**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Rubin, Jeffrey**
**Rubin Pomerleau**
**Three Center Plaza**
**Ste 400**
**Boston, MA 02108**

**DHS/ICE Office of Chief Counsel - SNA**
**1015 Jackson-Keller Rd, Suite 100**
**San Antonio, TX 78213**

**Name: NEVES-DA SILVEIRA, FILIPE**

**A 095-934-856**

**Date of this notice: 9/26/2019**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Cole, Patricia A.
Wendtland, Linda S.

Userteam: Docket

File: A095-934-856 – San Antonio, TX

Date: SEP 26 2019

In re: Filipe NEVES-DA SILVEIRA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jeffrey B. Rubin, Esquire

ON BEHALF OF DHS: Ricardo A. Cuellar
Assistant Chief Counsel

APPLICATION: Reopening; termination

The respondent, a native and citizen of Brazil, appeals the Immigration Judge's February 9, 2018, decision denying his motion to reopen. The respondent has appended additional evidence to his appellate pleadings, which we construe as a motion to remand. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge denied the motion to reopen as it did not meet the statutory requirements for a motion to reopen. This instant motion is time barred. *See* section 240(c)(7)(A), (c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(A), (c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). On January 29, 2003, an Immigration Judge issued an in absentia order of removal. The instant motion to reopen was filed on July 31, 2017.

On appeal, the respondent seeks reopening and termination of removal proceedings in light of *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), which was decided after the Immigration Judge denied the motion to reopen. In the alternative, he seeks to apply for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). We decline to reopen proceedings based on these arguments. However, we will exercise our sua sponte authority to reopen proceedings.

The respondent's arguments in support of termination are foreclosed by *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). In that case, we held that a notice to appear that does not specify the time and place of an alien's initial hearing vests an Immigration Judge with jurisdiction over removal proceedings so long as a notice of hearing specifying this information is later sent to the alien. We emphasized that *Pereira* involved a distinct set of facts raising the narrow issue of when (or whether) the "stop-time rule" is triggered. Because the respondent in *Bermudez-Cota* received proper notice of the time and place of his removal proceedings when he received the

notice of hearing, we held that the notice's omission of the time and place of his initial removal hearing was not a jurisdictional defect. *See Pierre-Paul v. Barr*, No. 18-60275, 2019 WL 3229150 (5th Cir. July 18, 2019) (denying reopening and termination consistent with *Matter of Bermudez-Cota*).

We also reject the respondent's request for reopening to apply for cancellation of removal. During the pendency of this appeal, we decided *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. 520 (BIA 2019) (en banc). In that case, we held that a deficient Notice to Appear that does not include the time and place of an alien's initial removal hearing is perfected by the subsequent service of a notice of hearing specifying that missing information, which satisfies the notice requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), and triggers the "stop-time" rule of section 240A(d)(1)(A) of the Act. *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I&N Dec. at 529. In *Pereira*, the Court did not reach the propriety of this two-step notice process because that alien had accrued the required ten years of physical presence before receiving the notice of hearing in reopened removal proceedings. *See Pereira v. Sessions*, 138 S. Ct. at 2112.

The respondent avers that he entered the United States on October 19, 2002, and he was served with a Notice to Appear that same day (Exh. 1; Respondent's appellate submission at 22). This Notice to Appear did not specify the date of the respondent's hearing (Exh. 1). However, the respondent was served via his attorney with a notice of hearing on December 26, 2002, specifying the date and location of his hearing. The respondent thus did not accrue the requisite ten years of continuous physical presence in the United States before the service of the notice of hearing triggered the stop-time rule.

We also conclude that we need not rescind the respondent's in absentia order of removal based on the Notice to Appear not specifying the time of the hearing. As noted, the respondent via his counsel was subsequently sent a notice of hearing specifying the date and location of his hearing. He did not appear after receiving this notice. In our recent decisions in *Matter of Pena-Mejia*, 27 I&N Dec. 546, 550 (BIA 2019) and *Matter of Miranda-Cordiero*, 27 I&N Dec. 551, 553 (BIA 2019), we distinguished *Pereira* and held that neither rescission of an in absentia order of removal nor termination of the 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.

However, we will exercise our sua sponte authority to reopen proceedings. Our authority to sua sponte reopen cases is limited to "exceptional situations" and "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); *see also Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (stating that "as a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations").

The respondent has presented evidence that he is married to a member of the armed forces.[1] He also is the beneficiary of an approved petition for alien relative (Form I-130) filed on his behalf by his spouse. The respondent argues that he is eligible for the "parole-in-place" provision set forth in section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5). We take administrative notice of a United States Citizenship and Immigration Services (USCIS) policy memorandum.[2] *See* USCIS Policy Memorandum, PM-602-0091, *Parole of Spouses, Children and Parents of Active Duty Members of the Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act Section 212(a)(6)(A)(i)*, 2013 WL 6623905 (November 15, 2013) (USCIS Memorandum).

The memorandum notes that parole-in-place should generally be granted only sparingly. 2013 WL 6623905, at *2. This memorandum further explains how parole-in-place should apply in the context of families of members of the armed forces.

> The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such an individual.

*Id.* A grant of parole-in-place would eliminate the respondent's section 212(a)(6)(A)(i) ground of inadmissibility. *Id.* at 6. Additionally, adjustment of status requires that the alien have been "inspected and admitted or paroled." *See* section 245(a) of the Act, 8 U.S.C. § 1255(a). A grant of parole-in-place overcomes that obstacle as well (USCIS Memorandum at 6).

In light of the above, we will exercise our sua sponte authority to reopen proceedings for the respondent to pursue parole-in-place and adjustment of status. We note that parole-in-place is benefit that is collateral to removal proceedings, in that USCIS has jurisdiction to grant or deny a request. However, the Immigration Judge ultimately has authority over the respondent's application for adjustment of status. *See* 8 C.F.R. § 1245.2(a)(1)(i) (establishing that, with exceptions not present here, the Immigration Judge hearing the removal proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status an alien may file). In light of the USCIS policy favoring parole-in-place for family of members of the armed forces and the evidence submitted regarding the marital relationship, we conclude that the respondent has

[1] The respondent is married to a member of the Coast Guard. The Coast Guard is not organized within the Department of Defense, but is still a part of the armed forces. *See* 10 U.S.C. § 101(a)(4) (2018) ("The term 'armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.").

[2] Although not binding on the Board, USCIS memoranda provide useful, practical guidance to the extent that they are not contradicted by sections 212 and 245 of the Act or any related regulations. *See Matter of Castillo-Padilla*, 25 I&N Dec. 257, 263 (BIA 2010).

established good cause for a continuance to seek parole-in-place once the record is remanded. *See generally Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018); 8 C.F.R. § 1003.29.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, the proceedings are reopened, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD