APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60333
Summary Calendar

FILED
September 12, 2018
Lyle W. Cayce, Clerk

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, U.S. ATTORNEY GENERAL,
Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A040 249 969

Before BARKSDALE, ELROD, and HO, Circuit Judges.
PER CURIAM[*]

For the reasons that follow, our court lacks jurisdiction to consider whether Pedro Pablo Guerrero-Lasprilla acted with the required diligence

[*] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

to warrant equitable tolling. Accordingly, his petition for review is dismissed.

Guerrero, a native and citizen of Colombia, was admitted to the United States in 1986 as an immigrant, but was removed in 1998 because of his felony convictions of conspiracy to possess with intent to distribute cocaine base and possession with intent to distribute cocaine base. In September 2016, Guerrero filed a motion to reopen, claiming the decision in *Matter of Abdelghany*, 26 I. & N. Dec. 254 (BIA 2014), rendered him eligible to seek relief under former Immigration and Nationality Act § 212(c); 8 U.S.C. § 1182(c) (repealed).

The immigration judge (IJ) denied the motion to reopen, determining, *inter alia*, the motion was not timely filed. The IJ determined Guerrero was required by 8 C.F.R. § 1003.44(h) to have filed a special motion to seek relief under former § 212(c) on or before 25 April 2005. The IJ concluded Guerrero had not shown he diligently pursued his rights, given that he waited two years to file his motion to reopen after his right to seek § 212(c) relief was explained in 2014 by *Matter of Abdelghany*.

On appeal, the Board of Immigration Appeals (BIA) adopted and affirmed the IJ's denial of the motion to reopen and dismissed the appeal. Largely echoing the IJ's conclusions, the BIA determined "[t]he motion to reopen was untimely because it was not filed within 90 days of the final administrative decision". The BIA upheld the IJ's conclusion that equitable tolling did not apply. Further, the BIA specifically rejected Guerrero's contention that he could not have filed a motion to reopen prior to *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

Finally, the BIA determined that Guerrero's action did not warrant sua sponte reopening of the proceedings.

Guerrero contends the BIA abused its discretion in deciding not to sua sponte reopen his immigration proceeding. Because this issue is raised for the first time in Guerrero's reply brief, we need not consider it. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). In any event, we lack jurisdiction to review the BIA's decision not to sua sponte reopen a proceeding. *See Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248–50 (5th Cir. 2004).

Challenging the determination, he was not entitled to equitable tolling, Guerrero asserts he could not have moved to reopen before *Lugo-Resendez* because any prior-filed motion would have been procedurally barred. He contends he was diligent by filing the motion to reopen 40 days after the *Lugo-Resendez* decision.

In our court, "the deadline for filing a motion to reopen under § 1229a(c)(7) is subject to equitable tolling". *Lugo-Resendez*, 831 F.3d at 343–44. Equitable tolling is warranted only if the litigant establishes "(1) he has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way and prevented timely filing". *Id.* at 344 (internal quotation marks and citation omitted).

Our court determined recently that, whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question. *See Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018). Because Guerrero was

removable on account of criminal convictions that qualified as aggravated felonies as well as violations of laws relating to controlled substances, we lack jurisdiction to consider the factual question of whether he acted with the requisite diligence to warrant equitable tolling. *See* 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i); 8 U.S.C. § 1252(a)(2)(C); *Penalva*, 884 F.3d at 525–26.

The decision for the above discussed equitable-tolling issue is dispositive of the instant petition for review. Therefore we need not consider Guerrero's contention that the BIA erred in determining he was required to file a special motion to seek relief. *See Guevara v. Gonzales*, 450 F.3d 173, 176 n.4 (5th Cir. 2006).

DISMISSED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A040 249 969-Oakdale, LA Date: JUL 14 2017

In Re: Pedro Pablo GUERRERO-LASPRILLA

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Bobbie C. Masters
Assistant Chief Counsel

APPLICATION: Reconsideration

The respondent filed a timely motion to reconsider our March 29, 2017, decision dismissing the respondent's appeal of an Immigration Judge's denial of his motion to reopen. The Department of Homeland Security (DHS) filed an opposition to the

[1] The respondent is treated as pro se because a Notice of Entry of Appearance, Form EOIR-27, was not filed with the motion. The record indicates that the respondent was removed from the United States in 1998 and resides at Calle 97 #70C-89 Torre 3 Apto. 301, Bogota, Colombia. A courtesy copy of this motion will be served on Mario R. Urizar, Prada Urizar, PLLC, 3191 Coral Way, Suite 628, Miami, FL 33145, as the attorney who signed the motion.

motion. For the reasons explained below, the motion to reconsider is denied.

The respondent, a native and citizen of Colombia, was admitted to the United States as an immigrant in 1986. Soon thereafter, on October 20, 1988, he was convicted of two drug trafficking crimes. About 10 years later, he was placed in removal proceedings. On September 22, 1998, an Immigration Judge determined that the respondent was removable because his drug trafficking convictions were aggravated felonies. The respondent did not appeal the Immigration Judge's decision. The DHS removed the respondent and he has resided outside of the United States since December of 1998.

On September 6, 2016, almost 18 years later, the respondent filed a motion to reopen, contending that he is now eligible for a waiver under former section 212(c) of the Act and that this case should be adjudicated so that the respondent can apply for such relief and decisions were key to his argument: *Matter of Abdelghany*, 26 l&N Dec. 254 (BIA 2014) and *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

He contends that under *Matter of Abdelghany*, he was eligible to seek a discretionary section 212(c) waiver, and that under *Lugo-Resendez*, the 90-day time limitation on reopening his 1998 removal order should be equitably tolled. Specifically, the respondent argued that equitable tolling applied because he filed his motion to reopen as soon as possible after *Lugo-Resendez*, *supra*.

In *Lugo-Resendez*, the Court of Appeals held, that equitable tolling may apply to a motion to reopen in immigration proceedings.

> Under this standard, a litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. The first element requires the litigant to establish that he pursued his rights with reasonable diligence, not maximum feasible diligence. The second element requires the litigant to establish that an extraordinary circumstance beyond his control prevented him from complying with the applicable deadline. . . . Apart from these general principles, the doctrine of equitable tolling does not lend itself to bright-line rules. Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.

Considering the facts and circumstances here, the Immigration Judge found that equitable tolling did not apply. The Immigration Judge also declined to exercise the court's sua sponte discretionary authority to reopen. We adopted and affirmed the Immigration Judge's decision, and dismissed the appeal.

There is no dispute that the motion to reopen was not filed within 90 days of the Immigration Judge's 1998 decision ordering the respondent removed. *See* section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c). Furthermore, the respondent did not demonstrate that a statutory or regulatory exception

to reopening applied. *Id.* Nor does the respondent challenge the decision to deny sua sponte reopening.

Rather, the respondent contends that the Board erred in affirming the Immigration Judge's decision denying reopening based on equitable tolling. The respondent contends that it was legal error for the Board to state that *Lugo-Resendez* merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent (Respondent's Motion at 3-5).

We decline to reopen the respondent's case. *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014) does not authorize the reopening of final order of removal so that a respondent may apply for relief from removal eighteen years after his order of removal was effectuated. The respondent's removal order is final. We do not ordinarily reopen long completed proceedings to re-adjudicate cases based on a change of law. This is so even if the change would render an alien ineligible for relief. *See*, e.g., *Lin v. US. DOJ*, 494 F.3d. 296 (2d Cir. 2007) (indicating agreement with the proposition that prior grants of asylum would not be reopened even though aliens were not eligible based on revised interpretation of the statute).

The respondent had a full and fair opportunity to litigate the criminal charges. He also had a full and fair opportunity to litigate the removal proceedings, including making arguments that later proved successful in cases like *Matter of Abdelghany*. There is a recognized public interest in finality in immigration proceedings and this case does not present any other significant facts that warrant a departure from finality principles. The respondent's drug convictions are very serious and he has not

shown the equitable tolling as justified to essentially restart his case. Accordingly, the following order will be issued.

ORDER: The motion to reconsider is denied.

[Signature Ineligible]

FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A040 249 969-Oakdale, LA Date: MAR 29 2017

In Re: Pedro Pablo GUERRERO-LASPRILLA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mario R. Urizar, Esquire

ON BEHALF OF DHS: Bobbie C. Masters
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of Colombia, appeals from the November 18, 2016, decision of the Immigration Judge, which denied his motion to reopen. The Department of Homeland Security opposes the respondent's appeal. The respondent's appeal will be dismissed.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.l(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in an appeal from an Immigration Judge's decision de novo. 8 C.F.R. § 1003.l(d)(3)(ii).

We affirm the Immigration Judge's decision denying the respondent's motion (I.J. at 3). Respondent was ordered removed on September 22, 1998. Respondent did not file his motion to reopen until September 6, 2016. The motion to reopen was untimely because it was not filed within 90 days of the final administrative decision in this case (I.J. at 2). *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(l).

We adopt and affirm the Immigration Judge's decision in this case. The respondent has not shown that the Immigration Judge erred in finding that equitable tolling did not excuse the untimely filing of the motion (I.J. at 3). A "litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016). "The second element requires the litigant to establish that an 'extraordinary circumstance' 'beyond his control' prevented him from complying with the applicable deadline." *Id.* at 344.

We agree with the Immigration Judge that the respondent has not demonstrated an extraordinary circumstance beyond his control following the issuance of *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014) (1.J. at 2-3). *See Lugo-Resendez v. Lynch*, *supra*, at 344. The Immigration Judge properly determined that pursuant to *Matter of Abdelghany*, *supra*, the respondent was no longer ineligible to apply for a waiver of inadmissibility under former

section 212(c) of the Act, 8 U.S.C. § 1182(c), as a form of relief from removal (I.J. at 3). Although the respondent was told of his eligibility for a 212(c) waiver under *Matter of Abdelghany*, *supra*, he chose not to file a motion to reopen these proceedings in order to seek such relief (I.J. at 3).

On appeal, the respondent argues that the Immigration Judge erred in denying his motion to reopen as untimely because equitable tolling is warranted. The respondent asserts that the untimeliness of his motion should be excused because an extraordinary circumstance, binding Fifth Circuit court precedent, prevented him from filing an untimely motion to reopen. The respondent contends that he could have only filed such a motion to reopen after the United States Court of Appeals for the Fifth Circuit issued *Lugo-Resendez v. Lynch*, *supra*. In that case which was issued on July 28, 2016, the Fifth Circuit Court held that the deadline for filing a motion to reopen under section 240(c)(7)(C)(i) of the Act is subject to equitable tolling. *Id.* at 344. The respondent further states that he exercised reasonable diligence in pursuing his claim for relief because he filed his motion to reopen on September 6, 2016 (I.J. at 2). We disagree as nothing prohibited the respondent from filing a motion to reopen before *Lugo-Resendez*. On the contrary, *Lugo-Resendez* merely recognized that the doctrine of equitable tolling applied, and did not overturn any existing precedent.

Even if the respondent's contentions support a claim for equitable tolling, the Immigration Judge nevertheless properly denied his motion to reopen. The respondent's claim of equitable tolling does not render him eligible to apply for a waiver of

inadmissibility under former section 212(c) of the Act. Regardless of whether the respondent has been physically removed from the United States and is currently outside of this country, he has not shown error in the Immigration Judge's determination that he had not timely filed a "special motion to seek section 212(c) relief' prior to the regulatory filing deadline of April 26, 2005 (I.J. at 1-2).[1] *See* 8 C.F.R. § 1003.44(h).

The Immigration Judge also properly determined that the respondent's case does not present exceptional circumstances that warrant a favorable exercise of discretion to reopen these proceedings sua sponte (I.J. at 2). *See* 8 C.F.R. § 1003.23(b)(l); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

For the foregoing reasons, the Immigration Judge's denial of the respondent's motion to reopen is affirmed. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

[Signature Ineligible]

FOR THE BOARD

[1] The respondent's reliance on an Immigration Judge's decision relating to another respondent is insufficient to support his claim. The respondent's claim is controlled by our precedents and those of the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises. *See* 8 C.F.R. § 1003.l(g); *Matter of N-C-M-*, 25 I&N Dec. 535, 535 (BIA 2011).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUSIANA

IN THE MATTER OF)
)
Pedro Pablo GUERRERO-LASPRILLA)
)
RESPONDENT)
)

IN REMOVAL PROCEEDINGS
File No.:A040-249-969

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as an alien, who at any time after admission, has been convicted of an aggravated felony as defined in section I01(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of Title 18 of the United States Code).

MOTION: Motion to Reopen.

ON BEHALF OF RESPONDENT:
Mario R. Urizar, Esq.
Prada Urizar, PLLC
3191 Coral Way, Ste. 628
Miami, Florida 33145

ON BEHALF OF THE DEPARTMENT:
Assistant Chief Counsel
DHS/ICE/Litigation Unit
1010 East Whatley Road
Oakdale, Louisiana 71463

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL & FACTUAL HISTORY

On August 5, 1998, the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("Department") personally served a Notice to Appear ("NTA") (dated July 29, 1998) alleging that Respondent is a native and citizen of Colombia who was admitted into the United States at Miami, Florida as an immigrant on March 3, 1986. The Department further alleged that on October 20, 1988, Respondent was convicted in the United States District Court, Southern District of Florida for the offenses of conspiracy to possess with intent to distribute cocaine base and possession with intent to distribute cocaine base in violation of Title 21, United States Code, Sections 846 and 84l(a)(l). Based on these allegations, the Department charged Respondent as

removable pursuant to section 237(a)(2)(A)(iii), as defined in section 10l(a)(43(B), of the Immigration and Nationality Act ("Act").

At the hearing on September 22, 1998, Respondent admitted factual allegations contained in the NTA. Based on Respondent's admissions and the evidence submitted into the record, the Court found that Respondent is removable as charged, and ordered that he be removed from the United States to Colombia. Respondent reserved appeal.

On September 6, 2016, Respondent, through counsel, submitted a motion to reopen proceedings. On October 5, 2016, The Department submitted an opposing motion. The Court will now address Respondent's motion.

II. APPLICABLE LAW

An Immigration Judge may upon his or her own motion at any time, or upon motion of the DHS or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 1003.23(b)(l). A motion to reopen "seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing." Matter of Cerna, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen must state the new facts that will be proven if the motion is granted and must 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. A motion to reopen will not be granted unless the Court is satisfied that the evidence sought to be offered is "material and was not available and could not have been discovered or presented at the former hearing." Id. The Court cannot grant a motion to reopen seeking to apply for relief if the Immigration Judge fully explained the right to apply for such relief and provided an opportunity to apply for the relief. Id.

Additionally, a motion to reopen is subject to time and numerical limitations. A respondent can only file one motion to reopen. 8 C.F.R. § 1003.23(b)(l). The motion must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. Id. These limitations shall not apply if the basis of the motion is to apply for asylum or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. Id. at § 1003.23(b)(4)(i).

III. ANALYSIS & CONCLUSION

The Court must deny Respondent's motion because it is not timely. The regulations require that a motion to reopen be filed within 90 days of a final administrative order of removal. Respondent was ordered removed on September 22, 1998. Respondent did not file his motion to reopen until September 6, 2016, almost eighteen years later. Thus, the motion is

untimely and must be denied.

Moreover, the Court will not reopen Respondent's motion *sua sponte*. In his motion to reopen, Respondent asserts that he is eligible for relief under the former 212(c) provision under the Act. However, the cases that he referenced do not alleviate the regulatory requirement that aliens subject to a final administrative order of deportation or removal must have filed a special motion to seek section 212(c) relief on or before April 25, 2005. 8 C.F.R. § I003.44(h); Matter of Judulang v. Holder, 132 S. Ct. 476 (2011); Matter of Abdelghany, 26 I&N Dec. 254 (BIA 2014). As such, Respondent missed the deadline to file a special motion to seek 212(c) relief. Id.; see also INS v. St. Cyr, 533 U.S. 289 (2001).

Nonetheless, the Court notes that even if the purported changes in the law allowed Respondent to qualify for special 212(c) relief and the Respondent complied with the regulatory requirements, he waited two years to motion the Court since the decisions rendering that change were issued. Respondent only asserts that his eligibility of relief was explained in 2014, but that his likelihood of being denied by the Court prevented him from pursuing his claims. The Respondent has not presented evidence that he had been diligently pursuing his rights or that some extraordinary circumstance prevented him from filing for relief for another two years after he became aware that he may be eligible for relief. See Lugo-Resendez v. Lynch, __Fed. Appx._, WL4056051 (5th Cir. 2016). Therefore, Respondent is not entitled to equitable tolling of his untimely motion to reopen. As such, the Court will not grant Respondent's motion to reopen removal proceedings as a favorable exercise of

discretion.

Accordingly, the following order is hereby entered:

ORDER: IT IS HEREBY ORDERED that Respodnent's motion to reopen is DENIED.

11/18/2016
Date

[signature ineligible]
Agnelis L. Reese
Immigration Judge

APPENDIX E

8 U.S.C. § 1229a(c)(7) – Motions to Reopen:

(A) In general.— An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents.— The 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 or other evidentiary material.

(C) Deadline.—

(i) In general.— Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

. . . .

* * * * * *

8 U.S.C. § 1252 – Judicial review of orders of removal:

(a) Applicable provisions.—

. . .

(2) Matters not subject to judicial review.—

. . .

(C) Orders against criminal aliens.—

Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review

any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims.— Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.