appear² that failed to specify the time or place of his/her first hearing before the immigration court. *See* Notice to Appear, dated_.

In *Pereira*, the noncitizen—like the Respondent here—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 and ordered him removed. *Pereira*, slip op. at 6-7. This Board affirmed the IJ’s decision, and the First Circuit deferred to the Board. *Pereira*, slip op. 7.

The Supreme Court reversed, holding, in the context of eligibility for cancellation of removal, 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)].” *Pereira*, slip op. 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. The import of the *Pereira* decision in the Respondent’s case is the Supreme Court’s construing the statutory phrase “notice to appear under section [239(a)]” as requiring the inclusion of time and place information

² The other documents listed at 8 C.F.R. § 1003.23 are not at issue in the Respondent’s case.

specified at INA § 239(a)(G). Under *Pereira*, a putative notice to appear that does not have this information is not a notice to appear as defined under the INA.

Like the noncitizen in *Pereira*, the Respondent was ordered removed based on a putative notice to appear that did not contain the requisite time or place information under the INA and the implementing regulations. See BIA Decision at p. In light of the Supreme Court’s decision in *Pereira*, the Board should grant reconsideration and terminate removal proceedings against the Respondent.

[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 vested the immigration court with jurisdiction over the Respondent’s case. 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 terminate removal proceedings against the Respondent.

Dated: _____

Respectfully submitted,

[Attach proof of service on opposing counsel]