national
IMMIGRATION
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PRACTICE ADVISORY: SAMPLE *CARACHURI-ROSENDO* MOTIONS

June 21, 2010

By Simon Craven, Trina Realmuto and Dan Kesselbrenner[1]

Prior to June 14, 2010, immigration judges and the Board of Immigration Appeals (Board) denied certain noncitizens the opportunity to apply for relief from removal if they had two or more convictions for simple possession of a controlled substance. The immigration courts in the Fifth and Seventh Circuits had held that two or more convictions for simple possession constituted an aggravated felony. This rule applied to someone whose immigration hearing took place in one of the following six states: Wisconsin, Illinois, Indiana, Texas, Louisiana, or Mississippi. If the hearing was in one of those six states, a person could not qualify for cancellation of removal or certain other forms of relief from removal if she or he had two or more controlled substance convictions.

On June 14, 2010, the Supreme Court issued its decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. __, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). It holds that a person who has been convicted of a second or subsequent simple possession of a controlled substance offense has not been convicted of an aggravated felony at least where there was no finding of a prior conviction.

As a result of the *Carachuri-Rosendo* decision, some individuals now are eligible for relief for removal or another benefit under the INA. These individuals should bring the *Carachuri-Rosendo* decision to the attention of the immigration court, Board or court of appeals where their case is pending or was last pending. Attached are sample motions that might be of assistance to *pro se* individuals whose cases present this issue.

This practice advisory and attached sample motions are not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. They are not intended as, nor do they constitute, legal advice. DO NOT TREAT THIS ADVISORY AND SAMPLE MOTIONS AS LEGAL ADVICE.

These samples assume that the convictions at issue do not involve a finding of a prior conviction. If a second or subsequent conviction does involve some finding of a prior conviction, these motions may need additional content to explain why the conviction does not meet the additional requirements for the conviction to be deemed an aggravated felony under the Court's decision and other case law. In this situation, and for additional information on *Carachuri-Rosendo*, please see Immigrant Defense Project's Practice Advisory, entitled "Multiple Drug Possession Cases After *Carachuri-Rosendo v. Holder*," to be posted at: www.immigrantdefenseproject.org.

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[1] This advisory is authored by Simon Craven, who is a Legal Intern at the National Immigration Project. Trina Realmuto is a Staff Attorney and Dan Kesselbrenner is the Executive Director. The authors thank Manuel D. Vargas of the Immigrant Defense Project for his invaluable assistance.

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SAMPLE MOTIONS

A: **If it has been 30 days or less since the immigration judge's decision in your case,** consider filing this motion to reconsider with the immigration court.

B: **If it has been between 30 and 90 days since the immigration judge's decision your case,** consider filing this motion to reopen with the immigration court.

C: **If an appeal is pending at the Board of Immigration Appeals,** consider filing this motion to remand with the Board of Immigration Appeals.

D: **If it has been 30 days or less since the Board of Immigration Appeals' decision,** consider filing this motion to reconsider with the Board.

E: **If it has been between 30 and 90 days since the Board of Immigration Appeals' decision,** consider filing this motion to reopen with the Board.

F: **If a petition for review is currently pending in either the Fifth Circuit Court of Appeals or the Seventh Circuit Court of Appeals and briefing has been completed,** consider filing **SAMPLE E** with the Board of Immigration Appeals and **Sample F** (Letter pursuant to Federal Rule of Appellate Procedure 28(j)) with the Fifth Circuit Court of Appeals or the Seventh Circuit Court of Appeals.

G: **If either the Fifth Circuit Court of Appeals or the Seventh Circuit Court of Appeals dismissed the petition for review**, consider filing **SAMPLE E** with the Board of Immigration Appeals and **SAMPLE G** (motion to stay or recall the mandate).

SAMPLE A

Motion to Reconsider with the Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

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

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to INA § 240(c)(6), I hereby move the Immigration Judge to reconsider this case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). The Supreme Court held that second or subsequent simple possession of a controlled substance offenses are not

aggravated felonies under § 101(a)(43)(B) of the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction.

In my case, the Immigration Judge (IJ) found me ineligible to apply for relief from removal as an aggravated felon based on having two or more convictions of possession of a controlled substance under the laws of _____ and of _____. The Supreme Court's decision in *Carachuri-Rosendo* has nullified this basis of the Immigration Judge's decision. Therefore, I ask the Immigration Judge to reconsider my case and hold a hearing on any application for which I may be eligible.

II. FEE WAIVER REQUEST

Pursuant to 8 C.F.R. § 1003.24(d), the Immigration Judge has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. As explained in my declaration, attached to this motion, I am unable to pay this fee and request that the Immigration Judge waive this fee.

III. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleges that I have been convicted of possession of a controlled substance on _____ in _____. DHS also alleges that I have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____.

As a result of these convictions, the Immigration Judge determined that I have been convicted of an aggravated felony, as defined in INA § 101(a)(43)(B). The Immigration Judge did not permit me to apply for any form of relief from removal or benefit under the Immigration

and Nationality Act that is statutorily barred due to having an aggravated felony conviction. The Immigration Judge ordered me removed on _____.

Pursuant to 8 C.F.R. § 1003.23(b)(i), I hereby declare that:

[___] The validity of my removal order has been or is the subject of a judicial proceeding. The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows:_____

_____.

[___] The validity of my removal order has not been and is not the subject of a judicial proceeding.

[___] I am currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] I am not currently the subject of any pending criminal proceeding under the Act.

IV. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.23(b)(1). A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.23(b)(1), or as soon as practicable after finding out about the decision. *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could

reasonably have been expected to have filed earlier") (citations omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"). The Supreme Court issued its decision in *Carachuri-Rosendo* on June 14, 2010. I am filing this motion as soon as practicable after finding out about the Supreme Court's ruling.

V. ARGUMENT

In *Carachuri-Rosendo*, the Supreme Court concluded that a second or subsequent simple possession offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. The petitioner in *Carachuri-Rosendo* was a lawful permanent resident who was convicted of two simple possession drug offenses in Texas. *Id.* After the second offense, the DHS initiated removal proceedings against him. *Id.* The Immigration Judge found that Carachuri-Rosendo's second simple possession conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal pursuant to INA § 240A(a)(3). *Id.* at *5. The BIA and United States Court of Appeals for the Fifth Circuit affirmed the IJ's findings. *Id* at *5, *6.

The Supreme Court reversed. *Carachuri-Rosendo*, 2010 WL 2346552 at *11. The Supreme Court held that second or subsequent simple possession convictions are not "aggravated felonies" as defined in INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. *Id.* at *3.

Like the petitioner in *Carachuri-Rosendo*, I was convicted of a second or subsequent simple possession of a controlled substance offense that was not based on the fact of a prior conviction. My conviction, therefore, is not an aggravated felony as defined in INA §

101(a)(43)(B) and, therefore, cannot render me ineligible for relief from removal or ineligible for other benefits under the Act.

VI. CONCLUSION

The Supreme Court's decision in *Carachuri-Rosendo* is a significant change in the law that nullifies the Immigration Judge's decision denying me the opportunity to apply for relief from removal or another benefit under the INA. The Immigration Judge should grant my motion to reconsider and schedule a hearing on any application for which I may be eligible, including, but not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

Dated: _____ Respectfully submitted,

_____
Respondent

DECLARATION OF _____

IN SUPPORT OF FEE WAIVER REQUEST

1. My name is _____.

2. I currently reside at _____

_____.

3. I am filing this declaration in support of a fee waiver request pertaining to a Motion to Reconsider in light of *Carachuri-Rosendo v. Holder*.

4. I am unable to pay the filing fee because _____

_____

_____

_____

_____

_____.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this _____ day of _____, 20____.

_____
Respondent

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO RECONSIDER IN LIGHT OF *CARACHURI-ROSENDO v. HOLDER*

on the attorney for the government at the following address:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____at _____, _____.

Signed,

_____

SAMPLE B

Motion to Reopen with IJ

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION COURT
_____, _____

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent,	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO REOPEN IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(7) of the Immigration and Nationality Act (INA), I hereby move the Immigration Court to reopen my case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). The Supreme Court held that second or subsequent simple possession of a controlled substance offenses are not aggravated felonies under § 101(a)(43)(B) of the

Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction.

In my case, the Immigration Judge (IJ) found me ineligible to apply for relief from removal as an aggravated felon based on having two or more convictions for possession of a controlled substance under the laws of _____ and _____. The Supreme Court's decision in *Carachuri-Rosendo* has nullified this basis of the Immigration Judge's decision. Therefore, I ask the Immigration Judge to reopen my case to permit me to apply for any relief or application for which I may be eligible.

II. FEE WAIVER REQUEST

Pursuant to 8 C.F.R. § 1003.24(d), the Immigration Judge has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. As explained in my declaration, attached to this motion, I am unable to pay this fee and request that the Immigration Judge waive this fee.

III. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleges that I have been convicted of possession of a controlled substance on _____ in _____. DHS also alleges that I have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____.

As a result of these convictions, the Immigration Judge determined that I have been convicted of an aggravated felony, as defined in INA § 101(a)(43)(B). The immigration judge did not permit me to apply for any form of relief from removal or benefit under the Immigration

and Nationality Act which is statutorily barred due to having an aggravated felony conviction. The Immigration Judge ordered me removed on _____.

Pursuant to 8 C.F.R. § 1003.23(b)(i), I hereby declare that:

[___] The validity of my removal order has been or is the subject of a judicial proceeding. The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows:_____

_____.

[___] The validity of my removal order has not been and is not the subject of a judicial proceeding.

[___] I am currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] I am not currently the subject of any pending criminal proceeding under the Act.

IV. STANDARD FOR REOPENING

A motion to reopen asks the IJ or BIA to reopen proceedings so that the respondent may present new evidence and a new decision can be entered following an evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(3). A motion to reopen to provide a respondent an opportunity to apply for relief or a benefit under the Act may be granted where the Immigration Judge did not fully explain the right to apply for relief and did not afford the person an opportunity to apply for relief at the hearing. 8 C.F.R. §

1003.23(b)(3). A motion to reopen also must be accompanied by the application for relief and all supporting documents. *Id.*

In general, only one motion to reopen may be filed and it must be filed within 90 days of the date of entry of a final administrative order, INA §§ 240(c)(7)(A)&(C), or as soon as practicable after finding out about the decision. *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"). The Supreme Court issued its decision in *Carachuri-Rosendo* on June 14, 2010. I am filing this motion as soon as practicable after finding out about the Supreme Court's ruling.

V. ARGUMENT

A. Pursuant to the Supreme Court's Decision in *Carachuri-Rosendo*, I Have Not Been Convicted of an Aggravated Felony as Defined in INA § 101(a)(43)(B).

In *Carachuri-Rosendo*, the Supreme Court concluded that second or subsequent simple possession offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. The petitioner in *Carachuri-Rosendo* was a lawful permanent resident who was convicted of two simple possession drug offenses in Texas. *Id.* After the second offense, the Department of Homeland Security initiated removal proceedings against him. *Id*. The Immigration Judge found that Carachuri-Rosendo's second simple possession conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal pursuant to INA § 240A(a)(3). *Id.* at *5.

The BIA and United States Court of Appeals for the Fifth Circuit affirmed the IJ's findings. *Id* at *5, *6.

The Supreme Court reversed. *Carachuri-Rosendo*, 2010 WL 2346552 at *11. The Supreme Court held that second or subsequent simple possession convictions are not "aggravated felonies" under the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction. *Id.* at *3.

Like the petitioner in *Carachuri-Rosendo*, I was convicted of a second or subsequent simple possession of a controlled substance offense that was not based on the fact of a prior conviction. My conviction, therefore, is not an aggravated felony as defined in INA § 101(a)(43)(B) and, therefore, cannot render me ineligible for relief from removal or ineligible for other benefits under the Act.

B. <u>I Am Eligible for Relief from Removal and/or Other Benefits under the INA.</u>

In light of the Supreme Court's decision in *Carachuri-Rosendo*, I am eligible for relief from removal or other benefits under the INA. Such relief includes, but is not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

I am representing myself in these proceedings. I ask the Court to liberally construe this motion, particularly the following requests for relief from removal and other benefits under this Act, in accordance with Supreme Court and circuit court case law. *Sanders v. United States*, 373 U.S. 1, 22-23 (1963) (judge not required to limit his decisions to grounds alleged by *pro se* litigant); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding that a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by

lawyers..."); *SEC v. AMX, Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993) (recognizing the established rule that this court "must construe [a *pro se* plaintiff's] allegations and briefs more permissively"); *Perez v. United States*, 312 F.3d 191, 194-95 (5th Cir. 2002) (noting that courts have adopted the rule that a *pro se* plaintiff's pleadings must be liberally construed to avoid punishing pro se litigants for "lacking the linguistic and analytical skills of a trained lawyer in deciphering the requirements of the United States Code"); *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir.2006) ("Because Marshall was proceeding pro se, the district court was required to liberally construe his complaint").

I believe I am eligible for:

[___] Cancellation of Removal under INA § 240A(a) because: (1) I have been a lawful permanent resident for not less than 5 years; (2) I have resided in the United States continuously for 7 years after having been admitted in any status (including prior to the service of a Notice to Appear and prior to the commission of an offense that renders me removable); and (3) I have not been convicted of an aggravated felony. See attached Application for Cancellation of Removal for Certain Permanent Residents, Form EOIR-42A.

[___] Asylum under INA § 208 because I have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, and/or political opinion if I am removed to _____..

[___] I have previously applied for withholding of removal under INA § 241(b)(3) and/or protection under the United Nations Convention Against Torture on Form I-589. Please deem my prior application as my asylum application (also submitted on Form I-589) for purposes of this motion.

[___] I have not previously applied for withholding of removal under INA § 241(b)(3) and/or protection under the United Nations Convention Against Torture on Form I-589. See attached Application for Asylum and For Withholding of Removal, Form I-589.

[___] Withholding of removal under INA § 241(b)(3) because it is more likely than not that I will be persecuted on account of race, religion, nationality, membership in a particular social group, and/or political opinion if I am removed to _____.

[___] I have previously applied for protection under the United Nations Convention Against Torture on Form I-589. Please deem my prior application as my withholding application (also submitted on Form I-589) for purposes of this motion.

[___] I have not previously applied for protection under the United Nations Convention Against Torture on Form I-589. See attached Application for Asylum and For Withholding of Removal, Form I-589.

[___] Termination of proceedings to pursue naturalization under INA §§ 310-361 because I am no longer ineligible for naturalization based on an aggravated felony conviction. 8 C.F.R. § 1239.2(f).

[___] Termination of proceedings because I am no longer removable for an aggravated felony conviction and DHS is not seeking to remove me on any other basis.

[___] In the event that I am not eligible for any of the above forms of relief, I would ask to be considered for voluntary departure under INA § 240B because I am not deportable for an

aggravated felony or terrorist offense and may agree to depart voluntarily at my own expense. However, I wish to be fully informed by the Immigration Judge about the consequences of applying for this relief.

C. The Immigration Court Has Authority to Reopen this Case.

The immigration courts and the BIA are bound by governing federal court precedents. *See, e.g., Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002); *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989). *Carachuri-Rosendo* undeniably establishes that a second or subsequent possession of a controlled substance offense does not constitute an aggravated felony as defined in INA § 101(a)(43). Because the Immigration Judge's decision is in conflict with the Supreme Court's decision, the Court should reopen my case.

This request is consistent with the actions taken by the Department of Justice in the aftermath of *INS v. St. Cyr*, 533 U.S. 289 (2001). On September 28, 2004, the Department issued procedures for reopening cases for respondents who were wrongly denied the right to apply for section 212(c) relief. *See* Executive Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57826 (Sept. 28, 2004) (codified at 8 C.F.R. § 1003.44). Even before the final regulation was issued, the immigration courts and BIA were reopening cases under *St. Cyr*. A similar remedy is needed in this case.

VI. CONCLUSION

The Supreme Court's decision in *Carachuri-Rosendo* is a significant change in the law that nullifies the immigration judge's decision denying me the opportunity to apply for relief

from removal or another benefit under the INA. This Court should grant my motion to reopen and schedule my case for a hearing on any application for which I may be eligible, including, but not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

Dated: _____ Respectfully submitted,

_____
Respondent

DECLARATION OF _____

IN SUPPORT OF FEE WAIVER REQUEST

1. My name is _____.

2. I currently reside at _____

_____.

3. I am filing this declaration in support of a fee waiver request pertaining to a Motion to Reopen in light of *Carachuri-Rosendo v. Holder*.

4. I am unable to pay the filing fee because _____

_____

_____

_____

_____

_____.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this _____ day of _____, 20____.

_____
Respondent

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO REOPEN IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

on the attorney for the government at the following address:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____at _____, _____.

Signed,

_____

SAMPLE C

Motion to Remand from BIA to Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

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

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIGHT OF *CARACHURI-ROSENDO v. HOLDER*

I. <u>INTRODUCTION</u>

I hereby move the Board of Immigration Appeals (BIA or Board) to remand this case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). The Supreme Court held that second or subsequent simple possession of a controlled substance offenses are not aggravated felonies under § 101(a)(43)(B) of the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction.

In my case, the Immigration Judge (IJ) found me ineligible to apply for relief from removal as an aggravated felon based on having two or more convictions for possession of a controlled substance in _____ and _____. The Supreme Court's decision in *Carachuri-Rosendo* has nullified this basis of the Immigration Judge's decision. Therefore, I ask the BIA to remand my case to the Immigration Judge for a hearing on any application for which I may be eligible.

IV. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleges that I have been convicted of possession of a controlled substance on _____ in _____. DHS also alleges that I have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____.

As a result of these convictions, the Immigration Judge determined that I have been convicted of an aggravated felony, as defined in INA § 101(a)(43)(B). The Immigration Judge did not permit me to apply for any form of relief from removal or benefit under the Immigration and Nationality Act that is statutorily barred due to having an aggravated felony conviction. The Immigration Judge ordered me removed on _____.

The Supreme Court issued its 9-0 decision in *Carachuri-Rosendo* on June 14, 2010. I am filing this motion as soon as practicable following the Supreme Court's ruling.

III. ARGUMENT

In *Carachuri-Rosendo*, the Supreme Court concluded that second or subsequent simple possession offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction

is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. The petitioner in *Carachuri-Rosendo* was a lawful permanent resident who was convicted of two simple possession drug offenses in Texas. *Id.* After the second offense, the Department of Homeland Security initiated removal proceedings against him. *Id.*. The Immigration Judge found that Carachuri-Rosendo's second simple possession conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal pursuant to INA § 240A(a)(3). *Id.* at *5. The BIA and United States Court of Appeals for the Fifth Circuit affirmed the IJ's findings. *Id* at *5, *6.

The Supreme Court reversed. *Carachuri-Rosendo*, 2010 WL 2346552 at *11. The Supreme Court held that second or subsequent simple possession convictions are not "aggravated felonies" as defined in INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. *Id.* at *3.

Like the petitioner in *Carachuri-Rosendo*, I was convicted of a second or subsequent simple possession of a controlled substance offense that was not based on the fact of a prior conviction. My conviction, therefore, is not an aggravated felony as defined in INA § 101(a)(43)(B) and, therefore, cannot render me ineligible for relief from removal or ineligible for other benefits under the Act.

IV. CONCLUSION

The Supreme Court's decision in *Carachuri-Rosendo* is a significant change in the law that nullifies the Immigration Judge's decision denying me the opportunity to apply for relief from removal or another benefit under the INA. The BIA should grant my motion and remand my case to the Immigration Judge to permit me to apply for any relief or application for which I

may be eligible, including, but not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

Dated: _____ Respectfully submitted,

_____
Respondent

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIGHT OF *CARACHURI-ROSENDO v. HOLDER*

on the attorney for the government at the following address:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____at _____, _____.

Signed,

_____

SAMPLE D

Motion to Reconsider with the BIA

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

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

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), I hereby move the Board of Immigration Appeals (BIA or Board) to reconsider my case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). The Supreme Court held that second or subsequent simple possession of a controlled substance offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction.

In my case, the Immigration Judge (IJ) found me ineligible to apply for relief from removal as an aggravated felon based on having two or more convictions of possession of a controlled substance under the laws of _____ and _____. The Board affirmed. The Supreme Court's decision in *Carachuri-Rosendo* has nullified this basis of the Board's decision. Therefore, I ask the Board of Immigration Appeals to reconsider and remand my case to the Immigration Judge to hold a hearing on any application for which I may be eligible.

II. FEE WAIVER REQUEST

Pursuant to 8 C.F.R. § 1003.8(a)(3), the Board has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. As explained in the attached Fee Waiver Request (Form EOIR-26A), I am unable to pay this fee and request that the Board waive this fee.

III. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleges that I have been convicted of possession of a controlled substance on _____ in _____. DHS also alleges that I have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____.

As a result of these convictions, the Immigration Judge determined that I have been convicted of an aggravated felony, as defined in INA § 101(a)(43)(B). The Immigration Judge did not permit me to apply for any form of relief from removal or benefit under the Immigration and Nationality Act that is statutorily barred due to having an aggravated felony conviction. The

Immigration Judge ordered me removed on _____. The Board of Immigration Appeals issued its decision affirming the IJ's decision on _____.

Pursuant to 8 C.F.R. §1003.2(e), I hereby declare that:

[___] The validity of my removal order has been or is the subject of a judicial proceeding. The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows:_____

_____.

[___] The validity of my removal order has not been and is not the subject of a judicial proceeding.

[___] My removal order is currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] My removal order is not currently the subject of any pending criminal proceeding under the Act.

[___] I am currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] I am not currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. §

1003.2(b)(2). A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"). The Supreme Court issued its decision in *Carachuri-Rosendo* on June 14, 2010. I am filing this motion as soon as practicable after finding out about the Supreme Court's ruling.

IV. ARGUMENT

In *Carachuri-Rosendo*, the Supreme Court concluded that second or subsequent simple possession offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. The petitioner in *Carachuri-Rosendo* was a lawful permanent resident who was convicted of two simple possession drug offenses in Texas. *Id.* After the second offense, the Department of Homeland Security initiated removal proceedings against him. *Id.* The IJ found that Carachuri-Rosendo's second simple possession conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal pursuant to INA § 240A(a)(3). *Id.* at *5. The BIA and United States Court of Appeals for the Fifth Circuit affirmed the IJ's findings. *Id* at *5, *6.

The Supreme Court reversed. *Carachuri-Rosendo*, 2010 WL 2346552 at *11. The Supreme Court held that second or subsequent simple possession convictions are not "aggravated

felonies" under the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction. *Id.* at *3.

Like the petitioner in *Carachuri-Rosendo*, I was convicted of a second or subsequent simple possession of a controlled substance offense that was not based on the fact of a prior conviction. My conviction, therefore, is not an aggravated felony as defined in INA § 101(a)(43)(B) and, therefore, cannot render me ineligible for relief from removal or ineligible for other benefits under the Act.

V. CONCLUSION

The Supreme Court's decision in *Carachuri-Rosendo* is a significant change in the law that nullifies the Board's decision denying me the opportunity to apply for relief from removal or another benefit under the INA. The Board should grant my motion and remand my case to the Immigration Judge for a hearing on any application for which I may be eligible, including, but not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

Dated: _____ Respectfully submitted,

_____
Respondent

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

OMB# 1125-0003

Fee Waiver Request

Name:

Alien Number ("A" Number:)

If more than one alien is included in your appeal or motion, only the lead alien need file this form.

I, _____ , declare under penalty of perjury, pursuant to 28 U.S.C. section 1746, that I am the person above and that I am unable to pay the fee. I believe that my appeal/motion is valid, and I declare that the following information is true and correct to the best of my knowledge:

Assets

Wages, Salary	$ _____ /month
Other Income (business, profession, (self-employed, rent payments, interest, etc.)	_____ /month
Cash	_____
Checking or Savings Account	_____
Property (real estate, automobile, stocks, bonds, etc.)	_____
Other Financial Support (public assistance, alimony, child support, gift, parent, spouse, other family members, etc.	_____ /month

Expenses (including dependents)

Housing (rent, mortgage, etc.)	$ _____ /month
Food	_____ /month
Clothing	_____ /month
Utilities (phone, electric, gas, water, etc.)	_____ /month
Transportation	_____ /month
Debts, Liabilities	_____ /month
Other _____ (specify)	$ _____ /month

_____
Signature

_____
Date

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO RECONSIDER IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

on the attorney for the government at the following address:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____at _____, _____.

Signed,

_____

SAMPLE E

Motion to Reopen with BIA

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

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

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO REOPEN IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(7) of the Immigration and Nationality Act (INA), I hereby move the Board of Immigration Appeals (BIA or Board) to reopen my case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010). The Supreme Court held that second or subsequent simple possession of a controlled substance offenses are not aggravated felonies under § 101(a)(43)(B)

of the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction.

In my case, the Immigration Judge (IJ) found me ineligible to apply for relief from removal as an aggravated felon based on having two or more convictions for possession of a controlled substance in _____ and _____. The Board affirmed. The Supreme Court's decision in *Carachuri-Rosendo* has nullified this basis of the Board's decision. Therefore, I ask the Board to reopen my case to permit me to apply for any relief or application for which I may be eligible.

II. FEE WAIVER REQUEST

Pursuant to 8 C.F.R. § 1003.8(a)(3), the Board has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. As explained in the attached Fee Waiver Request (Form EOIR-26A), I am unable to pay this fee and request that the Board waive this fee.

III. STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Homeland Security (DHS) alleges that I have been convicted of possession of a controlled substance on _____ in _____. DHS also alleges that I have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____.

As a result of these convictions, the Immigration Judge determined that I have been convicted of an aggravated felony, as defined in INA § 101(a)(43)(B). The Immigration Judge did not permit me to apply for any form of relief from removal or benefit under the Immigration

and Nationality Act which is statutorily barred due to having an aggravated felony conviction. The Immigration Judge ordered me removed on _____. The Board of Immigration Appeals issued its decision affirming the IJ's decision on _____.

Pursuant to 8 C.F.R. §1003.2(e), I hereby declare that:

[___] The validity of my removal order has been or is the subject of a judicial proceeding. The location of the judicial proceeding is: _____. The proceeding took place on: _____. The outcome is as follows:_____

_____.

[___] The validity of my removal order has not been and is not the subject of a judicial proceeding.

[___] My removal order is currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] My removal order is not currently the subject of any pending criminal proceeding under the Act.

[___] I am currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____

_____.

[___] I am not currently the subject of any pending criminal proceeding under the Act.

IV. STANDARD FOR REOPENING

A motion to reopen asks the IJ or BIA to reopen proceedings so that the respondent may present new evidence and a new decision can be entered following an evidentiary hearing.

Matter of Cerna, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." INA § 240(c)(6)(B); 8 C.F.R. § 1003.3(c)(1). A motion to reopen to provide a respondent an opportunity to apply for relief or a benefit under the Act may be granted where the Immigration Judge did not fully explain the right to apply for relief and did not afford the person an opportunity to apply for relief at the hearing. 8 C.F.R. § 1003.3(c)(1). A motion to reopen also must be accompanied by the application for relief and all supporting documents. *Id.*

In general, only one motion to reopen may be filed and it must be filed within 90 days of the date of entry of a final administrative order, INA §§ 240(c)(7)(A)&(C), or as soon as practicable after finding out about the decision. *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"). The Supreme Court issued its decision in *Carachuri-Rosendo* on June 14, 2010. I am filing this motion as soon as practicable after finding out about the Supreme Court's ruling.

V. ARGUMENT

A. Pursuant to the Supreme Court's Decision in *Carachuri-Rosendo*, I Have Not Been Convicted of an Aggravated Felony as Defined in INA § 101(a)(43)(B).

In *Carachuri-Rosendo*, the Supreme Court concluded that second or subsequent simple possession offenses are not aggravated felonies under INA § 101(a)(43)(B) when the conviction

is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. The petitioner in *Carachuri-Rosendo* was a lawful permanent resident who was convicted of two simple possession drug offenses in Texas. *Id.* After the second offense, the Department of Homeland Security initiated removal proceedings against him. *Id*. The Immigration Judge found that Carachuri-Rosendo's second simple possession conviction was an "aggravated felony" that rendered him ineligible for cancellation of removal pursuant to INA § 240A(a)(3). *Id.* at *5. The BIA and United States Court of Appeals for the Fifth Circuit affirmed the IJ's findings. *Id* at *5, *6.

The Supreme Court reversed. *Carachuri-Rosendo*, 2010 WL 2346552 at *11. The Supreme Court held that second or subsequent simple possession convictions are not "aggravated felonies" under the Immigration and Nationality Act (INA) when the conviction is not based on the fact of a prior conviction. *Id.* at *3.

Like the petitioner in *Carachuri-Rosendo*, I was convicted of a second or subsequent simple possession of a controlled substance offense that was not based on the fact of a prior conviction. My conviction, therefore, is not an aggravated felony as defined in INA § 101(a)(43)(B) and, therefore, cannot render me ineligible for relief from removal or ineligible for other benefits under the Act.

B. <u>I Am Eligible for Relief from Removal and/or Other Benefits under the INA.</u>

In light of the Supreme Court's decision in *Carachuri-Rosendo*, I am eligible for relief from removal or other benefits under the INA. Such relief includes, but is not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal

under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

I am representing myself in these proceedings. I ask the Court to liberally construe this motion, particularly the following requests for relief from removal and other benefits under this Act, in accordance with Supreme Court and circuit court case law. *Sanders v. United States*, 373 U.S. 1, 22-23 (1963) (judge not required to limit his decisions to grounds alleged by *pro se* litigant); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (holding that a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers..."); *SEC v. AMX, Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993) (recognizing the established rule that this court "must construe [a *pro se* plaintiff's] allegations and briefs more permissively"); *Perez v. United States*, 312 F.3d 191, 194-95 (5th Cir. 2002) (noting that courts have adopted the rule that a *pro se* plaintiff's pleadings must be liberally construed to avoid punishing pro se litigants for "lacking the linguistic and analytical skills of a trained lawyer in deciphering the requirements of the United States Code"); *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir.2006) ("Because Marshall was proceeding pro se, the district court was required to liberally construe his complaint").

I believe I am eligible for:

[___] Cancellation of Removal under INA § 240A(a) because: (1) I have been a lawful permanent resident for not less than 5 years; (2) I have resided in the United States continuously for 7 years after having been admitted in any status (including prior to the service of a Notice to Appear and prior to the commission of an offense that renders me removable); and (3) I have not been convicted of an aggravated felony. See attached Application for Cancellation of Removal for Certain Permanent Residents, Form EOIR-42A.

[___] Asylum under INA § 208 because I have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, and/or political opinion if I am removed to _____..

[___] I have previously applied for withholding of removal under INA § 241(b)(3) and/or protection under the United Nations Convention Against Torture on Form I-589. Please deem my prior application as my asylum application (also submitted on Form I-589) for purposes of this motion.

[___] I have not previously applied for withholding of removal under INA § 241(b)(3) and/or protection under the United Nations Convention Against Torture on Form I-589. See attached Application for Asylum and For Withholding of Removal, Form I-589.

[___] Withholding of removal under INA § 241(b)(3) because it is more likely than not that I will be persecuted on account of race, religion, nationality, membership in a particular social group, and/or political opinion if I am removed to _____.

[___] I have previously applied for protection under the United Nations Convention Against Torture on Form I-589. Please deem my prior application as my withholding application (also submitted on Form I-589) for purposes of this motion.

[___] I have not previously applied for protection under the United Nations Convention Against Torture on Form I-589. See attached Application for Asylum and For Withholding of Removal, Form I-589.

[___] Termination of proceedings to pursue naturalization under INA §§ 310-361 because I am no longer ineligible for naturalization based on an aggravated felony conviction. 8 C.F.R. § 1239.2(f).

[___] Termination of proceedings because I am no longer removable for an aggravated felony conviction and DHS is not seeking to remove me on any other basis.

[___] In the event that I am not eligible for any of the above forms of relief, I would ask to be considered for voluntary departure under INA § 240B because I am not deportable for an aggravated felony or terrorist offense and may agree to depart voluntarily at my own expense. However, I wish to be fully informed by the Immigration Judge about the consequences of applying for this relief.

C. <u>The Immigration Court Has Authority to Reopen this Case.</u>

The BIA is bound by governing federal court precedents. *See, e.g., Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002); *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989). *Carachuri-Rosendo* undeniably establishes that a second or subsequent possession of a controlled substance offense does not constitute an aggravated felony as defined in INA § 101(a)(43). Because the Board's decision is in conflict with the Supreme Court's decision, the Court should reopen my case.

This request is consistent with the actions taken by the Department of Justice in the aftermath of *INS v. St. Cyr*, 533 U.S. 289 (2001). On September 28, 2004, the Department issued procedures for reopening cases for respondents who were wrongly denied the right to

apply for section 212(c) relief. *See* Executive Office for Immigration Review, Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57826 (Sept. 28, 2004) (codified at 8 C.F.R. § 1003.44). Even before the final regulation was issued, the immigration courts and BIA were reopening cases under *St. Cyr*. A similar remedy is needed in this case.

VI. CONCLUSION

The Supreme Court's decision in *Carachuri-Rosendo* is a significant change in the law that nullifies the Board's decision denying me the opportunity to apply for relief from removal or another benefit under the INA. The Board should grant my motion to reopen and remand my case to the IJ to schedule a hearing on any application for which I may be eligible, including, but not limited to: cancellation of removal under INA § 240A(a); asylum under INA § 208, withholding of removal under INA § 241(b)(3), voluntary departure under INA § 240B, naturalization under INA §§ 310-361, or termination of removal proceedings.

Dated: _____ Respectfully submitted,

_____
Respondent

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

OMB# 1125-0003

Fee Waiver Request

Name:

Alien Number ("A" Number:)

If more than one alien is included in your appeal or motion, only the lead alien need file this form.

I, _____ , declare under penalty of perjury, pursuant to 28 U.S.C. section 1746, that I am the person above and that I am unable to pay the fee. I believe that my appeal/motion is valid, and I declare that the following information is true and correct to the best of my knowledge:

Assets

Wages, Salary	$ _____ /month
Other Income (business, profession, (self-employed, rent payments, interest, etc.)	_____ /month
Cash	_____
Checking or Savings Account	_____
Property (real estate, automobile, stocks, bonds, etc.)	_____
Other Financial Support (public assistance, alimony, child support, gift, parent, spouse, other family members, etc.	_____ /month

Expenses (including dependents)

Housing (rent, mortgage, etc.)	$ _____ /month
Food	_____ /month
Clothing	_____ /month
Utilities (phone, electric, gas, water, etc.)	_____ /month
Transportation	_____ /month
Debts, Liabilities	_____ /month
Other _____ (specify)	$ _____ /month

_____
Signature

_____
Date

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO REOPEN IN LIGHT OF
CARACHURI-ROSENDO v. HOLDER

on the attorney for the government at the following address:

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____at _____, _____.

Signed,

_____

SAMPLE F

Letter pursuant to Federal Rule of Appellate Procedure 28(j)
(Pursuant to the rule, the body of the letter must not exceed 350 words)

This letter is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE LETTER AS LEGAL ADVICE.

_____
_____
_____

Clerk of the Court
U.S. Court of Appeals for the _____Circuit
_____
_____
_____

Re: _____ v. _____
Case No. _____

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner submits *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. ___, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010).

In *Carachuri-Rosendo,* the Supreme Court held that a second or subsequent simple possession offenses are not aggravated felonies under 8 U.S.C. § 1101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. 2010 WL 2346552 at *3. Thus, the Court concluded that "Carachuri-Rosendo, and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal." *Id.* at *3.

Carachuri-Rosendo is applicable to this case because _____
_____

_____
_____.

Carachuri-Rosendo v. Holder supports the position in Petitioner's brief at pages _____ that the instant petition for review should be granted.

Respectfully submitted,

_____

cc:

Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

SAMPLE G

Motion to Stay or Recall the Mandate at Court of Appeals

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

IN THE UNITED STATES COURT OF APPEALS

FOR THE _____CIRCUIT

_____	Case No. _____
Petitioner,	
v.	
Eric H. Holder, Jr., Attorney General,	
Respondent.	

MOTION TO STAY OR RECALL THE MANDATE IN LIGHT OF THE SUPREME COURT'S DECISION IN *CARACHURRI-ROSENDO v. HOLDER*

I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 41, Petitioner moves this Court to stay or recall the mandate in this case in light of the Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, __ S.Ct. __, 2010 WL 2346552 (June 14, 2010).

II. RELEVANT PROCEDURAL HISTORY

Petitioner is alleged to have been convicted of possession of a controlled substance on _____ in _____ and _____.

Petitioner is alleged to have been convicted of a subsequent offense for possession of a controlled substance on _____ in _____ and _____.

As a result of these convictions, the immigration judge determined that Petitioner had been convicted of an aggravated felony, as defined in 8 U.S.C. § 1101(a)(43)(B). Based on this erroneous conclusion, the immigration judge did not permit Petitioner to apply for any form of relief from removal or benefit under the Immigration and Nationality Act which is statutorily barred due to having an aggravated felony conviction. The Board of Immigration Appeals affirmed the Immigration Judge's decision.

Petitioner then filed a petition for review of the BIA's decision with this Court. On _____, this Court dismissed or denied the petition for review, finding that Petitioner had been convicted of an aggravated felony. The Court's decision relied on then binding circuit case law. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009); *Fernandez v. Mukasey,* 544 F.3d 862 (7th Cir. 2008). The mandate either is set to issue or has issued.

The Supreme Court's unanimous decision in *Carachuri-Rosendo* was issued on June 14, 2010. Petitioner is filing this motion as soon as practicable following the Court's decision.

III. ARGUMENT

The Court should stay or recall the mandate in light of the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, __ S.Ct. __, 2010 WL 2346552, *3 (June 14, 2010). In *Carachuri-Rosendo,* the Supreme Court held that a second or subsequent simple possession offenses of a controlled substance are not aggravated felonies under 8 U.S.C. § 1101(a)(43)(B) when the conviction is not based on the fact of a prior conviction. Thus, the Court concluded that "Carachuri-Rosendo, and others in his position, may now seek cancellation of removal and thereby avoid the harsh consequence of mandatory removal." *Id.* at *11.

Carachuri-Rosendo is applicable in this case because _____

_____.

The Court's decision in *Carachuri-Rosendo* nullifies the Board's decision.

Thus, a recall of the mandate is warranted in order to prevent injustice and to allow Petitioner to apply for any relief from removal or benefit under the Immigration and Nationality Act for which Petitioner is determined to be eligible.

IV. POSITION OF OPPOSING COUNSEL

Petitioner is appearing pro se and was not able to obtain the position of opposing counsel.

V. CONCLUSION

For the foregoing reasons, this Court should stay the mandate, if it has not yet issued, or recall the mandate if it has issued. The Court should reconsider the instant petition for review. In accordance with the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, the Court should find that Petitioner has not been convicted of an aggravated felony, reverse the BIA's decision and remand the case for further proceedings.

Dated: _____ Respectfully submitted,

_____

CERTIFICATE OF SERVICE

On _____, I, the undersigned, served the within:

MOTION TO STAY OR RECALL THE MANDATE IN LIGHT OF THE SUPREME COURT'S DECISION IN *CARACHURRI-ROSENDO v. HOLDER*

on the attorney for the government at the following address:

Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____at _____, _____.

Signed,

_____