UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

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In the Matter of: )

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**,**  ) A Number:

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Respondent. )

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In RemovalProceedings. )

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**SUPPLEMENTAL BRIEF IN SUPPORT OF PENDING STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND**

**I.** **INTRODUCTION**

Pursuant to § 4.6(g)(ii) of the Board of Immigration Appeals Practice Manual and § 240(c)(6) of the Immigration and Nationality Act (“INA”), Respondent, (hereinafter “Ms. ”), hereby advances this supplemental basis for this Board to reconsider the removal order against her and to terminate her removal proceedings or, in the alternative, remand her removal proceedings for a hearing on her applications for cancellation of removal under INA §§ 240A(a) and (b)(2), in light of the recent decision of the U.S. Supreme Court in *Pereira v. Sessions*, \_\_ U.S. \_\_, No. 17-459 (June 21, 2018) [[1]](#footnote-1).

This Board issued a final order of removal against Ms. , previously a lawful permanent resident, on March 3, 2017, on the basis of a putative Notice to Appear (“NTA”) that failed to include the required time and place of her first removal hearing before the Immigration Court. *See* putativeNotice to Appear (Ex. A). The Board based the removal order on removability charges in the putative NTA under INA §§ 237(a)(2)(A)(i) (conviction for a crime involving moral turpitude (“CIMT”)) and 237(a)(2)(A)(ii) (two or more convictions for CIMTs). *See* BIA Decision (Ex. C). Ms. filed a petition for review of the BIA’s decision, which remains pending before the Second Circuit. *See*  *v. Sessions*, No. 17-871 (2d Cir. *pending*).

On April 4, 2018, Ms. filed with this Board a “Statutory Motion to Reconsider and Terminate in Light of *Obeya v. Sessions*,” (hereinafter “Respondent’s Motion”) arguing that the Second Circuit had ruled that conviction under one of the statutes of conviction in her case is not for a CIMT. *See* Respondent’s Motion. The Board docketed the motion on April 16, 2018. Ms. sought equitable tolling on the years in between her removal order and the Second Circuit’s decision in *Obeya*, and demonstrated that an extraordinary circumstance had prevented her timely filing of the motion to reconsider, and that she had exercised due diligence in pursuing the motion to reconsider after the Second Circuit’s decision in *Obeya* issued. *See* Respondent’s Motion (citing *Holland v. Florida*, 560 U.S. 631, 632 (2010) (stating the standard for determining whether equitable tolling is warranted)).

In this supplemental brief, Ms. now raises an additional basis, under *Pereira v. Sessions*, for this Board to reconsider and terminate or remand her removal proceedings for a hearing on applications for cancellation of removal. The Supreme Court’s decision in *Pereira* clarifies two dispositive issues in Ms. ’s case. First, that the Immigration Court never had jurisdiction over Ms. ’s case, requiring that the Board now terminate these proceedings improperly brought by DHS. Second, that if removal proceedings are permitted to go forward Ms. is statutorily eligible for lawful permanent resident cancellation of removal under INA § 240A(a) because the putative NTA issued in her case does not interrupt her required period of continuous physical presence and residence under INA § 240A(a)(2). Ms. has acquired more than the seven years of continuous presence required to apply for lawful permanent resident cancellation, and satisfies the other eligibility criteria. If the Board does not terminate these removal proceedings, it should remand to the Immigration Judge for hearings on her applications for cancellation of removal under INA §§ 240A(a) & (b)(2).

Ms. seeks equitable tolling of the time in between her removal order and the Court’s decision in *Pereira*. That decision identified and corrected legal errors that the Immigration Court and the Board committed in the Respondent’s case (and in similar cases) by exercising jurisdiction where there has been an improperly issued putative NTA, and by applying such a putative NTA to disqualify the Respondent from applying for cancellation of removal. This kind of ongoing agency error is recognized as an extraordinary circumstance requiring application of equitable tolling in favor of the movant. *See, e.g.*, *Luna v. Holder*, 637 F.3d 85, 99 (2d Cir. 2011) (“A[ noncitizen] who files a motion to reopen is entitled to equitable tolling when he exercises due diligence . . . and shows that he was prevented by . . . governmental interference from filing the motion on time.”). This extraordinary circumstance prevented earlier filing of this supplemental brief, which Ms. submits within 30 days of the Court’s decision in *Pereira*.

Accordingly, the Board should reconsider its decision and terminate removal proceedings against Ms. because the Supreme Court’s decision in *Pereira* controls this case. In the alternative, this Board should remand these removal proceedings to the Immigration Court for a hearing on applications for cancellation of removal. The Board should consider this a timely filed supplemental brief in support of a pending statutory motion to reconsider.

**II.** **RE-STATEMENT OF FACTS AND OF THE CASE**

Ms. refers this Board to the “Statement of Facts and Statement of the Case” (alteration in capitalization) in her pending motion for a statement of facts relevant to her case; she also provides a summary in the footnote below[[2]](#footnote-2). Here Ms. supplements that section with the following additional facts that are germane to this supplemental brief in support of her pending motion:

In a document dated August 19, 2009, DHS issued a putative “Notice to Appear In removal proceedings under section 240 of the Immigration and Nationality Act.” *See* putativeNotice to Appear (Ex. A). The putative NTA contains no time or date information about the first removal hearing. Instead, the document states:

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: to be calendared and notice provided by the office of the immigration court. on a date to be set at a time to be set to show why you should not be removed from the United States…

Putative Notice to Appear (Ex. A) (capitalization in original). Ms. became a lawful permanent resident in April 2004. *See* BIA Decision at 2 (Ex. C). She has continued to accrue continuous physical presence since that date, 14 years ago as of the filing of this motion.

**III.** **RE-STATEMENT OF STANDARD FOR RECONSIDERATION**

As previously stated in Respondent’s Motion, a motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. *See* Respondent’s Motion (citing 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. *See* id. (citing INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2)).

The Board issued its decision in Respondent’s case on March 3, 2017. As previously stated in the Respondent’s Motion, the Board should treat the Respondent’s Motion—including this supplemental brief—as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time and numeric limitations. *See infra* § IV.C.; *see also* Respondent’s Motion§ IV.B.; 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.”).

Further, as stated in the Respondent’s Motion, the motion is not barred pursuant to the regulatory departure bar because the Respondent has not departed from the United States and because the Second Circuit has held that the departure bar is invalid for statutory motions. 8 C.F.R. § 1003.2(d); *see* Respondent’s Motion§ IV.C.

**IV. ARGUMENT**

1. **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 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 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 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 Appear[[3]](#footnote-3) that failed to specify the time or place of her first hearing before the immigration court. *See* putative Notice to Appear, August 19, 2009 (Ex. A).

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. 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. 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. 2. In doing so, the Court construed the statutory phrase “notice to appear under section [239(a)]” as requiring the inclusion of time and place information 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 on the basis of a putative notice to appear that did not contain the requisite time or place information under the INA and the implementing regulations. *See* putative Notice to Appear (Ex. A). In light of the Supreme Court’s decision in *Pereira*, the Board should grant reconsideration and terminate removal proceedings against the Respondent.

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

In *Pereira* the 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 her does not interrupt her period of continuous presence required to qualify for LPR-cancellation of removal pursuant to INA § 240A(a), and thus 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. For lawful permanent residents, that period is seven years. *See* INA §§ 240A(a)(2). Under INA § 240A(d)(1)(A), “any period of continuous residence 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. 2-3. INA § 239(a), in turn, specifies the information that a notice to appear to appear must contain, including “the time and place at which the [removal] proceedings will be held.” *Pereira*, slip op 3-4 (quoting INA § 239(a)(G)(i)) (internal quotations omitted; brackets original).

As stated above, *see supra* § IV.A., the noncitizen in *Pereira* was served with a putative NTA that “did not specify the date and time of [his] removal hearing.” *Pereira*, slip op. 6. He “then applied for cancellation of removal” but the 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. 6-7. This Board affirmed the IJ’s decision and the First Circuit affirmed the BIA’s decision. *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. 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. 2.

Like the noncitizen in *Pereira*, the Respondent was found removable and precluded from applying for cancellation of removal. *See* BIA Decision (Ex. C). *Pereira* makes clear that the putative NTA issued in her case does not trigger the stop-time rule at INA §240A(d)(1)(A). Nor do the convictions at issue in her case trigger the stop-time rule at INA § 240A(d)(1)(B), as discussed in the Respondent’s Motion.[[4]](#footnote-4)

Thus, 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 applications for cancellation of removal.

1. **As Stated in the Respondent’s Motion, the Board Should Treat the Motion and this Supplemental Brief 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, *see* 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[[5]](#footnote-5), including the Second Circuit where Ms. ’s case arises, 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.). *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.”). The federal courts, including the Second Circuit, likewise 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 Rights and Extraordinary Circumstances Prevented Timely Filing of the Motion and This Supplemental Brief.**

Respondent refers to § IV.B.2. of the Respondent’s Motion for an explanation of why she is entitled to equitable tolling in this matter regarding the impact of the Second Circuit’s decision in *Obeya*. Here the Respondent advances those same arguments regarding the Supreme Court’s decision in *Pereira*, which itself constitutes an extraordinary circumstance that calls for equitable tolling of the motion to reconsider deadline in this case.

As stated in Respondent’s Motion, Ms. has vigorously pursued defenses to removal all the way through the petition for review stage. *See v. Sessions*, No. 17-871 (2d Cir. *pending*). She filed a timely motion to reconsider immediately following a decision of the Second Circuit (*Obeya v. Sessions*) that affects both her deportability and relief-eligibility. *See* Respondent’s Motion. The Supreme Court has now issued a decision in *Pereira* that governs the jurisdiction over an individual noncitizen’s case (like the Respondent’s) and also eligibility for cancellation of removal under INA §§240A(a), (b)(1), & (b)(2). Seeking the opportunity to apply for cancellation (and also challenging deportability in the first place) is the issue at the center of the Respondent’s case, and is now directly affected by *Pereira*. The extraordinary circumstance in this case is that the Supreme Court has now made clear that for noncitizens like the Respondent, the Immigration Courts do not have jurisdiction over their cases if initiated through incomplete and improper documents, or at the very least that such documents cannot bar cancellation eligibility. Ms. could not have moved to reconsider on this basis prior to the Court’s decision in *Pereira* because the Immigration Courts and the Board were exercising jurisdiction and pretermitting cancellation applications on the basis of deficient, putative NTAs like hers, a practice the Supreme Court has now corrected.

The Supreme Court decided *Pereira* on June 21, 2018. Ms. has exhibited the requisite diligence both before and after the issuance of the Court’s decision; she is filing the instant supplemental brief in support of her motion to reconsider within 30 days of the Court’s decision. Ms. attempted to challenge the Immigration Judge’s decision by appealing the decision to this Board, and later via Petition for Review to the U.S. Court of Appeals for the Second Circuit. *See* BIA Decision (Ex. C);  *v. Sessions*, No. 17-871 (2d Cir. *pending*). Ms. is filing this supplemental brief as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing her rights.

1. **In the Alternative, the Board Should Reconsider Respondent’s Removal Order *Sua Sponte*.**

Here the Respondent restates what has already been argued in her pending motion. 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* reconsideration or reopening. *See supra* § IV.A. Reconsideration is especially warranted in this case given Ms. ’s 14 years of lawful permanent residence in the United States; the effect her removal would have on her teenage U.S. citizen son; the domestic violence she endured for years before separating from her spouse; the danger she would face in El Salvador, a country to which she has not returned in 30 years; her employment history; and her commitment to continuing to access mental health services.

…

It would be a manifest injustice for the Board to deny *sua sponte* reopening in the Respondent’s case. The Board should *sua sponte* reconsider the removal order in this case and allow Ms. her to remain in the United States with her family.

**V. CONCLUSION**

The Board should reconsider its prior decision in this case and terminate removal proceedings against Respondent or, alternatively, remand for hearings on her applications for cancellation of removal under INA §§ 240A(a) & (b)(2).

Dated: July 19, 2018 Respectfully submitted,

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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UNITED STATES DEPARTMENT OF JUSTICE

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**EXHIBITS IN SUPPORT OF STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND PROCEEDINGS (NEW EXHIBITS BEGIN AT EX. J)**

**New Exhibit Filed in Support of Pending Motion and Supplemental Brief**

**Exhibit J: Copy of *Pereira v. Sessions*, \_\_ U.S. \_\_, No. 17-459 (June 21, 2018).**

**Exhibits Already Filed in Support of Pending Motion (and Supplemental Brief)**

Exhibit A: Copy of Notice to Appear;

Exhibit B: Copy of *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018);

Exhibit C: Copy of the Boards’ decision denying Respondent’s Appeal of Removal Order, dated March 3, 2017;

Exhibit D: Declaration of, Respondent’s co-counsel before EOIR;

Exhibit E: Copy of Marriage Certificate of and;

Exhibit F: Copy of Form I-797, Notice of Action (granting and extending prima facie classification under the self-petitioning provisions of the Violence Against Women Act for Ms. );

Exhibit G: Copy of Letter from;

Exhibit H: Copy of Birth Certificate of, Respondent’s U.S. citizen son;

Exhibit I: Order of Custody Modification conferring custody of to the Respondent.

UNITED STATES DEPARTMENT OF JUSTICE

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FALLS CHURCH, VIRGINIA

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In the Matter of: )

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**CERTIFICATE OF SERVICE**

I, Andrew Wachtenheim, served a copy of the foregoing

**MOTION TO ACCEPT SUPPLEMENTAL BRIEF IN SUPPORT OF PENDING STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND**

AND

**SUPPLEMENTAL BRIEF IN SUPPORT OF PENDING STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND**

**with Exhibit to J** on the Office of Chief Counsel, U.S. Department of Homeland Security, 201 Varick Street, Room 1130, New York, NY 10014 by mail on July 19, 2018.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Andrew Wachtenheim

Immigrant Defense Project

40 West 39th Street, Fifth Floor

New York, NY 10018

1. A copy of the Supreme Court’s decision in *Pereira v. Sessions* is attached at Ex. J. [↑](#footnote-ref-1)
2. In its decision ordering Ms. removed, the Board based its deportability findings on INA §§ 237(a)(2)(A)(i) (one CIMT conviction committed within five years of her admission to the United States), and 237(a)(2)(A)(ii) (two or more CIMT convictions). *See* BIA Decision at 1 (Ex. C). The Board also found that the “Immigration Judge determined that the respondent’s conviction pursuant to N.Y. Penal Law § 260.10(1) is categorically for a crime of child abuse, child neglect, or child abandonment under section 237(a)(2)(E)(i) of the Act,” BIA Decision at 2 (Ex. C), but did so in the context of the Respondent’s eligibility for cancellation of removal under INA § 240A(b)(2), not in the context of deportability or eligibility for LPR cancellation under INA § 240A(a). The Board went on to “uphold the Immigration Judge’s findings that [the Respondent] is also ineligible for the relief that she seeks because her conviction under NYPL § 120.00(1) for third-degree assault and conviction for petit larceny under NYPL § 155.25, each constitute crimes involving moral turpitude that independently preclude statutory eligibility for relief.” BIA Decision at 2 (Ex. C). In the Respondent’s Motion, she has addressed the legal effect of these convictions in light of recent developments at the Supreme Court and Second Circuit. Finally, it bears mention that review of the Board’s conclusion that a § 260.10(1) conviction constitutes a crime of child abuse under *Matter of Mendoza-Osorio*, 26 I&N Dec. 703 (BIA 2016) is pending in multiple petitions for review before the Second Circuit. *See, e.g.*, *Matthews v. Sessions*, No. 16-3145 (2d Cir. 2018, *argued* May 9, 2018). [↑](#footnote-ref-2)
3. The other documents listed at 8 C.F.R. § 1003.23 are not at issue in the Respondent’s case. [↑](#footnote-ref-3)
4. In her pending motion, the Respondent discusses the effect of recent decisional law from the Second Circuit and Supreme Court on the convictions at issue in her case; as stated therein, as clarified in recent decisional law the Respondent is no longer removable from the United States. If found removable, though, she is eligible for two forms of cancellation of removal: INA §§ 240a(A) & (b)(2). [↑](#footnote-ref-4)
5. *See* *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). [↑](#footnote-ref-5)