Immigration Court: BIA

Case: *Matter of Renata Miranda-Cordiero*, 27 I&N Dec. 551 (BIA 2019)
Date: May 22, 2019 **Adjudicated by:** Guendelsberger, Grant, Kendall Clark
Opinion: Grant

Tags: MTR, in absentia removal order, defective NTA, notice, jurisdiction, *Pereira*, provisional waiver of unlawful presence, cancellation of removal

Question Presented: Did IJ err in finding no exceptional circumstances for a sua sponte reopening?

Holdings: "Upon our de novo review, we find that the respondent's case does not present an exceptional situation that warrants the exercise of discretion to reopen sua sponte, regardless of the availability of a provisional waiver." 555 (Appeal dismissed)

Rationale: *Pereira* does not get her to reopen in absentia removal order (due to lack of notice or jurisdiction), and sua sponte isn't available, either.

Facts: (551-552) Citizen of Brazil who entered U.S. EWI in 2005. She was personally served with an NTA.

Procedural History:

- **March 2005:** Personally served with a NTA, refused to provide an address.
- **May 2005:** Ordered removed in absentia.
- **July 2017:** filed motion requesting sua sponte reopening of procedures so she could file I-601A based on her marriage to a USC and approved visa petition.
- **2018:** IJ denied motion to sua sponte reopen removal proceedings because he lacked jurisdiction over the waiver (USCIS business) and there were no exceptional circumstances that would warrant sua sponte reopening.

Appeals to Statute & Precedent:

- **INA 240(b)(5) / 8 U.S.C. § 1229(b)(5):** removal in absentia
- ***Pereira v. Sessions*, 138 S. Ct. 2105 (2018):** Respondent asserts that NTA was invalid and now she would be eligible for cancellation of removal.
- ***Mauricio-Benitez v. Sessions*, 908 F.3d 144, 148 (5th Cir. 2018):** Court "upheld our decision declining to reopen or rescind an in absentia order of removal where the alien did not receive a notice of hearing as a result of his failure to provide a correct address to the Immigration Court." 554
- ***Matter of G-Y-R-*, 23 I&N Dec. 181 (BIA 2001):** statutory address update obligations
- ***Matter of Pena-Mejia*, 27 I&N Dec. 546 (BIA 2019):** finding that *Pereira* is narrowly applied to stop-time rule for cancellation of removal.
- ***Gomez-Palacios v. Holder*, 560 F.3d 354 (5th Cir. 2009):** "an in absentia removal order should not be rescinded where lack of notice resulted from the alien's failure to update his mailing address." 554
- ***Fuentes-Pena v. Barr*, 917 F.3d 827 (5th Cir. 2019):** Lack of notice does not result if FN fails to update mailing address.

- ***Santos Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019):** Jurisdiction still vests even with defective NTA; *Pereira* is narrowly decided.

Respondent's Arguments:

- Seems to be using *Pereira* for something other than the stop-time rule: jurisdiction, or initiating removal proceedings at all (so therefore the in absentia order of removal should be rescinded). ["she was ordered removed by the IJ for reasons unrelated to the operation of the 'stop-time' rule," at 553.]

Discussion:

- "The respondent's [NTA] and her Record of Deportable/Inadmissible Alien (Form I-213) both show that, after she was notified by service of the [NTA] of her obligation to provide an address where she could be reached during the course of the removal proceedings, she refused to give that information." 551 n.2.
- Supreme Court in deciding *Pereira* narrowly "did not hold that such a deficient notice to appear is invalid for all purposes, including for initial removal proceedings." 552
- Jurisdiction vests in IJ when NTA is issued, regardless of whether it has date and time listed. 552 (see also **8 C.F.R. § 1003.15(c)**)
- **INA 240(b)(5) / 8 U.S.C. § 1229(b)(5):**
  - "Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section" may be ordered removed in absentia.
  - "Because the statute uses the disjunctive term 'or' rather than the conjunctive 'and,' an in absentia order of removal may be entered if a written notice containing the time and place of the hearing was provided *either* in a notice to appear under section 239(a)(1) *or* in a subsequent notice of the time and place of the hearing pursuant to section 239(a)(2)." 553
  - "In this case, a notice to appear was personally served on the respondent, in which she was advised of her obligation to 'notify the Immigration Court immediately' any time she changed her address during the course of the removal proceedings." 553
- "The Supreme Court's decision in *Pereira* is distinguishable and does not require that the respondent's in absentia order of removal be rescinded or that her proceedings be terminated." 553

Commentary:

- Respondent became eligible for Application for Provisional Waiver of Unlawful Presence (I-601A) after marriage to USC and approved I-130.