No. 23-101

In the Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL,
PETITIONER

v.

JULIO MARIO BRISENO-LUNA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 8 U.S.C. 1229a(b)(5), a noncitizen may be ordered removed in absentia when he "does not attend a [removal] proceeding" "after written notice required under paragraph (1) or (2) of [8 U.S.C. 1229(a)] has been provided" to him or his counsel of record. 8 U.S.C. 1229a(b)(5)(A). An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time" if the noncitizen subject to the order demonstrates that he "did not receive" such notice. 8 U.S.C. 1229a(b)(5)(C)(ii).

The question presented is whether the failure to receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. 1229(a) precludes an additional document from providing adequate notice under paragraph (2), and renders any in absentia removal order subject, indefinitely, to rescission.

RELATED PROCEEDING

United States Court of Appeals (1st Cir.):

Briseno-Luna v. *Garland*, No. 20-1723 (May 2, 2023)

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JULIO MARIO BRISENO-LUNA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-3a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 4a-8a) and immigration judges (App., *infra*, 9a-16a, 17a-22a, 23a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2023. A petition for rehearing was denied on May 2, 2023 (App., *infra*, 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this petition. App., *infra*, 26a-30a.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, requires that a noncitizen placed in removal proceedings be given "written notice" of certain information. 8 U.S.C. 1229(a)(1) and (2).* Two paragraphs in 8 U.S.C. 1229(a) specify the notice required.

Paragraph (1) of Section 1229(a) governs "notice[s] to appear." 8 U.S.C. 1229(a)(1). It provides that "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) specifying," among other things, the nature of the proceedings against the noncitizen, the legal authority for the proceedings, the charges against the noncitizen, the fact that the noncitizen may choose to be represented by counsel, the "time and place at which the proceedings will be held," and the "consequences" under 8 U.S.C. 1229a(b)(5) "of the failure * * * to appear." 8 U.S.C. 1229(a)(1). To provide the notice required under paragraph (1), the government uses a form labeled "Notice to Appear." *E.g.*, Administrative Record (A.R.) 216 (emphasis omitted); see A.R. 216-218. That form, which this petition refers to as an NTA, has space for the government to fill in the time and place at which the proceedings will be held. See, *e.g.*, A.R. 216.

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* This petition uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

Paragraph (2) of Section 1229(a) is entitled "Notice of change in time or place of proceedings." 8 U.S.C. 1229(a)(2) (emphasis omitted); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, sec. 304(a)(3), § 239(a)(2), 110 Stat. 3009-588. It provides that, "in the case of any change or postponement in the time and place of [the] proceedings," "a written notice 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) specifying" "the new time or place of the proceedings" and "the consequences" under Section 1229a(b)(5) of "failing * * * to attend." 8 U.S.C. 1229(a)(2)(A). To provide the notice required under paragraph (2), the government uses a form labeled "Notice of Hearing." *E.g.*, A.R. 210 (capitalization altered). That form, which this petition refers to as an NOH, has space for the immigration court to fill in the new time and place of the proceedings. See, *e.g.*, *ibid.*

Section 1229a(b)(5) specifies the consequences of failing to appear at a scheduled proceeding. It provides that "[a]ny alien who, after written notice required under paragraph (1) or (2)" of Section 1229(a) "has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229a(b)(5)(A). "The written notice * * * shall be considered sufficient for purposes of [Section 1229a(b)(5)(A)] if provided at the most recent address provided under [8 U.S.C.] 1229(a)(1)(F)," *ibid.*, which requires the noncitizen to provide the government with a "written record" of his address and "any

change of [his] address." 8 U.S.C. 1229(a)(1)(F)(i) and (ii); see 8 U.S.C. 1229(c) ("Service by mail under [Section 1229] shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with [Section 1229(a)(1)(F)].").

An order of removal that was entered in absentia "may be rescinded" "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)." 8 U.S.C. 1229a(b)(5)(C)(ii).

2. Respondent is a native and citizen of Mexico. App., *infra*, 4a. In March 2001, he entered the United States without inspection by jumping over a fence at the border with Mexico. A.R. 209.

On July 29, 2001, the former Immigration and Naturalization Service (INS) served respondent with an NTA. A.R. 216-218. The NTA charged that respondent was subject to removal because he was a noncitizen present in the United States without being admitted or paroled, and because he was a noncitizen seeking admission without valid entry documents. A.R. 218; see 8 U.S.C. 1182(a)(6)(A)(i) and (7)(A)(i)(I). The NTA ordered respondent to appear for removal proceedings at a "Time and Date To Be Set Later." A.R. 216.

On September 7, 2001, the immigration court mailed to respondent an NOH specifying that his case had been scheduled for a hearing on September 18, 2001, at 9:30 a.m. in Boston, Massachusetts. A.R. 210. The NOH was mailed to an address in Labelle, Florida, that respondent had provided to INS. A.R. 210; see A.R. 211.

On September 18, 2001, respondent failed to appear at his scheduled hearing. App., *infra*, 23a. The immigration judge (IJ) ordered respondent removed in absentia. *Id.* at 23a-24a.

3. In 2013, respondent filed a motion to reopen his removal proceedings and rescind the in absentia removal order. A.R. 162-168. Respondent acknowledged that he "was mailed [an NOH] alerting [him]" of the "hearing scheduled in his case for September 18, 2001." A.R. 164. Respondent asserted, however, that he had failed to appear at that hearing because he "was not in possession of proper documentation that allowed him to travel" from his home in Labelle, Florida, to the location of the hearing in Boston, Massachusetts. A.R. 167; see A.R. 166-167.

An IJ denied respondent's motion to reopen. App., *infra*, 17a-22a. The IJ deemed the motion untimely, observing that respondent had "failed to explain why he waited more than 12 years from the date of his hearing to file it." *Id.* at 19a. The IJ also found that respondent "was properly served with both the NTA and [NOH]," *ibid.*, and that respondent had "not alleged exceptional circumstances that warrant[ed] reopening the case," *id.* at 21a-22a.

4. In 2019, respondent filed a second motion to reopen, seeking rescission of his in absentia removal order on the ground that his NTA did not specify the time of his removal hearing. A.R. 88; see A.R. 84-89. An IJ denied the motion. App., *infra*, 9a-16a. The IJ explained that in *In re Pena-Mejia*, 27 I. & N. Dec. 546 (2019), the Board of Immigration Appeals (Board) had "held that proceedings need not be reopened for a failure to include the date or time in the NTA where that information is later supplied in [an NOH]." App., *infra*, 14a. Noting that respondent had "acknowledged receipt of the [NOH]," the IJ found reopening unwarranted. *Ibid.*

The Board dismissed respondent's appeal. App., *infra*, 4a-8a. The Board agreed with the IJ that the lack

of a specific time in the NTA did not render respondent's in absentia removal order subject to rescission because "respondent was later sent a hearing notice that specified the time and place of his removal hearing." *Id.* at 7a.

5. In an unpublished order, the court of appeals vacated the Board's decision and remanded for further proceedings in light of the court's "intervening precedent" in *Laparra-Deleon* v. *Garland*, 52 F.4th 514 (1st Cir. 2022). App., *infra*, 2a; see *id.* at 1a-3a.

REASONS FOR GRANTING THE PETITION

Respondent did not receive, in a single document, all of the information specified in paragraph (1) of 8 U.S.C. 1229(a). Instead, respondent received an NTA that stated that the time of his removal hearing was "To Be Set Later." A.R. 216. He then received an NOH that specified the time of his hearing. A.R. 99, 210; see App., *infra*, 14a ("Respondent acknowledged receipt of the [NOH]."). The question presented is whether the failure to receive, in a single document, all of the information specified in paragraph (1) precludes the NOH from providing adequate notice under paragraph (2), and renders respondent's in absentia removal order subject to rescission. See 8 U.S.C. 1229a(b)(5)(C)(ii).

The Board in this case determined that the lack of a specific time in the NTA did not preclude the NOH from providing adequate notice under the INA. App., *infra*, 6a-7a. The court of appeals, however, vacated that determination in light of its intervening decision in *Laparra-Deleon* v. *Garland*, 52 F.4th 514 (1st Cir. 2022). App., *infra*, 2a. In *Laparra-Deleon*, the court held that the failure to receive, in a single document, all of the information specified in paragraph (1) of Section 1229(a) pre-

cluded a subsequent NOH from providing adequate notice under paragraph (2). 52 F.4th at 519-522.

This Court recently granted certiorari in *Campos-Chaves* v. *Garland*, No. 22-674 (June 30, 2023), and *Garland* v. *Singh*, No. 22-884 (June 30, 2023), to decide whether that interpretation of the INA is correct. The Court should accordingly hold this petition for a writ of certiorari pending its decisions in *Campos-Chaves* and *Singh* and then dispose of the petition as appropriate in light of those decisions.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Campos-Chaves* v. *Garland*, cert. granted, No. 22-674 (June 30, 2023), and *Garland* v. *Singh*, cert. granted, No. 22-884 (June 30, 2023), and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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JULY 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1723

JULIO MARIO BRISENO-LUNA, PETITIONER,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT.

Entered: Mar. 6, 2023

JUDGMENT

Before: BARRON, Chief Judge, HOWARD and MONTECALVO, Circuit Judges.

Petitioner Julio Mario Briseno-Luna petitions for review of a decision of the Board of Immigration Appeals (BIA) dismissing his appeal from an immigration judge's (IJ's) denial of his motion to reopen. The operative final order of removal was entered in absentia. See generally 8 U.S.C. § 1229a(b)(5). Petitioner argued before the agency that proceedings should be reopened for a variety of reasons, including, as relevant for current purposes, infirmities in the notice(s) he received prior to entry of the in absentia order of removal.

Section 1229a(b)(5)(A) allows for entry of an in absentia removal order in a case where the non-citizen has failed to appear despite having received "written notice required under paragraph (1) or (2) of section 1229(a)."

Relatedly, § 1229a(b)(5)(C)(ii) allows a non-citizen to file a motion to reopen seeking recission of an in absentia order "at any time" on the ground that he "did not receive notice in accordance with paragraph (1) or (2) of section 1229(a)" prior to entry of the in absentia order.

Petitioner in this case, invoking § 1229a(b)(5)(C)(ii), argued before the BIA that the notifications he received prior to entry of the in absentia order did not satisfy the criteria set out at either § 1229(a)(1) ("notice to appear") or (a)(2) ("notice of change in time or place of proceedings"), such that entry of the in absentia order of removal had been improper pursuant to § 1229a(b)(5)(A). Relying on agency precedent, the BIA rejected the claim.

In light of intervening precedent, we conclude that vacatur and remand are in order. The BIA's ruling is **VACATED**, and the matter is **REMANDED** for further proceedings consistent with this judgment, Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), Laparra-Deleon v. Garland, 52 F.4th 514 (1st Cir. 2022), and related precedent. We express no opinion as to the proper scope and outcome of proceedings on remand and leave it to the BIA to determine in the first instance whether further remand to the IJ is in order.

In briefing before this court, petitioner claimed that the BIA had failed to address certain other challenges to the operative in absentia removal order. The BIA's denial of reopening having been vacated in full, petitioner is free to pursue the allegedly ignored challenges on remand if he wishes to do so. We leave it to the agency to determine in the first instance whether any such claims, if pressed, are appropriate for consideration and/or have merit.

By the Court:

Maria R. Hamilton, Clerk

cc:

Donna Carr, Chief Clerk, Board of Immigration Appeals
Christopher Boom
Anthony Paul Nicastro
Brooke M. Maurer
OIL

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A079-139-134 – Boston, MA

IN RE: JULIO MARIO BRISENO-LUNA

[Date: June 22, 2020]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Carlos M. Duque, Esquire

APPLICATION:
Reopening

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's decision dated June 4, 2019, denying his motion to reopen removal proceedings. The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). This Board reviews questions of law, discretion, and judgment, and all other is-

sues raised in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was ordered removed in absentia on September 21, 2001, because he did not appear for his September 18, 2001, hearing. He filed this motion to reopen removal proceedings on April 1, 2019, alleging that he was eligible for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). He argued that he is eligible for that relief because his notice to appear was defective, so the stop-time rule was not triggered, when he was ordered removed. The Immigration Judge denied the motion to reopen as untimely and successive, because it was filed 17 years after he was ordered removed, because this was his second motion to reopen, and because he did not submit a completed application with the motion (IJ at 3-4).[1] The Immigration Judge also denied the motion on the merits, rejecting his contention that the Immigration Judge lacked jurisdiction over the removal proceedings when she ordered him removed in 2001 because his notice to appear did not provide the time and place of the removal proceedings (IJ at 3-4).

On appeal, the respondent renews his argument that he is eligible for cancellation of removal because his notice to appear did not provide the time and place of the

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[1] The respondent's first motion to reopen was filed on September 25, 2013, over 12 years after he was ordered removed. The respondent did not dispute that he received the hearing notice. However, he indicated that he did not appear at his hearing because it was held in Massachusetts, and he lived in Florida. He argued that this constituted exceptional circumstances. The Immigration Judge denied the motion, finding that both the notice to appear and the hearing notice had been properly served on him (IJ at 2).

removal proceedings. In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court held that a notice to appear that does not designate a specific time and place of an alien's removal proceedings does not trigger the Act's stop-time rule, ending the alien's period of continuous presence in the United States for purposes of section 240A(b) of the Act, 8 U.S.C. § 1229b(b).

Subsequent to *Pereira v. Sessions*, this Board issued a precedent decision distinguishing *Pereira v. Sessions.* In *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), we held that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), so long as a notice of hearing specifying this information is later sent to the alien.

The First Circuit Court of Appeals agreed with *Matter of Bermudez-Cota* that a notice to appear that does not specify the time and place of an alien's initial removal hearing will still vest an immigration judge with jurisdiction over the removal proceedings as long as that information is later included in a hearing notice. *See Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019) (the Court held that a notice to appear that does not specify the time and place of the initial removal hearing does not deprive an Immigration Court of jurisdiction because the regulations that commence removal proceedings do not conflict with section 239(a) of the Act or *Pereira v. Sessions*).

In *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019), this Board also held that neither rescission of an in absentia order of removal nor termination of removal

proceedings is required where an alien did not appear at a scheduled hearing after being served with a notice to appear that did not specify the time and place of the initial removal hearing, so long as a subsequent notice of hearing specifying that information was properly sent to the alien. *See also Matter of Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019) (neither rescission of an in absentia order of removal nor termination of the proceedings is required where an alien who was served with a notice to appear that did not specify the time and place of the initial removal hearing failed to provide an address where a notice of hearing could be sent).

The respondent's case is analogous to *Matter of Bermudez-Cota* and *Matter of Pena-Mejia.* The respondent was personally served with a notice to appear on July 29, 2001 (IJ at 1; Exh. 1). Although the notice to appear did not specify the time and place of the respondent's initial hearing, the respondent was later sent a hearing notice that specified the time and place of his removal hearing. That hearing notice was sent to the address that the respondent provided to the Department of Homeland security (DHS) when he was released from detention (IJ at 1-2; Exhs. 2, 3). Because the respondent did not appear for his scheduled hearing on September 18, 2001, arrange for a continuance of the hearing, or arrange for a change of venue, the Immigration Judge properly ordered him removed in absentia and properly denied his motion to reopen proceedings (IJ at 2; Exh. 4).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by the Department of Homeland Security, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $799 for each day the respondent is in violation. See Section 274D of the Immigration and Nationality Act, 8 U.S.C. § 1324d; 8 C.F.R. § 280.53(b)(14).

[ILLEGIBLE]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

A 079-139-134

IN THE MATTER OF: BRISENO-LUNA, JULIO MARIO

[Date: June 4, 2019]

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act): Alien who is present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act"): Immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other

suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act;

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT

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ON BEHALF OF DHS

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ORDER OF THE IMMIGRATION COURT

I. Procedural History

The Respondent's removal proceedings began on August 14, 2001, with the filing of a Notice to Appear (NTA). Exh. 1. The Respondent, Julio Mario Briseno-Luna, is a native and citizen of Mexico who arrived in the United States at or near Douglas, Arizona, on or about July 29, 2001. *Id.* The Notice to Appear indicated that it was served upon the respondent in person on July 29, 2001, and that he was told in Spanish of the consequences of failing to appear for a removal hearing. Upon his release from INS custody, the Respondent indicated that he would be living at 6717 Santa Fe N., Apt. #22, Labelle, Florida, 33935. (Exh. 2). The NTA that was issued did not direct the Respondent to the time or place of his first Immigration Court hearing, but on September 6, 2001, the Boston Immigration Court mailed

the Respondent a notice of hearing directing him to appear at the Boston Immigration Court on September 18, 2001. The hearing notice was mailed to the Respondent's last known address of 6717 Santa Fe N., Apt. #22, Labelle, Florida 33935. (Exh. 3). The Respondent failed to appear at the September 18, 2001 hearing, and the Court accepted a Form 1-213, Record of Deportable/Inadmissible Alien into the Record of Proceedings, and determined that it established the Respondent was removable on the charges contained in the Notice to Appear. (Exh. 4).

The Respondent filed an emergency motion to reopen proceedings on September 25, 2013. The Court denied the motion, finding that he had been properly served with both the NTA and the notice of hearing. The Court found that the Respondent had not provided evidence sufficient to rebut the presumption that he had received notice of hearing by mail, and further noted that counsel's arguments in the motion to reopen that the hearing had been too close to the September 11, 2001, attacks in New York was not evidence.

The Respondent has filed a subsequent motion to reopen on April 1, 2019, claiming that he is entitled to reopening and termination of proceedings in light of the Supreme Court's decision in *Pereira v. Sessions*, and alternatively indicated that under *Pereira* he was now eligible to apply for cancellation of removal. *Id.*

II. Standards of Law

The Court may reopen any case in which it has made a decision, at any time, upon its own motion, or upon motion of DHS or the alien, unless jurisdiction is vested with the Board. 8 C.F.R. § 1003.23(b)(1) (2019). As a

general matter, Motions to Reopen are "disfavored as contrary to 'the compelling public interests in finality and the expeditious processing of proceedings.'" *Raza v. Gonzalez*, 484 F.3d 125, 127 (1st Cir. 2007) (quoting *Roberts v. Gonzales*, 422 F.3d 33, 35 (1st Cir. 2005)). In addition, there are both procedural and substantive bars to reopening removal proceedings. *See Smith v. Holder*, 627 F.3d 427, 433 (1st Cir. 2010).

A party may only file one Motion to Reopen, and it must be filed within ninety days of the entry of a final order of removal, deportation, or exclusion, subject to limited exceptions. INA § 240(c)(7)(C)(i) (2019); 8 C.F.R. § 1003.23(b)(1). These time and numerical limitations do not apply in circumstances where a removal order was entered *in absentia*. INA § 240(b)(5)(C)(ii); 8 C.F.R. §§ 1003.23(b)(4)(iii).

A Motion to Reopen for the purpose of applying for a form of relief must be accompanied by the appropriate application for relief and all supporting documents. 8 C.F.R. § 1003.23(b)(3); *Palma-Mazariegos v. Keisler*, 504 F.3d 144, 147 (1st Cir. 2007). The motion shall state new facts to be proven at a hearing held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). Factual assertions by counsel in pleadings or legal memoranda are not evidence and do not establish material facts. *See Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005) (Counsel's factual assertions in pleadings or legal memoranda are not evidence and do not establish material facts). The new evidence must be material, must not have been available at the former hearing, and could not have been discovered or presented at the former hearing. *Id.* For the Motion to Reopen to be

granted, a Respondent must make a *prima facie* showing that he is statutorily eligible for the relief sought. *See, e.g.*, *INS v. Doherty*, 502 U.S. 314, 323 (1992); *INS v. Abudu*, 485 U.S. 94, 106 (1988); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992).

While the Court may reopen a case under its *sua sponte* power, such discretionary authority is used sparingly as a general rule and is not meant to cure filing defects or circumvent the regulations. *See Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Nor is it meant to be a "general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but rather as an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002).

III. Findings of Fact and Conclusions of Law

The Court finds that this second motion to reopen proceedings is successive and is also being filed late, some 17 years after the order of removal. Nothing precluded the Respondent from having earlier argued that the Notice to Appear was deficient in that it did not identify a time or place of the Respondent's initial removal hearing.

Even if the Court were to assume that the Supreme Court's decision in *Pereira* somehow excuses the Respondent's successive filing, the Court concludes that the Respondent's argument is foreclosed by Board precedent. The Board of Immigration Appeals (BIA or Board), subsequent to *Pereira*, held that an NTA that does not specify the time and place of an alien's initial

removal hearing vests an Immigration Judge with jurisdiction so long as a notice of hearing specifying this information is later sent to the alien. *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 447 (BIA 2018). The Board has also held that proceedings need not be reopened for a failure to include the date or time in the NTA where that information is later supplied in a notice of hearing, and that termination is not warranted in such circumstances. *Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019). As noted, in the present matter, though the NTA did not specify the time and place of the initial removal hearing, the record reflects that the Respondent was provided a notice of hearing, mailed to his last known address. The Respondent acknowledged receipt of the Notice of Hearing. Therefore, the Court finds that jurisdiction did vest with the Court and the requested reopening and termination is inappropriate in the present matter.

The Respondent alternatively argues that the Court should reopen his proceedings because under *Pereira*, he is now eligible to apply for cancellation of removal for certain non-permanent residents. As a preliminary matter, the Court finds that the Respondent's motion to reopen is, as noted, successive, and untimely filed, as it was filed on April 1, 2019 more than ninety days after the Immigration Judge issued the final decision on September 18, 2001, and the Respondent does not allege that any exception to the filing deadline applies. Order of the Immigration Judge (Sept. 18, 2001); Resp't Mot. to Reopen (April 1, 2019); *see also* INA § 240(c)(7)(C)(i) (2019); 8 C.F.R. § 1003.23(b)(1). Even if the Respondent's motion was timely filed or he otherwise articulated an applicable exception to the filing deadline, the Respondent's motion to reopen would be denied as the motion does not include a *prima facie* case for relief. The

Board has recently held that where the NTA does not specify the time or place of the initial removal hearing, that the subsequently issued notice of hearing that does provide that information will serve to trigger the stop-time rule. The Respondent has thus failed to demonstrate that he has ten years of continuous physical presence in the United States. *Matter of Mendoza-Hernandez and Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019).

Further, he has failed to present the application for relief, and thus, the motion to reopen would separately be denied for that reason. 8 C.F.R. § 1003.23(b)(3) (requiring that a motion to reopen for the purpose of applying for relief from removal must include the corresponding application and all supporting documents); *see also Palma-Mazariegos*, 504 F.3d at 147 (holding that the denial of the petitioner's motion to reopen was sufficiently justified on the grounds that the appropriate application for relief and supporting documentation did not accompany the motion).

Finally, the Court declines to exercise its *sua sponte* authority as the Respondent has not established a truly exceptional situation in need of an extraordinary remedy, or that he exercised due diligence. *Matter of G-D-*, 22 I&N Dec. at 1133; *see also Matter of Jean*, 23 I&N Dec. 373, 380 n.9 (A.G. 2002). Therefore, because the Court finds that the Respondent's motion fails to meet both procedural and substantive requirements for motions to reopen, and does not warrant exercise of the Court's *sua sponte* authority, the following orders shall be entered:

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is **DENIED.**

[June 4, 2019] /s/ GWENDYLAN E. TREGERMAN
Date GWENDYLAN E. TREGERMAN
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

A 079-139-134

IN THE MATTER OF: JULIO MARIO BRISENO-LUNA,
RESPONDENT

[Date: Nov. 20, 2013]

IN REMOVAL PROCEEDINGS
DETAINED ALIEN

CHARGE: Immigration and Nationality (INA or Act) § 212(a)(6)(A)(i); and INA § 212(a)(7)(A)(i)(I)

APPLICATIONS: Motion to Reopen; Motion for Stay

ON BEHALF OF RESPONDENT
Andoni Gonzalez-Rua, Esq.
1200 Brickell Avenue, Suite 1950
Miami, FL 33131

ON BEHALF OF DHS
Office of the Chief Counsel
Assistant Chief Counsel
15 New Sudbury Street, Room 425
Boston, MA 02203

ON RESPONDENT'S MOTION TO REOPEN

1. The Respondent is a native and citizen of Mexico, who entered the United States at or near Douglas, Arizona, on or about March 15, 2001, and who was apprehended at or near Union, Maine, on July 29, 2001. Notice to Appear (NTA), dated July 29, 2001 (Exh. 1A).

2. The Respondent was not admitted or paroled and did not have a valid entry document, visa or a valid document of identity and nationality. *Id.*

3. The Respondent was personally served with the NTA on July 29, 2001. *Id.* and Mot. To Reopen.

4. In addition to personally serving the Respondent with the NTA, the legacy Immigration and Naturalization Service (INS) provided a Spanish interpreter, and explained, in Spanish, that failure to report for any immigration hearing might result in an *in absentia* removal order. *See id.*; *see also* I-213, Exh. 4.

5. The Respondent signed the Certificate of Service, attesting that he was personally served, and he also signed form I-826 indicated he was in the United States illegally and that he did not fear returning to Mexico voluntarily. *Id.*

6. The Respondent provided the following address: 6717 Santa Fe No., Apt. # 22, Labelle, FL, 33935 (Labelle, FL.). *Id.*, Mot. To Reopen.

7. A Notice of Hearing was sent to the Respondent at the Labelle, FL, address. Exh. 3;

8. The Notice of Hearing instructed the Respondent to appear for a hearing at the Boston Immigration

Court (the Court) on September 18, 2001, at 9:30 a.m. *Id.*

9. The Respondent filed a Motion To Reopen on October 16, 2013, more than 12 years after the date of his hearing. He does not assert in his motion that he did not receive the NTA or the Hearing Notice and he submitted no evidence that he was unable to travel to Boston for the hearing. See Mot. To Reopen. Counsel's statements are not evidence.

10. The Respondent's Motion is untimely and he failed to explain why he waited more than 12 years from the date of his hearing to file it.

11. The First Circuit has not yet decided whether limitations on motions to reopen can be surmounted by equitable tolling, *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007), but has held that the equitable tolling doctrine, where it is available, is to be invoked sparingly. *Id.* at 94; *Jobe v. INS*, 238 F.3d 96, 100 (1st Cir. 2001). Moreover, equitable tolling "is unavailable where a party fails to exercise due diligence." *See Boakai v. Gonzales*, 447 F.3d 1, 2 n.2 (1st Cir. 2006); *see also Jobe*, 238 F.3d at 100; *Gerrero-Santana*, 499 F.3d at 94.

12. DHS has filed a brief in opposition to the Respondent's Motion.

13. The Court finds that the Respondent was properly served with both the NTA and Notice of the Hearing.

14. An order of removal entered *in absentia* may be rescinded at any time if the motion to reopen demonstrates that the Respondent did not receive notice of his or her hearing. INA § 240(b)(5)(C)(ii);

8 C.F.R. § 1003.23(b)(4)(ii). Where a Notice to Appear or Notice of Hearing is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery, but it is weaker than the presumption that applies to documents sent by certified mail. *Matter of M-R-A-*, 23 I & N Dec. 665 (BIA 2008). This weakened presumption of delivery by regular mail may be overcome by submission of evidence for the Court's consideration. *Id.*, at 674 (listing a variety of factors including but not limited to the Respondent's affidavit; affidavits from family members or other individuals who are knowledgeable about the facts relevant to whether notice was received; the Respondent's actions upon learning of the in absentia order, and other factors). Moreover, not every alien who presents an affidavit of non-receipt is entitled to reopening of his removal proceedings. *Kozak v. Gonzales*, 502 F.3d 34 (1st Cir. 2007).

15. Respondent failed to appear for the September 18, 2001, hearing, and the Court ordered the Respondent removed *in absentia* to Mexico. *See* Order (Sheppard, I.J.), Sept. 21, 2001.

16. As noted above, the Respondent does not deny receiving the hearing notice and the statements of counsel that the Respondent was unable to attend his September 18, 2001, hearing date, due to its proximity to the terror attacks of September 11, 2001, are not evidence.

17. Following the hearing, a copy of the Court's order was sent to the Respondent at the Labelle, FL address, and it was not returned to the Court.

18. An Immigration Court may, upon its own motion at any time, or upon motion of DHS or the alien, reopen or reconsider any case in which it has made a decision unless jurisdiction is vested with the BIA. Title 8 of the Code of Federal Regulations (8 C.F.R.) § 1003.23(b)(1). A motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. *Id.*

19. The Respondent, in his Motion to Reopen, claims that he is eligible for Cancellation of Removal, Adjustment of Status, Prosecutorial Discretion, Voluntary Departure, Withholding of Removal and Deferral of Removal under the Convention Against Torture and Comprehensive Immigration Reform in the future, but has submitted no applications, nor evidence of eligibility (i.e., visa petitions, proof of 10 years continuous physical presence prior to July 29, 2001, or past or expected future harm). Two of the forms of "relief" referenced are either not within the Court's jurisdiction (prosecutorial discretion) or do not exist (Comprehensive Immigration Reform). The Respondent's Motion references a detailed Affidavit to be filed by him within 30 days of the Mot. To Reopen, but no such affidavit has been submitted. Mot. To Reopen.

20. The Court further declines to reopen these proceedings *sua sponte* because the Respondent has not alleged exceptional circumstances that warrant reo-

pening the case. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000).

21. As the Motion To Reopen is denied, the Motion For Stay is also denied.

ORDER

IT IS HEREBY ORDERED that Respondent's Motions To Reopen and For Stay are **DENIED**.

[11/20/2013] /s/ ROBIN E. FEDER
Date ROBIN E. FEDER
United States Immigration Judge

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203-0002

Case No. A79-139-134
Docket: Boston, Massachusetts

IN THE MATTER OF: BRISENO-LUNA, JULIO MARIO,
RESPONDENT

[Date: Sept. 21, 2001]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMGRATION COURT

On Sep 18, 2001, at 9:30 A.M., pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's request for relief from removal. However,

(✓) the respondent was not present.

( ) the respondent's representative was present; however, the respondent was not present.

( ) neither the respondent nor the respondent's representative was present.

Therefore, in the absence of any showing of good cause for the respondent's failure to appear at the hearing concerning the request for relief, I find that the respondent has abandoned any and all claim(s) for relief from removal.

Wherefore, the issue of removability having been resolved, it is HEREBY ORDERED for the reasons set forth in the Immigration and Naturalization Service charging document that the respondent be removed from the United States to MEXICO.

/s/ PATRICIA SHEPPARD
PATRICIA SHEPPARD
Immigration Judge
Date: Sep 21, 2001

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 20-1723

JULIO MARIO BRISENO-LUNA, PETITIONER,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL,
RESPONDENT.

Entered: May 2, 2023

ORDER OF COURT

Before: BARRON, Chief Judge, HOWARD and MONTECALVO, Circuit Judges.

Respondent's petition for panel rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Christopher Boom
Brooke M. Maurer
Elizabeth Fitzgerald-Sambou
OIL

APPENDIX G

1. 8 U.S.C. 1229(a)(1) and (2) provide:

Initiation of removal proceedings

(a) Notice to appear

(1) In general

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) specifying the following:

(A) The nature of the proceedings against the alien.

(B) The legal authority under which the proceedings are conducted.

(C) The acts or conduct alleged to be in violation of law.

(D) The charges against the alien and the statutory provisions alleged to have been violated.

(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may

be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

(iii) The consequences under section 1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)(i) The time and place at which the proceedings will be held.

(ii) The consequences under section 1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general

In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice 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) specifying—

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a(b)(5) of this title of failing, except under

exceptional circumstances, to attend such proceedings.

(B) Exception

In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

2. 8 U.S.C. 1229a(b)(5) provides:

Removal proceedings

(b) Conduct of proceeding

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

(B) No notice if failure to provide address information

No written notice shall be required under subparagraph (A) if the alien has failed to provide the address required under section 1229(a)(1)(F) of this title.

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the

reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

(E) Additional application to certain aliens in contiguous territory

The preceding provisions of this paragraph shall apply to all aliens placed in proceedings under this section, including any alien who remains in a contiguous foreign territory pursuant to section 1225(b)(2)(C) of this title.