Nos. 18-776, 18-1015

In the Supreme Court of the United States

PEDRO PABLO GUERRERO-LASPRILLA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

RUBEN OVALLES,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petitions for Writ of Certiorari Filed December 10, 2018, and January 29, 2019.

Certiorari Granted June 24, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent

No. 17-60333

NO.	DATE	DESCRIPTION
1	5/01/2017	IMMIGRATION CASE docketed.
		* * *
7	05/17/2017	IMMIGRATION RECORD FILED.
		* * *
12	07/17/2017	PETITIONER'S BRIEF FILED.
		* * *
20	09/01/2017	APPELLEE'S BRIEF FILED
		* * *
25	03/02/2018	APPELLANT'S REPLY BRIEF FILED

* * *

29	09/12/2018	UNPUBLISHED OPINION FILED.
30	09/12/2018	JUDGMENT ENTERED AND FILED.

Relevant Docket Entries

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN OVALLES,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent

No. 17-60438

NO.	DATE	DESCRIPTION
1	06/13/2017	IMMIGRATION CASE docketed.
		* * *
7	06/28/2017	IMMIGRATION RECORD FILED.
		* * *
9	08/08/2017	APPELLANT'S BRIEF FILED
		* * *
13	09/07/2017	APPELLEE'S BRIEF FILED
		* * *
15	09/21/2017	APPELLANT'S REPLY BRIEF FILED

* * *

21	02/28/2018	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Petitioner Mr. Ruben Ovalles
22	06/28/2018	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Petitioner Mr. Ruben Ovalles
23	10/31/2018	UNPUBLISHED OPINION FILED.
24	10/31/2018	JUDGMENT ENTERED AND FILED.

BEFORE THE HONORABLE IMMIGRATION JUDGE
AGNELIS L. REESE
ORDER OF REMOVAL: SEPTEMBER 22, 1998

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

IN REMOVAL PROCEEDINGS

IN THE MATTER OF:

PEDRO PABLO GUERRERO-LASPRILLA,
A NO.: 040-249-969

Respondent—Not Detained.

MOTION TO REOPEN

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August 31, 2016

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United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Oakdale, Louisiana

IN THE MATTER OF: PEDRO PABLO GUERRERO-LASPRILLA, RESPONDENT – NOT DETAINED.	IN REMOVAL PROCEEDINGS A NO.: 040-249-969

MOTION TO REOPEN

Pedro Pablo Guerrero-Lasprilla, hereinafter "Respondent," by and through undersigned counsel, respectfully submits the instant Motion to Reopen pursuant to INA §240(c)(7) in light of the Board of Immigration Appeals' decision: *Matter of Abdelghany,* 26 I&N Dec. 254 (BIA 2014); and the Fifth Circuit Court of Appeals decision: *Lugo-Resendez v. Lynch,* 2016 U.S. App. Lexis 13752 (5th Cir. 2016).

FACTUAL AND PROCEDURAL HISTORY

Respondent is a native and citizen of Colombia, who was admitted into the United States as a legal permanent resident ("LPR") on March 3, 1986.

On October 20, 1988, after having pled not guilty, Respondent was convicted in the United States District Court for the Southern District of Florida, for (1) conspiracy to possess with intent to distribute cocaine under 21 USC §846, and (2) possession with intent to distribute cocaine under 21 USC §841(a)(1).

To this day, Respondent has no other criminal record anywhere in the world.

Eventually, Respondent was placed in removal proceedings following the filing of a Notice to Appear ("NTA") dated July 29, 1998. The removal charges were levied under INA §237(a)(2)(A)(iii)—convicted of an aggravated felony as defined under INA §101(a)(43)(B)—drug trafficking crime. Respondent was unable to apply for relief at the time of his proceedings due to the defunct interpretations of INA §212(c)'s eligibility requirements post-IIRIRA.[1] Because no relief was deemed available, Respondent was ordered removed on September 22, 1998. Although Respondent reserved an opportunity to appeal, no appeal was filed due to the lack of eligible relief. Respondent was physically removed and returned to Colombia on December 17, 1998.

ARGUMENT

MATTER OF ABDELGHANY AND FORMER INA §212(c)

In *Matter of Abdelghany,* the Board brought its interpretation of former INA §212(c) in line with the Supreme Court's decisions in *Judulang v. Holder,* 132 S. Ct. 476 (2011), *Vartelas v. Holder,* 132 S. Ct. 1479 (2012), and *INS v. St. Cyr,* 533 U.S. 289 (2001). In *Abdelghany,* the Board eliminated the "comparable grounds" rule in recognition of its invalidity under *Judulang*. It also abrogated 8 C.F.R. §1212.3(h), which prohibited the granting of INA §212(c) relief to LPRs convicted after trial. *Matter of Abdelghany,* 26 I&N Dec. at 268-69. The Board's holding created uniformity as to the eligibility of individuals for INA §212(c) relief.

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[1] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").

Pertinent to Respondent's case, the Board concluded that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable by virtue of a conviction entered before April 24, 1996, is eligible to apply for INA § 212(c) relief in removal proceedings, *unless:* (1) the respondent is subject to the grounds of inadmissibility under INA § 212(a)(3)(A)—security related grounds, (B)—terrorism activities, (C)—against foreign policy, or (E)—Nazi persecution, or (10)(C)—international child abduction; or (2) the respondent has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996. *Matter of Abdelghany,* 26 I&N Dec. at 272. None of these exceptions bar Respondent from seeking relief because his conviction was obtained in 1988 and his crime did not trigger any of the inadmissibility grounds just mentioned.

Although Respondent's eligibility for relief was explained back in 2014, through *Abdelghany,* it was not until July 28, 2016 that Respondent was allowed to file the instant motion to reopen requesting his rights under INA §240(c)(7).

MOTION TO REOPEN, EQUITABLE TOLLING, AND *LUGO-RESENDEZ V. LYNCH*

The doctrine of equitable tolling "is entertained only in cases presenting rare and exceptional circumstances where it is necessary to preserve a plaintiff's claims when strict application of the statute of limitations would be inequitable." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006) (internal quotations omitted); *see also Kuusk v. Holder*, 732 F.3d 302, 304 (4th Cir. 2013) (equitable tolling is "reserved for those

rare instances where * * * it would be unconscionable to enforce the limitation period against the party and gross injustice would result.").

Until recently, all Circuit Courts of Appeals but the Fifth Circuit held that INA §240(c)(7)'s 90-day deadline for motions to reopen may be equitably tolled. *See Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015); *See also Da Silva Neves v. Holder*, 613 F. 3d 30 (1st Cir. 2010); *Iavorski v. INS*, 232 F. 3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F. 3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F. 3d 302 (4th Cir. 2013); *Barry v. Mukasey*, 524 F. 3d 721 (6th Cir. 2008); *Pervaiz v. Gonzales*, 405 F. 3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F. 3d 496 (8th Cir. 2005); *Valeriano v. Gonzales*, 474 F. 3d 669 (9th Cir. 2007); Riley v. INS, 310 F. 3d 1253 (10th Cir. 2002); *Avila-Santoyo v. United States Atty. Gen*., 713 F. 3d 1357 (11th Cir. 2013). But on July 28, 2016, the Fifth Circuit in their precedent decision, *Lugo-Resendez v. Lynch*, created a uniform ruling on equitable tolling by holding "that the deadline for filing a motion to reopen under [INA §240(c)(7)] is subject to equitable tolling." 2016 U.S. App. Lexis at *13.

Before *Lugo-Resendez*, individuals in Respondent's situation—those who were physically removed from the United States and outside the 90-day statutory motion to reopen period—were not allowed to file a motion to reopen within the Fifth Circuit because of "the departure bar."[2] The departure

[2] In implementing IIRIRA, the Attorney General promulgated several regulations, one of those regulations "concluded * * * that a motion to reopen cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States." *Garcia-Carias v. Holder*, 697 F.3d 257, 261 (5th Cir. 2012) (*quoting Inspection and Expedited Removal of Aliens: Detention and Removal of aliens*; *Conduct of Removal*

bar only applies to *sua sponte* motions to reopen and not to a motion to reopen filed under INA §240(c)(7), *i.e.*, a statutory motion to reopen. *See Garcia-Carias v. Holde*r, 697 F.3d 257, (5th Cir. 2012) (holding "that the Board's application of the departure regulation to statutory motions to reopen [was] invalid under *Chevron*'s first step as the statute plainly does not impose a general physical presence requirement."). *Ante-Lugo-Resendez*, if a motion sought equitable tolling of INA §240(c)(7)'s deadline the Fifth Circuit used to hold the request for equitable tolling tantamount to asking the court to exercise its *sua sponte* authority. *See Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) ("a request for equitable tolling of a time- number-barred motion to reopen . . . is in essence an argument that the Board should have exercised its discretion to reopen proceedings *sua sponte* based upon the doctrine of equitable tolling."); *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at * 12-13 ("in this circuit, an alien's request for equitable tolling was construed as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*") (internal quotations omitted). And because the immigration courts adhere to their Circuit Court's interpretation on salient issues of law, this Court would have been barred from entertaining any motion filed by someone in Respondent's position, *i.e.*, from outside the United States.

In 2015, the Supreme Court, in *Mata v. Lynch*, instructed the Fifth Circuit to stop re-characterizing requests to equitably toll the deadline for filing a

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Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 13021 (Mar. 6, 1997).); see also 8 CFR § 1003.23(b)(1). This is known as "the departure bar."

statutory motion to reopen as *sua sponte*. 135 S. Ct. at 2155-56 (2015); *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at *13. "The Supreme Court, however, expressly left open the merits question of whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen." *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at *13. It is important to note, the Supreme Court took notice that nine other circuits have held the deadline for filings a statutory motion to reopen is subject to equitable tolling. *Id.*

In July of 2016 the Fifth Circuit finally "join[ed] [their] sister circuits in holding that the deadline for filing a motion to reopen under [INA §240(c)(7)] is subject to equitable tolling." *Id.* The Fifth Circuit held "a [respondent] is entitled to equitable tolling * * * only if the [respondent] 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 filings." *Id.* at *14-15.

Regarding the first element—diligently pursuing one's rights—the respondent only need to establish that he pursued his rights with "reasonable diligence, not maximum feasible diligence." *Id*. at *15 (internal citations omitted). The second element—extraordinary circumstances—requires respondent establish the circumstances that prevented him from complying with the applicable deadline were both extraordinary and beyond his control. *Id.*; *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). This standard does not "lend itself to bright-line rules," but is a fact-intensive determination. *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at *15.

In *Lugo-Resendez* the Fifth Circuit directed the Board, and by extension the immigration courts, "not to apply the equitable tolling standard too harshly [in cases involving relief] because denying an alien the opportunity to seek [relief]—when it is evident that the basis for [doing so] is now invalid—is a particularly serious matter." *Id.* at *16. The structure and design of the immigration laws indicate that the relief stage has always been an integral part of removal proceedings. *See Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) ("[A]ppeals and petitions for relief are to be expected as a natural part of the process."); 8 CFR §1240.1(a)(I).[3] To deny an individual his

[3] 8 CFR §1240.1:

(a) Authority.

(1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:

(i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(cX1)(A) of the Act;

(ii) *To determine applications under* sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C) (ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105-100, section 902 of Pub. L. 105-277, and *former section 212(c) of the Act (as it existed prior to April 1, 1997)*;

(iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and

opportunity to apply for relief is a "particularly serious matter," for that dismissal denies the respondent the protections from removal, risking injury to an important interest in human liberty. Additionally, former INA §212(c) is a special form of relief because it is a one-shot opportunity to avoid removal. It is even more sacred given Respondent's circumstances where no other form of relief exists, and without this waiver Respondent has no opportunity to reunite with his family, who all reside in the United States as U.S. citizens. *See* Appendix Tab I-K.

Aside from instructing the Board to refrain from applying the equitable tolling standard too harshly in these situations, the Fifth Circuit also reminded the Board "the core purpose of equitable tolling is to escape the evils of archaic rigidity and to accord all the relief necessary to correct particular injustices." *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at *16 (quoting *Holland v. Florida*, 560 U.S. 631, 650 (2010)).

It is under *Lugo-Resendez*' precedent that Respondent files his motion to reopen. As stated above, Respondent has to show (1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance beyond his control stood in his way. It is Respondent's contention that his circumstances qualify under the standards for equitable tolling.

It is a fact that Respondent was removed because it was concluded that he was ineligible for any relief

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> (iv) To take any other action consistent with applicable law and regulations as may be appropriate.

(emphasis added).

at the time of his removal proceedings. After years of litigation, and three U.S. Supreme Court decisions, the Board in 2014 under *Matter of Abdelghany* held that individuals like Respondent, who had been convicted of crimes after having entered a plea of not guilty, are eligible for INA § 212(c) relief. *See* 26 I&N Dec. at 272. Therefore, *Abdelghany* clarified that Respondent was eligible for relief during his removal proceedings. Of course, this decision came almost 16 years after Respondent had been ordered and physically removed, well over the 90-day deadline to file a statutory motion to reopen. But even if Respondent had filed a motion to reopen immediately after *Matter of Abdelghany* seeking to equitably toll the 16 years, this Court would have had to deny the motion based on contemporaneous case law interpreting the departure bar because *Lugo-Resendez* does not appear until July 2016. The law at the time simply did not allow Respondent to file his "one" motion to reopen under INA §240(c)(7). It is important to understand "the test for equitable tolling * * * is not the length of the delay in filing * * *; it is whether the [respondent] could reasonably have been expected to have filed earlier." *Pervaiz v. Gonzales*, 405 F.3d at 490. The way courts apply and interpret the immigration laws "are matters outside" Respondent's control. *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. at 756. This "extraordinary circumstance" stood in Respondent's way and prevented him from timely filing.

In regards to the first element, Respondent has been diligent in seeking a way to regain his status as an LPR. "Courts must consider the individual facts and circumstances of each case in determine whether equitable tolling is appropriate." *Lugo-Resendez v. Lynch*, 2016 U.S. App. Lexis at *15. *Lugo-Resendez*

reminds the courts that "[i]n a case such as this one, the [courts] should give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions." *Id.* at *16. Ever since he was physically removed from the United States, Respondent has done everything reasonably possible to seek a solution for his predicament—reuniting with his family, who are all U.S. citizens and living in the United States. *See* Appendix Tab G and H. For years he constantly inquired with attorneys on developments with the immigration laws that might benefit him. It was through his commitment and determination to one-day reunite with his family that he was able to ascertain the ruling of *Lugo-Resendez*, which has allowed him to file this motion. Respondent has not been idle in his efforts; he has pursued his rights with "reasonable diligence." *Id*. No better evidence of such diligence exists than the filing of this motion immediately following *Lugo-Resendez*.

CONCLUSION

In light of Respondent's circumstances, it is only fair and just to apply equitable tolling in Respondent's case. To refuse equitable tolling would result in a draconian approach to the 90-day rule under INA § 240(c)(7). *See Lugo-Resendez v. Lynch,* 2016 U.S. App. Lexis at *16 ("the core purpose of equitable tolling is to escape the evils of archaic rigidity and to accord all the relief necessary to correct particular injustices.").

WHEREFORE, Respondent implores this Honorable Court to grant the instant Motion to Reopen in order to apply for INA §212(c) relief.

Respectfully Submitted,

/s/ Mario R. Urizar

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August 24, 2016

Hon. Immigration Judge
EO IR Oakdale, Louisiana
1900 East Whatley Road
Oakdale, Louisiana 71463

To the Honorable Immigration Judge Presiding over my Motion to Reopen:

I, Pedro Pablo Guerrero, write this letter to explain to this Hon. Court the reasons for filing the instant motion to reopen.

On September 22, 1998, I was ordered removed by this Immigration Court. But before being ordered removed, my family and I inquired with countless attorneys as to the possibility of relief. At the time they had all said that given my crime I was not eligible for relief. On the day I was ordered removed I was not eligible to apply for any relief, nonetheless, I reserved appeal. My family and I continued to inquire but to no avail; I was told nothing could be done given a recent change in the law. I was physically removed from the United States in December 1998.

Over the years, my family continued to inquire with attorneys as to a way to reunite me in the United States. Given that I was out of the United States it was extremely difficult to consult with attorneys. My family did a lot of the consulting but every now and then I was able to speak to the attorneys from oversees. They always said nothing could be done.

Then in 2001, my family read in the papers of a new U.S. Supreme Court case called INS v. St. Cyr.

Again, we commenced looking into my proceedings with hopes of being able to reunite. But we were told by numerous attorneys that because I did not plead guilty, but not guilty, I was unable to seek reopening of my case under INS v. St. Cyr. We inquired with different attorneys' interpretations of INS v. SL Cyr., but they all agreed that the U.S. Supreme Court's ruling did not apply to me.

Years went by without anything new regarding my case. Every now and then I would call and pay money for an attorney phone consultation or my family would go inquire, but not with same fervor as we did when I was initially removed or after INS v. St. Cyr. decision. Our hopes dwindled.

I always called my family to keep an ear toward any new U.S. Supreme Court cases regarding my situation. We called attorneys so many times that they would just give us the answers—"No, nothing new"—for free. Over the years, as our hopes died, so did the frequency of our calls and consults with attorneys. This is how it was for many years, until 2016.

On June 16, 2016, my mother spoke about my case to a new attorney, Mario R. Urizar, who explained that a 2014 decision had been handed by the Board of Immigration Appeals regarding my eligibility for relief. Mr. Urizar and my mother called me from his office and explained the decision under Matter of Abdelghany. I could not believe new hope was breathing into my situation. But he was clear that it had been many years since my removal and that if he were to file for my motion it would be under a sua sponte circumstance. He explained that my problem lied in that I was out of the United States and I was technically barred from seeking sua sponte motion given the regulations, and that the 5th Circuit had yet

to accept equitable tolling for a statutory motion to reopen. He told me he has filed several motions to reopen within the 5th Circuit and problems always arise regarding equitable tolling, but that he and other attorneys were currently before the 5th Circuit in trying to convince them to allow for equitable tolling as many other circuits have already. He explained that my best chance was for equitable tolling to be accepted by the 5th Circuit in order to apply for my motion under statute, as it would not be barred by the departure bar. He requested a retainer in order to file for the motion as soon as possible upon the 5th Circuit made a favorable decision. On June 16, 2016 my family and I retained Mr. Urizar.

I must have been on the phone for hours asking questions trying to wrap my head around the different Circuit Courts in the United States, how their interpretations differed, how they intertwine with Board of Immigration Appeals decisions, it was an eye-opening expiation as to the intricacies of immigration laws in the United States. Many things I continue to not understand but I trust I am being led the right way.

On August 17, 2016, Mr. Urizar called and advised that the 5th Circuit had made a favorable decision regarding equitable tolling and that I would be able to file for my motion. He cited to Lugo-Resendez v. Lynch. He told me that the decision was published on July 28, 2016.

As this Honorable Court can see I have been diligent in my efforts in pursuing a way to reunite with my family. I have no family in Colombia. My mother, sisters, brother-in-law, nieces, and nephews are all in the United States, and all are United States citizens. I am the only one outside. We have done everything possible to figure out a way to reunite. It

is not until now that I am able to file my motion and seek reunification. I have learned a lot since I was 21 years, the age I was when convicted of my crime. I have maintained an impeccable criminal record since. This remains my only criminal record in the world. Had it not been for the way the laws were being applied in my case I would have applied sooner.

For this reason, I seek to reopen my case and apply for the relief for which it has been determined I was eligible for, and in doing so I also seek equitable tolling on my motion.

Sincerely,

/s/ Pedro Guerrero

Pedro Guerrero (A no: 040-249-969)

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN REMOVAL PROCEEDINGS

IN THE MATTER OF:

PEDRO PABLO GUERRERO-LASPRILLA,
A NO.: 040-249-969

Respondent (Not-Detained).

—

APPELLATE BRIEF FOR RESPONDENT

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ON APPEAL FROM THE OFFICE OF THE IMMIGRATION JUDGE—OAKDALE, LOUISIANA
DENIAL OF MOTION TO REOPEN

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December 16, 2016

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF: PEDRO PABLO GUERRERO-LASPRILLA, RESPONDENT—NOT DETAINED.	IN REMOVAL PROCEEDINGS A NO.: 040-249-969

APPELLATE BRIEF FOR RESPONDENT

Pedro Pablo Guerrero-Lasprilla, hereinafter "Respondent," by and through undersigned counsel, respectfully files the instant brief in support of his appeal. Respondent continues to reside outside the United States in Colombia.

Respondent's motion to reopen was denied by the Immigration Judge for two reasons: (1) the Immigration Judge determined the motion to be untimely and refused to apply equitable tolling because Respondent had "waited two years to motion the Court since the decisions rendering [the applicable] changes were issued," I.J. Decision at 3 (Nov. 21, 2016); and (2) the Immigration Judge refused to exercise sua sponte authority because Respondent failed to adhere to the "regulatory requirement that aliens subject to a final [] order of . . . removal must have filed a special motion to seek [INA § 212(c)] relief on or before April 25, 2005." *Id*. at 2.

First, the Immigration Judge confused which event properly gave rise to Respondent's motion to reopen. It appears the Immigration Judge believed

Respondent filed this motion under the changes brought by *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Although Respondent does benefit from the holding under *Abdelghany*, this is not what prompted the filing of his motion. It is important to remember that Immigration Courts must adhere to jurisdictionally controlling Circuit Court interpretations on salient issues of law. With that said, had Respondent filed the motion in 2014 it would have been denied under then-Fifth Circuit's jurisprudence regarding the departure bar. *See Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (holding INA § 240(c)(7) does not grant the right to file an untimely motion to reopen, nor may an individual rely on the statute to challenge the departure bar; and the departure bar overrides sua sponte authority to reopen a case); *see also Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) ("a request for equitable tolling of a time-number-barred motion to reopen . . . is in essence an argument that the Board should have exercised its discretion to reopen proceedings sua sponte based upon the doctrine of equitable tolling."); *but cf. Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (holding the Board's application of the departure regulation to statutory motions to reopen is invalid under *Chevron*'s first step. Despite this holding, the Fifth Circuit refused to address the motion's timeliness issue as it was not addressed previously, thus stopped short of discussing the possibility for equitable tolling on statutory motions to reopen and leaving its previous holding in *Ramos-Bonilla v. Mukasey* in effect).

On July 28, 2016, in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), the Fifth Circuit effectively overruled its previous position that a request for equitable tolling equals a request for sua sponte

authority, *see Ramos-Bonilla v. Mukasey*, 543 F.3d at 220, and held that motions under INA § 240(c)(7) are subject to equitable tolling. *See Lugo-Resendez v. Lynch*, 831 F.3d at 344 ("we . . . join our sister circuits in holding that the deadline for filing a motion to reopen under [INA § 240(c)(7)] is subject to equitable tolling.").[1] It was under the auspices of *Lugo-Resendez* that Respondent to filed his motion to reopen under INA § 240(c)(7). The Immigration Judge received Respondent's motion to reopen on September 6, 2016—one month and 9 days (40 days total) after the Fifth Circuit published *Lugo-Resendez*. Whether the Immigration Judge was judging Respondent's acts of diligence on a 90-day period from the salient change—the time required under INA § 240(c)(7)(C)—or based on the totality of the circumstances, the fact that Respondent only allowed 40 days to elapse before getting his motion to the Immigration Judge from abroad evinces diligence. Most distressing, the Immigration Judge cites to *Lugo-Resendez*—with a clear understanding that it is a 2016 precedent—to determine that "Respondent has not presented evidence that he had been diligently pursing 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*

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[1] In *Mata v. Lynch*, 135 S. Ct. 2150 (2015), the Supreme Court held that the Fifth Circuit may not decline to exercise jurisdiction over requests for equitable tolling by characterizing them as challenges to the Board's sua sponte decisions. "The Supreme Court, however, expressly left open the merits question of whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen." *Lugo-Resendez v. Lynch*, 831 F.3d at 343 (*citing Mata v. Lynch*, 135 S. Ct. at 2155 n.3.). Therefore, *Mata v. Lynch* did not solidify Respondent's claim for equitable tolling, but merely provided the Fifth Circuit with an opportunity to revisit the issue at a later date.

relief." I.J. Decision at 3 (emphasis added). There may not be a more evident example of an "extraordinary circumstance" preventing Respondent from filing his motion than unfavorable binding Circuit Court precedent. *See Bonilla v. Mukasey*, 543 F.3d 216, *abrogated by Lugo-Resendez v. Lynch*, 831 F.3d 337. Within his motion, Respondent clearly articulated the legal barriers that prevented him from filing his motion from abroad before July 28, 2016. *Matter of Abdelghany* did nothing to avail Respondent against the Fifth Circuit's precedent which prevented him from seeking equitable tolling under INA § 240(c)(7) from abroad; it was *Lugo-Resendez*' precedent that cleared the legal barrier for Respondent. Moreover, Respondent provided the Immigration Judge with his signed statement, explaining all he has done over the years in diligently pursuing relief from abroad. *See* App. Resp't Mot. to Reopen, Tab G, pg. 20. The Immigration Judge erred in determining Respondent had not pursued his relief diligently for purposes of equitable tolling.

Second, the Immigration Judge unfairly criticizes Respondent for not filing "a special motion to seek section 212(c) relief on or before April 25, 2005." I.J. Decision at 2 (*citing* 8 CFR § 1003.44(h), 69 FR 57826 (Sept. 28, 2004, *effective* Oct. 28, 2004)).[2] Yet, for the reasons stated below, it was not Respondent's fault he was unable to file for a special motion to seek INA § 212(c) relief.

8 CFR § 1003.44(k)[3] clearly restricted Respondent from filing "a special motion to seek section 212(c)

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[2] 8 CFR § 1003.44(h) marks the deadline as April 26, 2005, not April 25, 2005 as noted by the Immigration Judge. Regardless, this error is harmless for the purposes of this appeal.

[3] 8 CFR § 1003.44(k)—Limitations on eligibility under this section. This section does not apply to: (1) Aliens who have

relief;" regardless of § 1003.44(k) restriction, Respondent did not meet the eligibility requirements under the regulations because he did not plea guilty or nolo contendere to his crime. *See* 8 CFR §§ 1003.44(b)(2), 1003.44(k). Further, Board precedent gave (or gives) the departure bar "full effect." *See Matter of Armendarez*, 24 I&N Dec. 646, 660 (BIA 2008) (holding the departure bar under 8 CFR §§ 1003.2(d), 1003.23(b)(1), disables the Board's and the Immigration Courts' authority to reopen proceedings—whether on a statutory motion to reopen or sua sponte—if the alien has departed the United States).[4] Even the Immigration Judge was denying

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departed the United States and are currently outside the United States.

[4] Undersigned counsel is unaware of any Board precedent modifying its holding in *Matter of Armendarez*, 24 I&N Dec. 646, despite the overwhelming Circuit Court precedents that are at odds with parts of *Armendarez*' decision. *See Perez-Santana v. Holder*, 731 F.3d 50, 61 (1st Cir. 2013) ("the post-departure bar cannot be used to abrogate a noncitizen's statutory right to file a motion to reopen); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) (holding the departure bar invalid under INA § 240(c)(7)); *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (holding that INA § 240(c)(7) "clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed"); *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (holding that the Board's application of the departure regulation to statutory motion to reopen is invalid under *Chevron*'s first step); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); Reyes-*Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc) (concluding that "[b]ecause the post-departure bar regulation conflicts with Congress' clear intent, it cannot survive step one of the *Chevron* analysis"); *Lin v. U.S. Att'y Gen*., 681 F.3d 1236, 1241 (11th Cir. 2011) (holding that "the plain language of the statute, the statutory structure, and the amendment scheme all point to one

motions from other respondents abroad who filed timely special motions under 8 CFR § 1003.44 because of the departure bar.[5] To hold it against Respondent for not filing a special motion under 8 CFR § 1003.44 is arbitrary and capricious. It is even more patently unfair if the Immigration Judge used this fact in making an unfavorable determination for equitable tolling, i.e., in finding Respondent did not pursue his rights diligently.

Conclusion

WHEREFORE, Respondent respectfully implores the Board to sustain Respondent's appeal and reopen his proceedings.

Respectfully Submitted,

/s/ Mario R. Urizar

MARIO R. URIZAR
Counsel of Record
EOIR: UR820429
PRADA URIZAR, PLLC
3191 Coral Way, Suite 628
Miami, Florida 33145
Dir.: (305) 790-3982
murizar@pradaurizar.com

Counsel for Respondent

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conclusion: IIRIRA guarantees an alien the right to file one motion to reopen, and the departure bar impermissibly undercuts that right"); *cf. Prestol Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011) (in the context of statutorily authorized motions for reconsideration, holding that the "post-departure bar regulation conflicts with Congress' clear intent for several reasons").

[5] *See* attached IJ Decision, A no.: 035-418-243 (Nov. 13, 2001).

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U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

BOP# 17016004
File No: INS# 040249969

In the Matter of:

Respondent: Pedro Pablo GUERRERO-Lasprilla currently residing at:

Federal Correctional Institution, 5000 E. Whatley Rd, Oakdale, LA 71463
(Number, Street, City, State, and ZIP Code) (Area Code and Phone Number)

☐ 1. You are an arriving alien.

☐ 2. You are an alien present in the United States who has not been admitted or paroled.

☑ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

A 1. You are not a citizen or national of the United States;
A 2. You are a native and a citizen of Colombia;
A 3. You were, on March 3, 1986, admitted into the United States at Miami, Florida as an immigrant;
A 4. You were, on October 20, 1988, convicted in 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 841(a)(1);

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provisions(s) of law:

A Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that you have been convicted of an aggravated felony as defined in section 101(a)(43)(B)of the Act, to wit: illicit trafficking in controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime(as defined in Title 18, United States Code, Section 924(c).

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Office of the Immigration Judge 1900 E. Whatley Rd. Oakdale, LA 71463
(Complete Address of Immigration Court, Including Room Number, if Any)

on _____ at _____ to show why you should not be removed from the United States
(Date) (Time)
based on the charge(s) set forth above.

EXHIBIT # 1

Date: 07-29-98

9/28/98 (DATE) (JUDGE)

Nancy A. Hooker, DIC
(Signature and Title of Issuing Officer)

Oakdale, LA
(City and State)

See reverse for important information

Form I-862 (Rev. 4-1-97)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent bersons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrage to have such witnesses present at the hearing.

At your hearing, you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportableon the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. NOtices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

Before: _____

(Signature and Title of INS Officer)

_____

(Signature of Respondent)

Date: _____

CERTIFICATE OF SERVICE

This Notice to Appear was served on the respondent by me on 8/5/98 (Date), in the following manner and in complicance with section 239(a)(1)(F) of the Act:

☑ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☑ Attached is a list of organizations and attorneys which provide free legal services.

☑ The alien was provided oral notice in the English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

Pedro Guevara
(Signature of Respondent if Personnally Served)

Karen Brooks, Agent
(Signature and Title of Officer)

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

Prada, Mark Andrew
Prada Urizar, PLLC
3191 Coral Way, Suite 628
Miami, FL 33145

DHS - ICE Office of Chief Counsel – OAKDA 2
1010 E. Whatley Rd.
OAKDALE, LA 71463

Name: OVALLES, RUBEN

A040-070-535

Type of Proceeding: Removal

Date of this notice: 3/30/2017

Type of Motion: MTR BIA-REO

Filed by: Alien

FILING RECEIPT FOR MOTION

The Board of Immigration Appeals acknowledges receipt of your motion and fee or fee waiver request (where applicable) on 3/27/2017 in the above-referenced case.

PLEASE NOTE:

Filing a motion with the Board of Immigration Appeals DOES NOT automatically stop the Department of Homeland Security from executing an order of removal or deportation. If you are in DHS detention and are about to be deported, you may request the Board to stay your deportation on an emergency basis. For more information, call BIATIPS at (703) 605-1007.

In all future correspondence or filings with the Board, please list the name and alien registration number ("A" number) of the case (as indicated above), as well as all of the names and "A" numbers for each family member who is included in this motion.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals – including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

MusgrovD

Userteam: Motions

Prada Urizar, PLLC
Madison Circle
3191 Coral Way, Suite 628
Miami, Florida 33145
(786) 703-2061

March 22, 2017

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Re-Submission of Rejected Motion to Reopen
Ovalles, Ruben / A 040-070-535

Honorable Clerk:

Please accept the attached motion to reopen. I apologize for not signing the motion when it was first delivered to the Board. I have signed the motion, and have included it with this cover letter.

Thank you for your time and attention in this matter.

Respectfully submitted,

Mark A. Prada

Mark A. Prada
mprada@pradaurizar.com
dir.: (786) 238-2222

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

OVALLES, RUBEN **20352-265/A040-070-535** **CALLE LA PRADERA** **#510 BELLO CA** **SEE REMARKS, FA** **99999.0000** **Name: OVALLES, RUBEN**	**DHS - ICE Office of Chief Counsel – OAKDALE 2** **1010 E. Whatley Rd.** **OAKDALE, LA 71463** **A 040-070-535**
Type of Proceeding: Removal	**Date of this notice: 3/20/2017**
Type of Motion: MTR BIA-REC	**Filed By: Alien**

REJECTION OF MOTION

This notice is to inform you that the motion received by the Board of Immigration Appeals in the above-referenced case on Date Received: 3/16/2017 is being rejected for the following reason(s):

- **The motion is not signed.**

PLEASE NOTE

If you correct and resubmit this motion, YOU MUST ATTACH THIS REJECTION NOTICE to your submission.

We have returned your motion and all attachments to you for timely correction of the defect(s). THIS DOES NOT EXTEND THE ORIGINAL STRICT TIME LIMIT within which you must file your motion.

Your motion must be RECEIVED at the Clerk's Office at the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the motion and assume your motion will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of you motion.

Any corrected motion resubmitted after the original time limits should be filed within 15 days of this notice and should include a request that the Board accept the motion by certification. The Board will consider whether to certify each request in the exercise of discretion.

FILING INSTRUCTIONS

Use of an over-night courier service is strongly encouraged to ensure timely filing.

If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals — including correspondence, forms, briefs, motions, and other documents. If you

are the Respondent or Applicant, the "Opposing Party" is the District Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

FILING ADDRESS:

Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

Use of an overnight courier service is strongly encouraged to ensure timely filing.

Userteam:

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

OMB#1125-0005

Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals

(Type or Print)
NAME AND ADDRESS OF REPRESENTED PARTY

Ruben (First) Ovalles (Last)

(First) (Middle Initial) (Last)

C/ Mandana B #12 Amarilis III

(Number and Street) (Apt. No.)

Santo Domingo, Dominican Republic

(City) (State) (Zip Code)

ALIEN ("A") NUMBER
(Provide A- number of the party represented or the visa beneficiary in this case.)
040-070-535

USCIS Visa Appeal (Provide beneficiary name)

Fine (Provide fine number)

Disciplinary case (Provide docket number)

Attorney or Representative (please check one of the following):

☑ I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest court(s) of the following states(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia (use additional space on reverse side if necessary) and I am not subject to any order disbarring, suspending, enjoining, restraining or otherwise restricting me in the practice of law in any jurisdiction (if subject to such an order, do not check this box and explain on reverse).

Full Name of Court Supreme Court of Florida **Bar Number (if applicable)** 91997

☐ I am a representative accredited to appear before the Executive Office for Immigration Review as defined in 8 C.F.R. § 1292.1(a)(4) with the following recognized organization:

☐ I am a law student or law graduate of an accredited U.S. law school as defined in 8 C.F.R. § 1292.1(a)(2).

☐ I am a reputable individual as defined in 8 C.F.R. § 1292.1(a)(3).

☐ I am an accredited foreign government official, as defined in 8 C.F.R. § 1291.1(a)(5), from _____ (country).

☐ I am a person who was authorized to practice on December 23, 1952, under 8 C.F.R. § 1292.1(b).

Clerks Office MAR 2017 Received BIA

Attorney or Representative (please check one of the following):

☑ I hereby enter my appearance as attorney or representative for, and at the request of, the party named above.

☐ EOIR has ordered the provision of a Qualified Representative for the party named above and I appear in that capacity.

I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representations before the Board of Immigration Appeals. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE	EOIR ID NUMBER	DATE
X	YY184925	03/13/2017

NAME OF ATTORNEY OR REPRESENTATIVE, ADDRESS, FAX & PHONE NUMBERS, & EMAIL ADDRESS

Name: Mark (First) A (Middle Initial) Prada (Last)

Address: 3191 Coral Way, Suite 628 (Number and Street)

Miami (City) FL (State) 33145 (Zip Code)

Clerks Office MAR 2017 Received BIA

Telephone: (786) 238-2222 Facsimile: _____ Email: mprada@pradaurizar.com

☐ Check here if new address

Form EOIR - 27
Rev. July 2015

Indicate Type of Appearance:

☑ Primary Attorney/Representative ☐ Non-Primary Attorney/Representative

I am providing pro bono representation. Check one: ☐ yes ☑ no

Proof of Service

I (Name) Mark A. Prada mailed or delivered a copy of this Form EOIR-27 on (Date) 03/13/2017

to the ☑ DHS (U.S. Immigration and Customs Enforcement – ICE) at 1010 E. Whately Road, Oakdale, LA 71463-1128

☐ DHS (U.S. Citizenship and Immigration Services – USCIS) at _____

☐ EOIR Disciplinary Counsel at _____

X _____

Signature of Person Serving

APPEARANCES - An appearance for each represented party shall be filed on a separate Form EOIR-27 by the attorney or representative appearing in each appeal or motion to reopen or motion to reconsider before the Board of Immigration Appeals (see 8 C.F.R. § 1003.38(g)), even though the attorney or representative may have appeared in the case before the Immigration Judge or the U.S. Citizenship and Immigration Services. If information is omitted from the Form EOIR-27 or it is not properly completed, the appearance may not be recognized and the accompanying filing may be rejected. When an appearance is made by a person acting in a representative capacity, his/her personal appearance or signature constitutes a representation that, under the provisions in 8 C.F.R. part 1003, he/she is authorized and qualified to represent individuals and will comply with the EOIR Rules of Professional Conduct in 8 C.F.R. § 1003.102. Thereafter, substitution or withdrawal may be permitted upon approval by the Board of a request of the attorney or representative of record in accordance with *Matter of Rosales*, 19 I&N Dec. 655 (1988). Please note that appearances for limited purposes are not permitted. *See Matter of Velasquez*, 19 I&N Dec. 377, 384 (BIA 1986). Attorneys and Accredited Representatives (with full accreditation) must first update their address in eRegistry before filing a Form EOIR-27 that reflects a new address.

FREEDOM OF INFORMATION ACT - This form may not be used to request records under the Freedom of Information Act or the Privacy Act. The manner of requesting such records is in 28 C.F.R. §§ 16.1-16.11 and appendices. For further information about requesting records from EOIR under the Freedom of Information Act, see How to File a Freedom of Information Act (FOIA) Request With the Executive Office for Immigration Review, available on EOIR's website at http://www.justice.gov/eoir.

PRIVACY ACT NOTICE - The information requested on this form is authorized by 8 U.S.C. § 1362 and 8 C.F.R. § 1003.3 in order to enter an appearance to represent a party before the Board of Immigration Appeals. The information you provide is mandatory and required to enter an appearance. Failure to provide the requested information will result in an inability to represent a party or receive notice of actions in a proceeding. EOIR may share this information with others in accordance with approved routine uses described in EOIR's system of records notice, EOIR-001, Records and Management Information System, 69 Fed. Reg. 26,179 (May 11, 2004), or its successors and EOIR-003, Practitioner Complaint-Disciplinary Files, 64 Fed. Reg. 49237 (September 1999).

CASES BEFORE EOIR - Automated information about cases before EOIR is available by calling (800) 898-7180 or (240) 314-1500.

ADDITIONAL INFORMATION:

Under the Paperwork Reduction Act, a person is not required to respond to a collection of information unless it displays a valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. The estimated average time to complete this form is six (6) minutes. If you have comments regarding the accuracy of this estimate, or suggestions for making this form simpler, you can write to the Executive Office for Immigration Review, Office of the General Counsel, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041.

Form EOIR - 27
Rev. July 2015

MARK A. PRADA, ESQ.
PRADA URIZAR, PLLC
3191 CORAL WAY, WUITE 628
MIAMI, FL 33145

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
ARLINGTON, VIRGINIA

IN THE MATTER OF:

OVALLES, RUBEN,

IN REMOVAL PROCEEDINGS.

FILE NO.: A 040-070-535

GRANT OF CANCELLATION OF REMOVAL VACATED: MARCH 8, 2004

MOTION TO REOPEN WITH EQUITABLE TOLLING

MOTION TO REOPEN WITH EQUITABLE TOLLING

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
ARLINGTON, VIRGINIA

In the Matter of:	
OVALLES, RUBEN	**File No.: A 040-070-535**
In Removal Proceedings	

MOTION TO REOPEN WITH EQUITABLE TOLLING

The respondent, RUBEN OVALLES, by and through undersigned counsel, move this Honorable Board to reopen these proceedings under section 240(c)(7) of the Act, pursuant to an exercise of equitable tolling in light of *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016), and *Lopez v. Gonzales*, 549 U.S. 47 (2006).

STATEMENT OF THE CASE AND ARGUMENT

This motion seeks to reopen the Board's March 8, 2004, decision vacating the immigration judge's grant of cancellation of removal, wherein the Board held that the respondent's conviction for attempted simple possession of a controlled substance was a drug trafficking crime aggravated felony. *See* Tab A. The immigration judge had granted relief on November 10, 2003. *See* Tab B. The Department never argued against a favorable exercise of discretion in its appeal.

Following Ovalles' removal from the United States, the Supreme Court decreed its 2006 opinion in *Lopez*, which validated the immigration judge's finding of statutory eligibility for relief. On September 27, 2007, the Board denied Ovalles' motion to reopen *sua sponte* because of the regulatory departure bar. *Ruben Ovalles*, A40 070 535, 2004 WL 880229 (BIA Mar. 8, 2004) (attached at Tab C). On July 27, 2009, the Fifth Circuit Court of Appeals denied Ovalles' petition for review, holding "that the BIA reasonably interpreted the post-departure bar in section 1003.2(d) as overriding its *sua sponte* authority to reconsider or reopen Ovalles's case under 8 C.F.R. § l003.2(a)." *Ovalles v. Holder*, 577 F.3d 288, 300 (5th Cir. 2009) (revised Aug. 12, 2009) (attached at Tab D).

In light of the recent evolution of the controlling circuit court's case law, Ovalles respectfully moves the Board for statutory reopening pursuant to an exercise of equitable tolling. Ovalles has acted diligently in response to the Fifth Circuit's new case law permitting, for the first time in this circuit, the equitable tolling of statutory motions to reopen.

I. THE IMMIGRATION JUDGE GRANTS CANCELLATION OF REMOVAL, BUT THE BOARD GRANTS PRETERMISSION TO THE DEPARTMENT.

Ovalles is a native and citizen of the Dominican Republic who was admitted to the United States as an alien lawfully admitted for permanent residence at the age of six, on November 7, 1985. *See* Tab E (NTA, ¶¶ l-3); Tab F (LPR card). The Department had alleged that Ovalles was removable for having been convicted of a controlled substance violation on May 14, 2003, also alleging that the crime of conviction was an aggravated felony. *See* Tab E (NTA, ¶ 4).

At a hearing held on August 27, 2003, Ovalles denied the conviction and the two charges of removal. Tr. at 5:9-17. A hearing on the charges was held on September 4, 2003. The court held that Ovalles was "convicted of a controlled substance violation," and then asked for the Department's position on the aggravated felony charge. Tr. at 13:15-21. The Department responded, "it is our position that the state of Ohio has defined that offense as a felony," and that "under *Matter of Yanez*, the Court is to look [at] how the individual state defines the offense * * *." Tr. at 13:23-24, 15:1-2. In response, Ovalles' counsel explained, "there's no conviction that my client trafficked in drugs. This is simply a possession case that resulted in no prison term whatsoever * * *." Tr. at 16:8-10.

Ultimately, the court held that it was "not going to sustain the aggravated felony charge" because "[t]he respondent was convicted of a possession." Tr. at 19:6-7. A hearing on relief was then scheduled. At the individual hearing, the court granted cancellation of removal to Ovalles, stating:

> I find that the respondent meets all of the criteria set forth in Matter of C-V-T-. He certainly meets all of the statutory requirements entering into the United States as a lawful permanent resident for 18 years, the inception of that local residence beginning at around age six. The respondent has all of his immediate family in the United States, and he has worked continuously. The respondent is only 24 and he is in a viable relationship and plans to marry and take care of his future wife, children. He seems to be satisfied with the relationship. He has a good relationship with all of his siblings and their

> children. It seems to be a close-knit family, and I believe it would be a hardship if the respondent were to be separated from them. From everything that's been said, the respondent has little knowledge of life in the Dominican Republic and although he has family there, his ties with them are relatively tenuous compared to ties to his immediate family and fiancée in this country. So, I do find that the equities of the respondent has demonstrated both in the documents as well as the testimony outweigh the conviction for attempted possession of drugs, for which the respondent received no time in jail, and only got probation on these proceedings because he was picked up by the Immigration Service at the probation office.

Tr. at 112:1-22.

On appeal, the Department renewed its arguments from its motion to pretermit Ovalles' relief, "that a determination of whether an offense is a 'felony' for purposes of 8 U.S.C. § 924(c) depends on the classification of the offense under the law of the convicting jurisdiction." DHS Br. on App. at 3 (Jan. 28, 2004) (*citing Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002); *Matter of Santos Lopez*, 23 I&N Dec. 419 (BIA2002)). The Department also argued "that an offense is a 'drug trafficking crime' under§ 924(c)(2) if it is (1) punishable under the Controlled Substances Act and (2) a felony under either state or federal law.'" *Id*. (*citing United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997)).

The respondent countered that because his crime "would have been a misdemeanor under federal law, it was not an aggravated felony for immigration

purposes." Resp't's Br. on App. at 13 (Jan. 27, 2004). Ovalles also analogized with a case that "held that 'solicitation to possess marijuana for sale' is not within the scope of the second category [(drug trafficking crimes)] because it is *not* an offense *punishable* under the Controlled Substances Act.,'" *Id*., at 12 (*citing Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (emphasis in original)).

To be an aggravated felony, a drug crime must qualify as "a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). In its order sustaining the Department's appeal, the Board held that "[a]n offense classified as a felony under the law of the convicting jurisdiction is deemed to be 'classified by an applicable Federal or State law as a felony' in accordance with 21 U.S.C. § 802(13)." BIA Order at 2 (Mar. 8, 2004) (*citing Matter of Yanez*) (attached at Tab A). The Board had followed "the clear trend among the circuit courts * * * which permits a state drug offense that is classified as a felony under the law of the convicting state to qualify as a felony under the CSA even if it could only be punished as a misdemeanor under federal law." *Id*. (*citing Matter of Yanez*).

II. THE SUPREME COURT VALIDATES THE IMMIGRATION JUDGE'S RULING, BUT THE RESPONDENT'S MOTION TO REOPEN *SUA SPONTE* IS BARRED FROM REVIEW.

Less than three years after Ovalles' removal, the Supreme Court succinctly validated the immigration judge's finding of eligibility for relief:

> The question raised is whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a "felony punishable under the Controlled

> Substances Act." 18 U.S.C. § 924(c)(2). We hold it is not.

Lopez, 549 U.S., at 50. The conclusion is so because "[m]ere possession is not * * * a felony under the federal CSA * * *." *Id*., at 53.

Like in this case, "the Immigration Judge agreed with Lopez that his state offense was not an aggravated felony because the conduct it proscribed was no felony under the Controlled Substances act (CSA)." *Id*., at 51. And similarly to this case, "after the Board of Immigration Appeals (BIA) switched its position on the issue, the same judge ruled that Lopez's drug crime was an aggravated felony after all, owing to its being a felony under state law." *Id*., at 51-52 (*citing Matter of Yanez-Garcia* (announcing that BIA decisions would conform to the applicable circuit law); *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997) (*per curiam*) (holding state felony possession offenses are aggravated felonies)). And, like Lopez, Ovalles was convicted of a mere possession offense that would have been punishable under federal law only as a misdemeanor. Therefore, Ovalles was never convicted of an aggravated felony, he was statutorily eligible for cancellation of removal, and his grant of relief should be reinstated as a matter of law.

Diligently, "[u]pon learning of the Supreme Court's decision in *Lopez*, Mr. Ovalles took immediate steps to locate an attorney to assist him with seeking reconsideration of the Board's decision," and then filed a motion to reopen *sua sponte* with the Board. Resp't's Mot. to Reop. at 11 (Jul. 31, 2007). However, the motion was denied because "[t]he regulation at 8 C.F.R. § 1003.2(d) prohibits the filing of motions to reopen by removed aliens who have departed the United States." BIA Order at 1 (Sep. 27, 2007) (attached at Tab C). Diligently, Ovalles petitioned the

Court of Appeals for review of his arguments concerning the departure bar's validity because "the Board lacks the authority to consider challenges to regulations implemented by the Attorney General." *Id*. (*citing Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989)). However, the Court of Appeals held "that the BIA reasonably interpreted the post-departure bar in section 1003.2(d) as overriding its *sua sponte* authority to reconsider or reopen Ovalles's case under 8 C.F.R. § 1003.2(a)." *Ovalles*, 577 F.3d, at 300 (attached at Tab D).

III. EQUITABLE TOLLING OF STATUTORY MOTIONS TO REOPEN HAS RECENTLY BECOME AUTHORIZED IN THIS CIRCUIT, AND THE DEPARTURE BAR DOES NOT APPLY.

Since Ovalles last sought relief from his unlawful removal,[1] the landscape of motion to reopen case law has been significantly altered. In fact, motion to reopen law has been in flux since the Congressional overhaul of the immigration laws during the nineties. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and

[1] Given that the removal order, and the underlying vacatur of the grant of cancellation of removal were predicated upon an erroneous ruling of law, the result was contrary to law. Analogizing to criminal cases, this would be considered fundamental error. *Cf. United States v. Stoneman*, 870 F.2d 102, 105 (3d Cir. 1989) ("If a defendant were convicted and punished 'for an act that the law does not make criminal[, t]here can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief.' ") (*citing Davis v. United States*, 417 U.S. 333, 346-47 (1974)) (alterations in original).

Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

"Since the Board was established in 1940, it has possessed the regulatory power to entertain motions, including motions to reopen * * *." *Garcia-Carias v. Holder*, 697 F.3d 257, 261 (5th Cir. 2012). "In 1952, the Attorney General limited that power by promulgating the 'departure bar,' a regulation barring the Board from reviewing a motion to reopen filed by a person who has left the United States." *Id*. (*citing* 17 Fed.Reg. 11,469, 11,475 (Dec. 19, 1952)). "In 1961, Congress created a statutory counterpart" to the departure bar which "prohibited federal courts from reviewing deportation and exclusion orders if the alien 'has departed from the United States after the issuance of the order.' " *Id*. (*citing* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53 (1961)).

Decades later, Congress overhauled the law of motions to reopen. First, the "bar to judicial review [of departee motions] was repealed in 1996 with the passage of' IIRIRA. *Id*. "Along with repealing this bar, the Act also established a statutory right to file a motion to reopen." *Id*. "In doing so, it 'tr*ansform*[*ed*] *the motion* to reopen from a regulatory procedure *to a statutory form of relief* available to the alien.' " *Id*., at 261-62 (*quoting Dada v. Mukasey*, 554 U.S. 1, 15 (2008)) (emphasis added). "Notably, despite codifying various limitations on an alien's right to file a motion to reopen, Congress did not codify the departure regulation." *Id*., at 262. In issuing regulations to implement IIRIRA, the Attorney General decided to maintain the regulatory departure bar on March 6, 1997. *Id*. (citation omitted). The departure bar has been hotly contested throughout the years since these regulations were published.

Seven years later, on March 8, 2004, Ovalles' relief from removal was vacated and he was ordered removed by the Board, based on the holding that a simple possessory drug offense was an aggravated felony where the convicting jurisdiction punishes the offense as a felony. *See* Tab A. On December 5, 2006, the Supreme Court held in *Lopez v. Gonzales* that simple possessory offenses were not aggravated felonies, regardless of the convicting State's treatment of the offense, because federal law only punishes such offenses as misdemeanors. 549 U.S., at 50.

Ovalles diligently responded by filing a motion for regulatory *sua sponte* reopening with the Board. Resp't's Mot. to Reopen (Jul. 31, 2007). In his motion, Ovalles noted that the *Lopez* decision rendered unlawful the vacatur of the grant of cancellation of removal. *Id*., at 9-10. As for the departure bar, Ovalles argued that: (1) the departure bar did not apply to regulatory motions to reopen (just like the deadlines for statutory motions do not apply); (2) the departure bar neither applied to his factual circumstances, nor to unlawful removals; (3) the departure bar was *ultra vires* of the statute, and; (4) the departure bar was an unconstitutional deprivation of due process. *Id*., at 3-8. The Board disagreed, noting that it "lacks the authority to consider challenges to regulations implemented by the Attorney General." BIA Order at 1 (Sep. 27, 2007) (citation omitted). Ultimately, the Court of Appeals denied Ovalles petition for review on July 27, 2009. *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) (revised Aug. 12, 2009) (attached at Tab D).

Importantly, throughout the time that Ovalles prosecuted his regulatory motion to reopen, the law of the circuit precluded him from filing a statutory motion. Specifically, the law of the circuit was "that a request for equitable tolling of a time- or number-

barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the BIA should have exercised its discretion to reopen the proceeding *sua sponte* based upon the doctrine of equitable tolling.' " *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (*citing Jie Lin v. Mukasey*, 286 Fed.Appx. 148, 150 (5th Cir. 2008) (per curiam) (unpublished)).

That is, the only option available to the respondent was a *sua sponte* motion because any attempt to seek equitable tolling of a motion styled as being statutory would result in the motion's treatment as being *sua sponte* as a matter of law.[2] The law of the circuit held so by reasoning that, "[b]ecause equitable is not a basis for filing an untimely or numerically-barred motion under the statute or regulations, this argument [for tolling] is in essence an argument * * * to reopen the proceeding sua sponte * * *." *Jie Lin*, 286 Fed.Appx., at 150. Also, the Board expressed awareness of the lack of further relief when it "noted that the Fifth Circuit had not adopted the doctrine of equitable tolling in t[he motion to reopen] context." *Ramos-Bonilla*, 542 F.3d, at 218.

This understanding of the circuit's motion to reopen law remained the status quo for many years, as was recently iterated by the Court of Appeals:

> In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th

[2] As explained below, this distinction is of the utmost importance because the departure bar would eventually be held not to apply to statutory motions to reopen.

> Cir. 2008). As the BIA has complete discretion in determining whether to reopen *sua sponte* under 8 C.F.R. § 1003.2(a), and we have no meaningful standard against which to judge that exercise of discretion, we lack jurisdiction to review such decisions. *Id*.

Mata v. Holder (*Mata I*), 558 Fed.Appx. 366, 367 (2014). However, the Supreme Court recently intervened: "the court below declined to take jurisdiction * * * because the motion to reopen had been denied as ultimely[, and w]e hold that was error." *Mata v. Lynch* (*Mata II*), 135 S.Ct.2150,2153 (2015). As an initial matter, the Supreme Court recognized that "[e]very other Circuit that reviews removal orders has affirmed its jurisdiction to decided an appeal * * * that seeks equitable tolling of the statutory time limit to file a motion to reopen a removal proceeding." *Id*., at 2154.[3]

Ultimately, the Court disagreed with the Court of Appeals' treatment of every motion to reopen as a *sua sponte* motion because "the Fifth Circuit's practice of recharacterizing appeals like Mata's as challenges to the Board's *sua sponte* decisions and then declining to exercise jurisdiction over them prevents [a circuit]

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[3] Footnote 1 of the Court's opinion cited: *Da Silva Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010) (per curiam); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Barry v. Mukasey*, 524 F.3d 721 (6th Cir. 2008); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496 (8th Cir. 2005); *Valeriano v. Gonzales*, 474 F.3d 669 (9th Cir. 2007); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo v. U.S. Atty Gen*., 713 F.3d 1357 (11th Cir. 2013) (per curiam). Furthermore, "[e]xcept for *Da Silva Neves*, which did not resolve the issue, all those decisions also held, on the merits, that the INA allows equitable tolling in certain circumstances." *Mata II*, 135 S.Ct., at 2154 n.l.

split from coming to light." *Id*., at 2156. However, Ovalle's right to relief remained unresolved given that the Court "express[ed] no opinion as to whether or when the INA allows the Board to equitably toll the 90-day period to file a motion to reopen." *Id.*, at 2155, n.3. That is, the Court remanded the case to the Court of Appeals so that it "may reach whatever conclusion it thinks best as to the availablity of equitable tolling" in the context of motions to reopen styled as being statutory. *Id*., at 2156. It was not until last year that the Fifth Circuit aligned itself with every other Circuit by permitting equitable tolling of statutory motions to reopen in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

Before discussing the newly available relief of equitable tolling, it is important to address the preliminary hurdle of the departure bar. Because Ovalles was prevented from seeking an equitably tolled statutory motion to reopen at the time of his prior motion—due to then-prevailing circuit law—he had no other option but to file a motion for regulatory, *sua sponte* reopening. The hurdle of the departure bar ultimately decided the motion, leading to its denial by the Board. BIA Order at l (Sep. 27, 2007) (attached at Tab C). In an exercise of diligence, Ovalles exhausted the only strategic option left—to challenge the departure bar outright on various, alternative grounds. This lead to the Court of Appeals holding "that the BIA reasonably interpreted the post-departure bar in section 1003.2(d) as overriding its *sua sponte* authority to reconsider or reopen Ovalles's case under 8 C.F.R. § 1003.2(a)." *Ovalles*, 517 F.3d, at 300 (attached at Tab D).

However, things have changed significantly since then. The hurdle has become a hurdle no more. In *Garcia-Carias v. Holder*, the Court of Appeals

addressed whether "the departure regulation is invalid under *Chevron*." 697 F.3d 257, 261 (5th Cir. 2012). The Court of Appeals held "that section [240](c)(7) unambiguously gives aliens a right to file a motion to reopen regardless of whether they have left the United States." *Id*., at 263. "[A]n alien's ability to exercise his *statutory* right to file a motion to reopen is not contingent upon his presence in the United States." *Id.,* at 264 (emphasis added). This ruling was a new departure from "the applicability of the departure regulation in the context of the Board's exercise of its regulatory power to reopen cases sua sponte." *Id*., at 265 (*citing Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675-76 (5th Cir. 2003). But, *Garcias-Carias* did not reach the petitioner's equitable tolling argument because the BIA never addressed it, and remanded for the issue's consideration. *Id*., at 261 n.l, 266. Thus, Ovalles was still left without relief despite the 2012 decision in *Garcia-Carias*.[4] Even in 2014 it was being held that requests for equitably tolled statutory motions were to be construed as *sua sponte* motions. *Mata I*, 558 Fed.Appx., at 367.

Thus, we arrive at *Lugo-Resendez* which finally delivered Ovalles with the final piece to the puzzle. In this case, the Court of Appeals provided Ovalles with access to a statutory motion to reopen for the first time by recognizing the doctrine of equitable tolling. By

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[4] Indeed, the Court distinguished its decision in *Ovalles* as not controlling because "*Ovalles* could not avail himself of his statutory right to file a motion * * * because his motion before the Board was untimely." *Garcia-Carias*, 697 F.3d, at 265 (*citing Ovalles*, 577 F.3d, at 296.). The timeliness issue was considered a bar because the *Ramos-Bonilla* re-characterization doctrine was not to be overruled by the Supreme Court until *Mata II* in 2015.

permitting the filing of a statutory motion through tolling of the 90-day deadline, the law provided Ovalles with a vessel to overcome the departure bar which had sunk his last motion to reopen.[5] His motion to reopen may finally be heard on the merits, and the grant of cancellation of removal reinstated pursuant to *Lopez v. Gonzales*, 549 U.S. 47 (2006).[6]

In *Lugo-Resendez*, the Court of Appeal's analysis reveals that a request for equitable tolling of the 90-day deadline makes the motion statutory because tolling would be dispositive of the motion's timeliness. 831 F.3d, at 341-43 (distinguishing *Ovalles v. Holder* because no argument for timeliness, *e.g.*, equitable tolling, had been made[7]). "[I]f [the movant] is entitled to equitable tolling, then his motion to reopen [i]s timely and he can invoked § [240](c)(7)." *Id*., at 343 (emphasis in original). After explaining the Fifth Circuit's history of "not decid[ing] whether equitable tolling applies" to statutory motions "[d]espite numerous opportunities to do so," the Court of Appeals finally "join[ed its] sister circuits in holding that the deadline for a motion to reopen under §

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[5] The fact that Ovalles previously filed a motion to reopen does not prevent him seeking the instant motion. The statute's number-bar only applies to "one motion to reopen proceedings under this section * * *." INA § 240(c)(7)(A). A regulatory motion is not a motion "under * * * section [240]," and would not count against the number-bar. Alternatively, the number-bar would be subject to equitable tolling for the same reason as the time-bar.

[6] It should be noted that, just like Ovalles, the petitioners in *Garcia-Carias* and in *Lugo-Resendez* also sought motions to reopen grounded on the Supreme Court's holding in *Lopez v. Gonzales*, 549 U.S.47 (2006).

[7] As has been argued throughout this motion, the circuit case law prohibited timeliness arguments through the now-defunct re-characterization doctrine that was enshrined in *Ramos-Bonilla*.

[240](c)(7) is subject to equitable tolling." *Id*., at 343-44.

In explaining the required showing for equitable tolling, the Court of Appeals explained:

> 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 right 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.

Id., at 344 (citations omitted). "[T]he doctrine of 'equitable tolling does not lend itself to bright-line rules.' " *Id*. (citation omitted). " 'Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.' " *Id*., at 344-45 (citation omitted).

Most importantly, in these types of cases, "the BIA should give due consideration to the reality that many departed aliens are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions." *Id*., at 345. "The BIA should also take care not to apply the equitable tolling standard 'too harshly' because denying an alien the opportunity to seek cancellation of removal—when it is evident that the basis for his removal is now invalid—'is a particularly serious matter.' " *Id*. (citation omitted). This is even more true

where the respondent was granted cancellation before having it taken away. "[T]he core purpose of equitable tolling is to escape the 'evils of archaic rigidity' and 'to accord all relief necessary to correct * * * particular injustices.' " *Id*. (*citing Holland v. Florida*, 560 U.S. 631,650 (2010)) (ellipsis in original).

IV. EQUITABLE TOLLING IS WARRANTED.

This motion to reopen should be granted because Ovalles has been diligently in seeking relief from the vacatur of cancellation of removal for years, including a motion for regulatory reopening and an antecedent petition for judicial review, and because the extraordinary circumstances of the Fifth's prior case law preventing him from seeking relief on the merits—the merits issue being that the basis for finding him ineligible for relief was later invalidated by the Supreme Court in *Lopez v. Gonzales*. Therefore, Mr. Ovalles humbly requests that the Board apply the doctrine of equitable tolling to the 90-day deadline and grant him relief.

The diligence pursued by Ovalles can be displayed from the procedural history of this case itself. Upon learning of the 2006 Supreme Court case of *Lopez v. Gonzales*, Ovalles filed a motion to reopen with the Board in 2007 and exhausted all appeals until the culmination of *Ovalles v. Holder* in 2008. Despite this crushing loss,[8] Ovalles continued to periodically reach out to attorneys in the United States to inquire about any changes in the law. *See* Tab G at 31a-36a (e-mails between 2007 and 2012). Most recently, in December 2016, Ovalles sought out counsel in light of *Lugo-Resendez*. *Id*., at 37a. Mr. Ovalles has submitted a copy of his sworn statement, attesting to his periodic

[8] Ovalles noted his depression in a July 2012 e-mail. *See* Tab G at 35a.

inquiries with attorneys, for the Board's review. *See* Tab H. Ovalles has also submitted a copy of a Dominican police clearance letter certifying that he has never been arrested there. *See* Tab I.

Additionally, Ovalles' family, made up entirely of U.S. citizens, have submitted declarations in support of this motion. *See* Tab J. His father, Amado Ovalles, a seventy five year-old with serious medical conditions, implores the Board to reopen. *Id*., at 49a-51a. Ovalles' mother, Nati Vasquez, also has detailed the hardships and loss of her son over the years. *Id*., at 52a-56a. His three sisters, Yolanda, Joselyn and Maria, have also submitted statements detailing their family's ordeal. The nature of the injustice of having been removed under overruled doctrines of law, combined with concerns of familial unity, counsel in favor of equitable relief.

Second, this case merits equitable tolling an extraordinary circumstance stood in Ovalles' way and preventing timely filing. The later-overruled legal doctrines that prevented Ovalles from requesting equitable tolling in the past—(1) the rule that state felony classifications convert possession into aggravated felonies; (2) the motion to reopen re-characterization doctrine; (3) the departure bar; and (4) the lack of precedent permitting equitable tolling of a statutory motion's time deadline—where conditions beyond his control which prevented him from seeking relief. It took too many years for this circuit's caselaw to create a remedy for Mr. Ovalles that had previously been prohibited for him.

CONCLUSION

For the foregoing reasons, the respondent, RUBEN OVALLES, moves this Honorable Board to equitably toll the deadline for this statutory motion under INA § 240(c)(7), reopen these removal

proceedings, and reinstate the immigration judge's grant of cancellation of removal.

Respectfully Submitted,

/s/ Mark A. Prada

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Counsel for Respondents

FW:
1 message

Jessica Chicco
<jessica.chicco@bc.edu>

Thu, Dec 16, 2010 at 1:22 PM
To: rubenovalles27@gmail.com
<rubenovalles27@gmail.com>

Hi Ruben -

Not sure whether you received my message since I've been having some email troubles. I am available to talk any time tomorrow, Friday, before 12:30pm or between 3-5pm. Otherwise I am available almost any time next week.

Jessica

Jessica Chicco
Supervising Attorney
Post-Deportation Human
Rights Project
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Newton, MA 02459
617.552.9261
www.bc.edu/postdeportation

—Original Message—
From: Jessica Chicco [mailto:jessica.chicco@bc.edu]
Sent: Monday, December 13, 2010 9:50 PM

To: Ruben Ovalles
Subject: Re:

Hi Ruben- I am available tomorrow between 11am and 3pm my time, or any time Thursday afternoon.

Jessica

Sent from my iPhone

On Dec 13, 2010, at 5:36 PM, Ruben Ovalles <rubenovalles27@gmail.com> wrote:

> Hi, i thank you for this email, what would be a good time and day to call you.

(no subject)
7 messages

Ruben Ovalles
<rubenovalles27@gmail.com>

Mon, Dec 13, 2010 at 6:36 PM
To: jessica.chicco@bc.edu

Hi, I thank you for this email, what would be a good time and day to call you.

Jessica Chicco
<jessica.chicco@bc.edu>

Mon, Dec 13, 2010 at 10:49 PM
To: Ruben Ovalles <rubenovalles27@gmail.com>

Hi Ruben- I am available tomorrow between 11am and 3pm my time, or any time Thursday afternoon.

Jessica

Sent from my iPhone
[Quoted text hidden]

Jessica Chicco Mon, Jan 3, 2011 at 9:46 AM
<jessica.chicco@bc.edu>

To: Ruben Ovalles <rubenovalles27@gmail.com>

Hi Ruben,

I believe I responded to this email, but I haven't heard from you. I am in the office all week, and generally available. Let me know if there's a time that works best for you between 8:15am-5pm East Coast time, or please feel free to just give us a call.

Thank you and look forward to speaking with you.

Jessica Chicco

Supervising Attorney

Post-Deportation Human Rights Project

Boston College Law School

885 Centre Street

Newton, MA 02459

617.552.9261

www.bc.edu/postdeportation

From: Ruben Ovalles
[mailto:rubenovalles27@gmail.com]
Sent: Monday, December 13, 2010 5:36 PM
To: Jessica Chicco
Subject:

Hi, i thank you for this email,what would be a good time and day to call you.

Ruben Ovalles
<rubenovalles27@gmail.com>

Tue, Jan 4, 2011 at 8:57 PM
To: Jessica Chicco <jessica.chicco@bc.edu>

I do apologise, but i haven't had any Internet access to the Internet because my computer its not working, hopefully ill fix it this weekend.i need the computer so i can call with my voip phone.
[Quoted text hidden]

Jessica Chicco
<jessica.chicco@bc.edu>

Tue, Jan 4, 2011 at 9:35 PM
To: Ruben Ovalles <rubenovalles27@gmail.com>

Hi Ruben- that's fine. I will speak with you soon.

Jessica Chicco
Post-Deportation Human Rights
Project
(617) 552-9249

_____
From: Ruben Ovalles [rubenovalles27@gmail.com]
Sent: Tuesday, January 04, 2011 7:57 PM
To: Jessica Chicco
Subject: Re:

I do apologise,but i haven't had any Internet access to the Internet because my computer its not working, hopefully ill fix it this weekend.i need the computer so i can call with my voip phone.

On Mon, Jan 3, 2011 at 5:46 AM, Jessica Chicco <jessica.chicco@bc.edu<mailto:jessica.chicco@bc.edu> > wrote:
Hi Ruben,

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best for you between 8:15am-5pm East Coast time, or please feel free to just give us a call.

Thank you and look forward to speaking with you.

Jessica Chicco
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From: Ruben Ovalles
[mailto:rubenovalles27@gmail.com<mailto:rubenovalles27@gmail.com>]
[Quoted text hidden]

Ruben Ovalles
<rubenovalles27@gmail.com>

Thu, Jul 26, 2012 at 11:30 PM
To: Jessica Chicco <jessica.chicco@bc.edu>

Hi, Mrs Chicco I never responded to your email.I think I was feeling a little bit down from the verdict.I guess it took me a while to get over it.but I think im ready to try again is there anything else that we can try. Thank you.
[Quoted text hidden]

Jessica Chicco
<jessica.chicco@bc.edu>

Fri, Jul 27, 2012 at 1:16 PM

To: Ruben Ovalles <rubenovalles27@gmail.com>

Dear Ruben,

Thank you for contacting us again. Unfortunately I cannot say that there is anything new or helpful to share at this time. We are continuing to litigate the post-departure bar on motions to reopen and currently have another case pending in the 5th circuit. It is hard to tell how the court may decide, but even if it invalidates the departure bar in some limited circumstances, it might not be enough to be helpful in your case.

The reason I wrote over a year ago was because I wanted to make sure that you were aware of the Supreme Court decision from March 2010 called Padilla v. Kentucky. In that decision, the Supreme court found that a criminal defense attorney has a duty to inform his clients of the immigration consequences of a conviction, especially when those consequences are clear (the case dealt with someone who had been convicted of drug trafficking, which, as an aggravated felony, leads to almost certain deportation). Following this decision, noncitizens who did not receive such advice from their criminal defense attorneys have been able to vacate their convictions on this basis. Some courts, however, have refused to apply the Supreme Court's ruling to convictions entered before the Supreme Court decision. This very issue (whether the court's ruling in Padilla can be applied to convictions before March 2010) is currently pending before the Supreme Court and will be decided this year. If you are interested in exploring the possibility of vacating your conviction, you may want to consult with a criminal attorney familiar with the court of conviction and with post-

conviction relief. If you are successful in vacating your conviction, you may then have new opportunities to seek return to the U.S.

I'm happy to discuss any of the above with you. I can be reached at (617) 552-9249.

Best,

Jessica Chicco
Supervising Attorney
Post-Deportation Human Rights Project
Boston College Law School
885 Centre Street
Newton, MA 02459
617.552.9261
www.bc.edu/postdeportation

—Original Message—
From: Ruben Ovalles
[mailto:rubenovalles27@gmail.com]
Sent: Thursday, July 26, 2012 11:31 PM
To: Jessica Chicco
[Quoted text hidden]

Prada Law Group, P.A. Mail - possible referral – Ruben Ovalles

Mark Prada <mark@pradalawgroup.com>

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possible referral - Ruben Ovalles

Christine.Gay@hklaw.com Wed, Dec 14, 2016 at 4:17 PM
<Christine.Gay@hklaw.com>

To: mark@pradalawgroup.com

Mark,

I received your contact information from Jane Marie Russel in my office. About 7 years ago we represented a pro bono client, Ruben Ovalles, who was deported, on an appeal before the 5th Circuit. He is in still in the DR, but called me today because he has an immigration issue he needs help with. I am not sure exactly what it is, but i am going to pass along your contact information to him in case you may be able to assist.

Thank you,

Christine

Christine Fuqua Gay | Holland & Knight
Senior Counsel
Holland & Knight LLP
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Phone 305.789.7447 | Fax 305.789.7799
christine.gay@hklaw.com | www.hklaw.com

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Dominican Republic	)	
National District	)	
Santo Domingo	)	ss:
Embassy of the United States	)	
of America	)	

I certify that on this day the individual(s) named below appeared before me and, being duly sworn, made the statements set forth in the attached instrument.

Ruben Antonio Ovalles Vasquez
(Typed Name(s) of Affiant(s))

/s/ Ana M. Saviñon
Consular Associate
(Signature of Consular Officer)

Ana M. Saviñon
Consular Associate
(Typed Name of Consular Officer)

Vice Consul of the United States of America

19 ENE. 2017
(Date)

"For the content of the annexed document the Embassy assumes no responsibility"

SWORN DECLARATION OF RUBEN OVALLES

I, Ruben Ovalles, hereby affirm and state:

My name is Ruben Ovalles, alien number 040--070-535. I'm currently living in Santo Domingo, Dominican Republic. I immigrated to the United States with my family in 1985, when I was six years old, and grew up in the United States as a lawful permanent resident.

On May 14 2003, I was convicted of attempted possession of drugs in Ohio and sentenced to five years probation. On November 10, 2003, an Immigration Judge in Oakdale, Louisiana granted my application for cancellation of removal. The DHS appealed this decision, though, and the BIA said that I was not eligible for cancellation of removal because my conviction was an aggravated felony. After the BIA made its ruling I was deported to the Dominican Republic.

Since arriving to Dominican Republic I have been looking for legal ways to get back to my family. It's real hard to get any information on legal matters from the United states, so I had to go to Internet cafés whenever I could afford it. In April 2007, I found information on the internet about a Supreme Court case dealing with convictions like mine. I contacted Manuel Vargas at the Immigration Defense Project to see if he could help me find a lawyer who would take my case for free, since I couldn't afford to hire a lawyer. Mr. Vargas put me in contact with Rachel Rosenbloom from the Post-Deportation Human Rights

Project. After reviewing my case Mrs. Rosenbloom agreed to help me.

On July 27 2007, Mrs. Rosenbloom filed for a motion to Sua Sponte Reconsideration or Reopening. On September 27 2007 the BIA dismissed my petition for Reconsider or Reopening alleging that my motion was untimely and that the regulation at 8 C.F.R § 1003.2(d) prohibits the filing of motions to reopen by removed aliens who had departed the United States. On October 24 2007, I filed a timely petition for review with the United States Courts of Appeals for the Fifth Circuit. On July 27 2009, the Court of Appeals for the Fifth Circuit denied my motion.

After my motion for review was denied, I have been searching online for any news that can help me get back with my family in the US. Because of my financial situation I was not able to have access to the internet for a while. On December 2010, I contacted the Post-Deportation Human Rights Project to see if there was something new that could help my case. On July 27 2012, I again contacted the Post-Deportation Human Rights Project. On October 10 2014, I contacted Jessica Chicco from the Post-Deportation Human Rights Project yet again. Nothing came about from those talks. I continue in search to no avail.

My father is 77 years of age, so is getting harder for him to come visit me. On December 2016, while speaking to my father about how is getting hard for him to come to visit, he told me that a friend of his stated that I could apply for a waiver after being outside the US for more than 10 years after deportation. While searching online for that waiver, I stumble across the Fifth Court decision In Sergio Lugo-Resendez v. Loretta Lynch.

On Dec 14 2016, I contacted Mrs. Chicco from the Post-Deportation Human Rights Project. I was

advised by Mrs. Chicco that they no longer are taking cases. I also contacted Christine F. Gay, who was one of the counsel on my petition for review on the Fifth Circuit Court of Appeals. Mrs. Gay put me in contact with Immigration lawyer Mark A. Prada.

I declare under penalty of perjury under United States law that the foregoing is **a** true and correct statement.

01/19/2017	/s/ Ruben A. Ovalles
Date	Ruben A. Ovalles

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U.S. Department of Justice
Immigration and Naturalization Service

Warrant for Arrest of Alien

Case No: CLE0304000160
File No. A040 070 535
Date: April 14, 2003

To any officer of the Immigration and Naturalization Service delegated authority pursuant to section 287 of the Immigration and Nationality Act:

From evidence submitted to me, it appears that:
Ruben OVALLES
(Full name of alien)

an alien who entered the United States at or near San Juan, Puerto Rico (Port) on November 7, 1985 (Date) is within the country in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act.

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I command you to take the above-named alien into custody for proceedings in accordance with the applicable provisions of the immigration laws and regulations.

(Signature of authorized INS official)

BARRY W. HALFHILL
(Print name of official)

INTERIM RESIDENT AGENT IN CHARGE
(Title)

Certificate of Service

Served by me at Cleveland, Ohio on July 1, 2003 at 12:30 PM.
I certify that following such service, the alien was advised concerning his or her right to counsel and was furnished a copy of this warrant.

PATRICK SWEENEY
(Signature of officer serving warrant)

SPECIAL AGENT
(Title of officer serving warrant)

Form I-200 (Rev. 4-1-97)N