17-3827

United States Court of Appeals for the Second Circuit

CHURCHILL LEONARD SPENCER ANDREWS,
AKA CHURCHILL LENARD ANDREWS,
PETITIONER

v.

JEFFERSON B. SESSIONS III, UNITED STATES ATTORNEY GENERAL,
RESPONDENT

BRIEF FOR PETITIONER
CHURCHILL LEONARD SPENCER ANDREWS

On Petition For Review From A Decision Of
The Board Of Immigration Appeals, [redacted]

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STATEMENT OF JURISDICTION

The Board of Immigration Appeals (BIA) had jurisdiction over Mr. Andrews's motion for reconsideration under 8 C.F.R. § 1003.2. The BIA issued its final decision on October 25, 2017, and Mr. Andrews timely filed this petition for review on November 22, 2017. This Court has jurisdiction over the denial of the statutory motion to reconsider under 8 U.S.C. § 1252. *See Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015). As to the Board's denial of sua sponte relief, the Court has jurisdiction to consider whether the BIA "misperceived the legal background" it believed compelled its decision. *See Centurion v. Sessions*, 860 F.3d 69, 74 (2d Cir. 2017) (citing *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009)).

STATEMENT OF THE ISSUES PRESENTED

Mr. Andrews, who for 35 years had been a lawful permanent resident, was found removable and ineligible for cancellation of removal on the basis of a violation of N.Y. Penal Law § 220.31, which the Board of Immigration Appeals (BIA) determined was an aggravated felony under the Immigration and Naturalization Act. *See* AR000066-67; 8 U.S.C. § 1229(b)(3). On appeal, a panel of this Court affirmed in an unpublished decision, and Mr. Andrews was deported to Guyana. *Andrews v. Holder*, 534 F. App'x 32, 34 (2d Cir. 2013); AR000019. In a subsequent published opinion in a different case, the Court reached the opposite conclusion on the relevant legal issue, holding that a violation of the same state statute is not an aggravated felony. *See Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017). Less than a month after this Court's decision in *Harbin*, Mr. Andrews filed a statutory motion with the BIA for reconsideration and termination of his proceedings, arguing that his prompt action after the change in law entitled him to equitable tolling of the 30-day deadline for motions to reconsider. AR000015-25. He simultaneously asked the Board to grant *nunc pro tunc* relief using its sua sponte powers. AR000026.

The issues presented are whether the BIA committed reversible error by:

1) denying Mr. Andrews's prompt motion for reconsideration when the BIA has repeatedly found the same relief proper for individuals moving much less promptly;

2) failing to provide a reasoned explanation for its denial of Mr. Andrews's motion for reconsideration; and

3) failing to address Mr. Andrews's request for the Board to exercise its sua sponte authority to grant *nunc pro tunc* relief.

STATEMENT OF THE CASE

Churchill Leonard Andrews seeks review of the October 25, 2017 decision of the Board of Immigration Appeals (BIA), authored by Edward R. Grant, denying (i) his statutory motion to reconsider and terminate his removal proceedings in light of this Court's decision in *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017), and (ii) his concurrent request for the Board to exercise its sua sponte authority to grant him relief *nunc pro tunc*.

[redacted]

In September 2009, however, DHS initiated removal proceedings against Mr. Andrews, "because of" the New York state conviction (AR000258-59), charging him as removable due to a conviction of an aggravated felony (8 U.S.C.

§ 1227(a)(2)(A)(iii)) and a conviction of a controlled substance offense (8 U.S.C. § 1227(a)(2)(B)(i)). *See* AR000797 (Notice to Appear).

At an immigration court master calendar hearing on October 20, 2010, Mr. Andrews' then-attorney conceded that the charge was in fact one for an aggravated felony, making him both removable and ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(a); AR000032-33; AR000326-27.[1] Instead of cancellation, Andrews's attorney pursued asylum, withholding of removal, and relief under the Convention Against Torture, each of which imposes a more demanding standard. AR000259.

Immigration Judge (IJ) Steven R. Abrams conducted an extensive hearing and considered a large body of evidence. On May 10, 2011, he concluded reluctantly that the requested relief was not available, but repeatedly made clear that he would have granted cancellation of removal were it not for the apparent legal obstacle of an aggravated-felony conviction. In rendering his decision, Judge Abrams stated:

[redacted]

[1] Under the cancellation-of-removal provision, the Attorney General (or his delegate) has authority to provide relief to an otherwise removable lawful permanent resident (LPR) who meets certain longevity requirements and, as relevant here, has "not been convicted of any aggravated felony." *See Harbin v. Sessions*, 860 F.3d at 60 n.1.

[redacted]

Judge Abrams further stated: "If this were a cancellation of removal case, it would have taken me 15 seconds to make a decision" to allow Mr. Andrews to remain in the United States with his family. AR000477. But, he continued to explain, "unfortunately, it's not," emphasizing that the outcome was a result of the higher standard for other forms of relief in comparison to cancellation of removal. AR000477-78. As he explained, "[i]n different circumstances, in different applications, this case might have been different," but that "[u]nfortunately, based on the relief that you're seeking, I cannot grant your request." *Id.*

Mr. Andrews, represented by new counsel, timely sought relief from the Board in mid-2011, appealing Judge Abrams's decision on the merits and requesting reopening based on the ineffective assistance of his prior counsel. *See* AR000032. He argued, as relevant here, that he was unable to seek cancellation of removal due to that ineffective assistance. In October 2011, the Board denied relief on the basis that Mr. Andrews was not prejudiced by his original counsel's conduct. AR000035. Specifically, the Board concluded that under the "modified categorical approach," his New York conviction "constitute[d] an aggravated felony, which bar[red] him from establishing his eligibility for cancellation of removal." AR000033-35. Mr.

Andrews timely appealed to this Court, which in an unpublished decision affirmed on the related ground that the New York conviction was "categorically a drug trafficking aggravated felony." *Andrews v. Holder*, 534 F. App'x 32, 34 (2nd Cir. 2013). He then sought rehearing, which was denied on November 19, 2013. AR000056.

His federal avenues exhausted, Mr. Andrews was removed to Guyana in January 2014, [redacted]

He has also continued to pursue all available means of legal relief. Specifically, he continued his years-long efforts to obtain state court relief, pursuing his *coram nobis* petition all the way to the New York Court of Appeals. AR000025. After that court denied relief, Mr. Andrews worked with counsel on an application for gubernatorial clemency. *Id*. There were, however, no practical avenues for relief in the federal system until June 21, 2017. On that date, this Court held in a precedential decision that N.Y. Penal Law § 220.31 (under which Mr. Andrews was convicted) "is not a drug-trafficking aggravated felony under the INA," and thus that "a conviction under that statute does not bar … cancellation of removal." *Harbin*, 860 F.3d at 68. Had *Harbin* been on the books already, Mr. Andrews clearly would have

qualified for cancellation of removal (and indeed, there would have been no conviction sufficient to support a charge of removal in the first instance).

Mr. Andrews, no longer in the United States, learned of *Harbin* from pro bono counsel eight days after the decision, on June 29, 2017. AR000059. Only 19 days later (and 27 days after this Court decided *Harbin*), he filed a statutory motion for reconsideration at the BIA under 8 U.S.C. § 1229(c)(6). He also asked the Board to exercise its sua sponte authority to grant him *nunc pro tunc* relief. In his motion, Mr. Andrews argued that he was entitled to equitable tolling of the 30-day deadline for filing a motion to reconsider (*see* 8 U.S.C. § 1229(c)(6)(B)), having diligently pursued his rights at every possible opportunity, and having filed within 30 days of the dispositive change in law. AR000015-27. The government opposed. AR000007-12.

On October 25, 2017, the Board issued a one-page decision denying relief. *See* AR000003. The Board wrote that the motion was "more accurately characterized as one seeking reopening," but in any event was "untimely" and that "reopening is not warranted." *Id.* It provided no reasoning for this denial of relief (*i.e.*, why it was "not warranted"), and did not cite any authority relating to tolling or otherwise address that issue. *Id.*

In a separate paragraph of the decision, the Board denied sua sponte reopening, holding that it was "prohibited" by the Board's regulatory "departure bar" (8

C.F.R. § 1003.2(d)) on considering such relief for individuals who have left the United States. *Id.* In the same paragraph, the Board further wrote, cryptically, that Mr. Andrews "has not otherwise shown that equitable tolling is warranted." *Id.* The Board did not address Mr. Andrews's request for *nunc pro tunc* relief.

Mr. Andrews timely filed a petition for review in this Court.

STANDARDS OF REVIEW

The Court reviews de novo the BIA's legal determinations in denying a statutory motion to reopen or reconsider. *Luna v. Holder*, 637 F.3d 85, 87 (2d Cir. 2011). Other aspects of the BIA's denial of a motion to reopen are reviewed for abuse of discretion. *Chen v. Gonzales*, 436 F.3d 76, 77 (2d Cir. 2006) (per curiam). The BIA abuses its discretion when its decision "provides no rational explanation," "inexplicably departs from established policies," "is devoid of any reasoning," or "contains only summary or conclusory statements." *Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 45 (2d Cir. 2005) (quotation omitted). The BIA similarly commits reversible error when it engages in "[p]atently inconsistent application of agency standards to similar situations," a practice which by definition "lacks rationality and is arbitrary." *Vargas v. I.N.S.*, 938 F.2d 358, 362 (2d Cir. 1991).

The Court reviews the BIA's interpretation of the scope of its sua sponte authority with "substantial deference." *Gaytan-Aragon v. Lynch*, 614 F. App'x 536, 538 (2d Cir. 2015).

SUMMARY OF ARGUMENT

I. The Board acted arbitrarily and capriciously in denying Mr. Andrews equitable tolling when it has regularly found such relief available in similar, and even less meritorious, circumstances. There is no dispute that under this Court's decision in *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017), Mr. Andrews's underlying state conviction was not grounds for a charge of deportation, much less a barrier to cancellation of removal. Mr. Andrews filed for relief based on *Harbin* less than a month after the case was decided, requesting that the Board reconsider its earlier decision and terminate his proceedings. The Board had repeatedly found tolling available *years* after an order of removal, even when a respondent did not act until years after a material change in law, and even when the change in law occurred much longer after the order of removal than here. Yet it denied Mr. Andrews relief, and then granted another individual's "untimely" motion to reopen under *Harbin* less than a week later. *See In Re: [Redacted]* (BIA Oct. 31, 2017) (attached at Add. 14). Such "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious." *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 95 (2d Cir. 2001). Accordingly, the Court should

reverse the Board's decision and remand with instructions to reopen, vacate the removal order, and terminate Mr. Andrews's removal proceedings.[2]

II. There is an alternative ground for vacatur: the Board's complete failure to provide adequate reasoning for its decision. The BIA, like all administrative agencies, has a "duty to … provide a rational explanation for its ruling." *Sheng Gao Ni v. Bd. of Immigration Appeals*, 520 F.3d 125, 129-30 (2d Cir. 2008) (quotation omitted). It utterly failed to meet that mandate here. The agency's entire answer to Mr. Andrews's statutory motion for reopening was the epitome of conclusory: "We find that reopening is not warranted." AR000003. It did not even acknowledge his argument for equitable tolling, let alone provide any reasoned explanation for why such relief was inappropriate.

It is clear that remand on that alternative ground would not be futile here. This is the opposite of a case in which the Court "can predict with confidence that the agency would reach the same result." *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d

[2] A number of public, but difficult-to-access, Board decisions are attached as part of the addendum. These "public documents, promulgated by or binding on a government agency, and not subject to reasonable dispute" are properly subject to judicial notice at "'any stage in the proceeding.'" *Richardson v. N.Y.C. Bd. of Educ.*, 711 F. App'x 11, 14 (2d Cir. 2017) (quoting Fed. R. Evid. 201(d)); *see also Weinstein's Federal Evidence* § 201.12[13] (noting that "decisions of administrative agencies" are subject to judicial notice and citing cases).

Cir. 2009). To the contrary, in light of its approach to similar cases, another denial would be another reversible error.

III. The Board further erred in failing to respond to Mr. Andrews's request that it exercise its sua sponte authority to grant relief *nunc pro tunc*. As the Court recently held, such "failure to provide any basis for finding *nunc pro tunc* relief unavailable to excuse the filing deadline for [a] motion to reopen requires remand." *Diaz-Tineo v. Sessions*, 689 F. App'x 34, 37 (2d Cir. 2017).

ARGUMENT

I. The Board of Immigration Appeals committed reversible error in denying Mr. Andrews's statutory motion to reopen.

Under this Court's recent decision in *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017), Mr. Andrews's state conviction was neither an aggravated felony nor a controlled substance offense under the INA, meaning there was no valid ground for his removal. At the very least, *Harbin* directly establishes that there was no bar to granting cancellation of removal, the remedy the immigration judge said it would have taken him only "15 seconds" to grant had he thought it available. Having previously diligently pursued all realistic routes of relief (both state and federal), Mr. Andrews took action within weeks of the *Harbin* ruling. Twenty-seven days after the Court issued its opinion, he filed a statutory motion for reconsideration at the BIA, consistent with the numerous Board cases supporting relief for those acting with similar (and considerably less) diligence after a change in law.

In his motion, Mr. Andrews acknowledged the need for equitable tolling to make his filing timely, and he explained in detail how his ongoing diligence and the recent change in law met the standard. The Board has repeatedly granted relief in numerous other cases that also involved a change in law after a final order of removal. Here, however, it denied the motion. The agency's inconsistent handling of comparable situations is arbitrary and capricious. The appropriate remedy is to remand with direction to reopen, vacate the order of removal, and terminate proceedings.

A. This Court's *Harbin* decision is a change in law that merits reconsideration and termination of Mr. Andrews's proceedings.

A motion to reconsider is a "request that the Board reexamine its decision in light of additional legal arguments, *a change of law*, or perhaps an argument or aspect of the case which was overlooked." *Matter of O-S-G-*, 24 I. & N. Dec. 56, 57 (BIA 2006) (quoting *Matter of Ramos*, 23 I. & N. Dec. 336, 338 (BIA 2002)) (emphasis added).[3]

[3] The Board got off on the wrong foot by declaring, in the face of clear precedent to the contrary, that Mr. Andrews's "motion is more accurately characterized as one seeking reopening as he does not allege error into the Board's decision, but instead seeks to have the Board consider the effect of a subsequently issued case." AR000003. That contradicts not only the precedent quoted above, but the Board's own practice manual, which explains that a motion to reconsider "identifies a change in law that affects a prior Board decision and asks the Board to reexamine its ruling." *BIA Practice Manual* § 5.7(a) (revised Feb. 3, 2017). The case cited by the Board for its contrary view—*Matter of Coelho*, 20 I. & N. Dec.

In *Harbin v. Sessions*, this Court held that a conviction under N.Y. Penal Law § 220.31 is not "a drug-trafficking aggravated felony under the INA." 860 F.3d 58, 68 (2d Cir. 2017). Accordingly, Mr. Andrews should never have been charged as removable in the first place: *Harbin* squarely eliminated removal under the theory that a Section 220.31 conviction is an aggravated felony. And the Board has already conceded, in light of *Harbin*, that a Section 220.31 conviction does not qualify as a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)(i)—the other ground for removability in this case. *See, e.g.*, *In Re: Iankel Ortega*, A041 595 509 (BIA Dec. 1, 2017) (terminating proceedings in light of *Harbin* because respondent was no longer removable based on a controlled substance offense) (Add. 10).

In addition, as *Harbin* held, because it is not an aggravated felony, a "conviction under [Section 220.31] does not bar … cancellation of removal" under 8 U.S.C. § 1229b(a) in those cases where a person *is* removable. *Harbin*, 860 F.3d at 68. That is also dispositive because, after reviewing the factors relevant to Mr. Andrews, the immigration judge said on the record that "it would have taken [him] 15 seconds

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464 (BIA 1992)—doesn't say anything about the appropriate vehicle for relief after a change in law. Nonetheless, as explained further below, whether Mr. Andrews' filing is called a motion to reopen or a motion to reconsider, he is entitled to the relief he requests.

to" grant that relief had he thought it available. AR000477 (Immigration Judge oral decision).

The Board knows all of this. In the wake of *Harbin,* the BIA has already terminated numerous other removal proceedings predicated on a conviction under the same and related New York provisions.[4] Because Mr. Andrews's motion was timely, for the reasons explained below, he is entitled to the same ultimate relief: vacatur of the order of removal and termination of his proceedings.

B. Despite repeated Board decisions granting equitable tolling under circumstances that Mr. Andrews unquestionably meets, the Board impermissibly denied him the requested tolling.

1. Agencies cannot decide similar cases in a "plainly inconsistent manner."

This Court has explained that "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious." *Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 95 (2d Cir.

[4] *See, e.g.*, *In Re: Iankel Ortega*, A041 595 509 (BIA Dec. 1, 2017) (terminating proceedings in light of *Harbin* because respondent was no longer removable based on a controlled substance offense) (attached at Add. 10); *In Re: [Redacted]* (BIA Oct. 31, 2017) (granting "untimely" motion to reconsider, and reopening and terminating proceedings for removal on both aggravated-felony and controlled substance offense grounds) (attached at Add. 14); *In Re: Ariel Jonathan Diaz Vargas*, A044 480 297 (BIA Sept. 29, 2017) (affirming IJ termination of removal proceedings on aggravated-felony grounds) (attached at Add. 16); *In Re: [Redacted]* (I.J. Sept. 18, 2017) (granting motion to reconsider and terminating proceedings for removal on controlled substance offense grounds) (attached at Add. 18).

2001). Or as the Supreme Court observed, "[i]f the BIA proposed to narrow the class of deportable aliens eligible to seek … relief by flipping a coin—heads an alien may apply for relief, tails he may not—we would reverse the policy in an instant." *Judulang v. Holder*, 565 U.S. 42, 55 (2011). That rule reflects the "fundamental principle of justice" that "similarly situated individuals be treated similarly." *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006).

Accordingly, on multiple occasions this Court has reversed or vacated BIA decisions that could not be reconciled with other Board decisions presenting similar facts—including in the context of denial of reconsideration or reopening. That is exactly the scenario presented here, and reversal is therefore warranted.

For example, in *Vargas v. INS*, the Court vacated a BIA decision denying reconsideration because, among other problems, the Board's approach to the dispositive issue was "erratic." 938 F.2d 358, 362 (2d Cir. 1991). Citing two other recent unpublished cases in which the agency had taken the opposite approach to similar circumstances, the Court explained that a "sometimes-yes, sometimes-no, sometimes-maybe policy … cannot … be squared with our obligation to preclude arbitrary and capricious management of the Board's mandate." *Id.* (quotation omitted; first alteration original).

Similarly, in *Twum v. INS*, then-Judge Sotomayor wrote for this Court to vacate a BIA decision denying reopening, explaining that the agency had applied a

standard "inconsistent with the agency's analysis of … similar claims" in two other cases. 411 F.3d 54, 60-61 (2d Cir. 2005).

And in *Zhao*, the Court reversed a BIA decision as an abuse of discretion because the case had "many parallels" with a prior BIA decision, yet reached a different result, and the Board did not "explai[n] why its decision was a permissible outcome" in light of the earlier case. 265 F.3d at 95. In doing so, the Court reiterated its rule that "application of agency standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious." *Id.* (citing *Vargas*, 938 F.2d at 362); *see also Zheng v. Gonzales*, 497 F.3d 201, 203 (2d Cir. 2007) (remanding when "it appear[ed] that the BIA has taken contrary positions on this issue").

2. The Board's decision here conflicts with almost twenty of its other equitable tolling decisions.

In the decision below, the Board characterized Mr. Andrews's motion as untimely, even though he filed it less than a month after this Court reversed itself by ruling—for the first time—that his underlying conviction was not an aggravated felony. That cannot be squared with numerous cases in which the BIA has found that tolling due to a change in law *did* make a motion to reopen or reconsider timely, even one filed years after a final order of removal, and sometimes even years after the change in law making relief newly available.

Under this Court's holdings in *Vargas*, *Twum*, and *Zhao*, among others, the BIA's decision here is reversible error. Notably, in *Vargas*, two inconsistent decisions were enough for the Court to conclude that the BIA's approach had been "erratic" and vacate. 938 F.2d at 362. Here, in *at least* 19 recent cases (identified *infra*), the BIA has held that a motion to reopen or reconsider based on intervening case law can be timely as long as a decade after the original order of removal and years after the change in law.[5]

These rulings, coming in a variety of postures and formats, all point to the conclusion that the pre-change-in-law passage of time, by itself, was no basis for the Board to deny Mr. Andrews's request for tolling, and thus his motion to reconsider and terminate. For example, in cases involving changes in law after a final order of removal, the Board has:

[5] The true number is likely considerably higher given that the overwhelming majority of BIA decisions are not readily accessible to the public. "[M]ost" BIA and IJ decisions "are not published in readily available databases." *See, e.g.*, Edward L. Carter & Brad Clark, *"Membership in A Particular Social Group": International Journalists and U.S. Asylum Law*, 12 Comm. L. & Pol'y 279, 312 (2007). An additional limited set of "unrestricted" unpublished decisions is available for review, but only in-person at DOJ's Executive Office for Immigration Review (EOIR) law library in Falls Church, Virginia. The cases cited in this brief have been collected from Westlaw, other immigration practitioners, and the partial collection of "unrestricted" unpublished decisions at the EOIR law library.

- directly granted reopening or reconsideration after finding tolling warranted (*see, e.g.*, *In Re: Sergio Lugo-Resendez*, A034 450 500 (BIA Dec. 28, 2017) (attached at Add. 7));
- remanded cases to an immigration judge for the specific purpose of considering if tolling was appropriate under the facts of the case (*see, e.g.*, *In Re: Siththar Bin,* A025 386 935, 2017 WL 5377618, at *1-2 (BIA Sept. 27, 2017));
- denied tolling explicitly because the respondent did not act promptly *after* the change in law—exactly the opposite of the facts here, where Mr. Andrews filed his motion within a month of this Court's *Harbin* decision (*see, e.g.*, *In Re: Alberto Perez Mata*, A042 330 528, 2017 WL 6555117, at *2 (BIA Sept. 29, 2017)); and
- granted motions to reopen or reconsider that were clearly filed considerably longer after the change in law than happened here, without any mention that lack of timeliness was a consideration (*see, e.g.*, *In Re: J. Marcos Cisneros-Ramirez*, A090 442 154, 2016 WL 6137092, at *1 (BIA Aug. 9, 2016)).

Most remarkably, the Board granted what it called an "untimely motion to reconsider" and terminate—based on *Harbin*—just four business days after denying

Mr. Andrews's motion. *In Re: [Redacted]* (BIA Oct. 31, 2017) (attached at Add. 14).

These cases, which are described in more detail in the following pages, cannot be reconciled with denying Mr. Andrews's motion, promptly filed after this Court's *Harbin* decision. *See* AR000003, 24.[6]

The BIA has granted an "untimely" motion for reconsideration and termination based on *Harbin*.

The Court explained long ago that an agency may not employ "a rule for Monday [and] another for Tuesday." *Marco Sales Co. v. FTC*, 435 F.2d 1, 7 (2d Cir. 1971) (quotation omitted). Yet, on October 31, 2017, four business days after denying Mr. Andrews's motion, the Board granted what it called an "untimely" motion to reconsider, ordering reopening and terminating proceedings because, based on *Harbin*, the respondent's underlying conviction was not an aggravated

[6] As was true of the cases that this Court relied upon in *Vargas*, these many BIA cases are "unpublished." Thus they are not cited as "binding precedent," but rather as evidence of the BIA's arbitrary and erratic approach to similar cases. *See Shardar v. Att'y Gen. of U.S.*, 503 F.3d 308, 315 (3d Cir. 2007) ("[R]egardless whether the *Hossin* decision is precedential, by reaching an exactly contrary decision on a materially indistinguishable set of facts, the Board acted arbitrarily."); *Perez-Vargas v. Gonzales*, 478 F.3d 191, 194 (4th Cir. 2007) ("[W]e note that courts typically look askance at an agency's unexplained deviation from a prior decision, even when the prior decision is unpublished."); *Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994) ("Put bluntly, we see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so.").

felony. *In Re: [Redacted]* (BIA Oct. 31, 2017) (attached at Add. 14). The Board did not explain why it was excusing the passage of time in that case, just as it did not explain why it did the opposite in Mr. Andrews's case. For all that any outside observer can tell, this is the equivalent of "flipping coins" to determine eligibility for relief—a practice the Supreme Court has explicitly labeled as unacceptably "arbitrary." *Judulang*, 565 U.S. at 61.

The BIA has held that the filing deadline starts running from the time of the change in law.

On at least two occasions, the BIA has tolled the deadline to file a motion to reopen until 90 days after the change in law (or 90 days after the respondent *learned* of the change in law), even more than a decade after the original removal order became final. In one of those cases, the respondent was removed in 2000, but the second of two changes in law needed to allow his motion to be successful did not occur until September 2012, and he did not learn of it for almost two more years, on August 16, 2014. *In Re: Antonio Medina Leon A.K.A. Antonioleon Medina*, A090 919 097, 2017 WL 2376475, at *2 (BIA Apr. 21, 2017). He filed his motion on December 22, 2014. The BIA held that the motion "was untimely because it was not filed within the *'tolled' 90-day time limit"* of November 16, 2014—90 days after the respondent learned of the 2012 change in law, and almost 15 years after the Feb-

ruary 11, 2000 order of removal. *Id.* at *1, 3 (emphasis added). Under that reasoning, a 90-day clock started in Mr. Andrews's case on June 29, 2017, started when he learned of *Harbin*, and he filed well within that 90-day period.[7]

In a second case, the original order became final on November 17, 2010, and the change in law came four-and-a-half years later, on May 12, 2015. *In Re: Fermin Moya-Marrero*, A099 647 764, 2017 WL 4736608, at *1-2 & n.1 (BIA Aug. 16, 2017). The BIA found the motion untimely because the respondent did not file to reopen for "nearly two years after" the change in law, "and he has not provided an affidavit or any other evidence to show that he has been pursuing his rights diligently or that some extraordinary circumstance stood in his way and prevented the *timely filing* of his motion." *Id.* at *1 (emphasis added). Put another way, the obstacle to finding a "timely filing" was the respondent's long wait between the change in law and his motion—meaning either that tolling was not needed or it was implicitly available for the period between the order of removal and the change in the law. Under the same rationale, Mr. Andrews's request for equitable relief *would* have been granted—he filed only 27 days after the change in law. Moreover, the period between the date that Mr. Andrews's removal became final and the date the law

[7] The deadline for filing a motion to reconsider is 30 days, compared to the 90-day deadline for a motion to reopen. *See* 8 U.S.C. § 1229(c)(6)(B), (7)(c)(i). Thus Mr. Andrews filed within the relevant period regardless of whether the motion is considered one to reopen or one to reconsider.

changed was roughly three years and eight months—less than the four-and-a-half years in *Moya-Marrero*.

The BIA has granted tolling to allow motions based on years-old changes in law.

In other recent cases, the BIA has granted tolling even after lapses of years between the final order, the change in law, and the motion to reopen. Under those decisions too, Mr. Andrews is entitled to relief.

A prime example is *In Re: Wilmer Alberto Garcia Carias*, A044 007 448, 2017 WL 6555101 (BIA Sept. 27, 2017). In that case, the Board granted equitable tolling in light of, among other things, "the actions [the respondent] took upon learning of the Supreme Court's decision in *Lopez v. Gonzalez*, 549 U.S. 47 (2006)," under which his underlying state drug conviction was not an aggravated felony under the INA. 2017 WL 6555101, at *1. That is the same type of change in law at issue here. Notably, the relevant Supreme Court decision in *Garcia-Carias* came the year after the respondent's removal, but he did not file the motion for *another four years* (a total of five years after his removal). *See Garcia-Carias v. Holder*, 697 F.3d 257, 260 (5th Cir. 2012) (establishing chronology). The Board nonetheless granted relief. In doing so, it noted what applies equally here: the applicant had the "evidence to establish a reasonable likelihood of success on the merits of his application for cancellation of removal." 2017 WL 6555101, at *1.

Another example is *In Re: Sergio Lugo-Resendez*, A034 450 500 (BIA Dec. 28, 2017) (attached at Add. 7), in which, in circumstances comparable to those here, the Board wrote "we *cannot* uphold the [IJ's] determination that equitable tolling is *not* warranted." *Id.* at 3 (emphasis added). The respondent in that case was a lawful permanent resident of three decades when he was removed in 2003 based on a state drug conviction. *Id.* at 1. In 2006, the Supreme Court's *Lopez v. Gonzalez* decision made clear his conviction was not an aggravated felony, and then, in 2012, the relevant court of appeals removed the last "obstacle to his filing," a BIA-imposed regulatory bar on motions to reopen by aliens outside the United States. *Id.* at 3. Another two years later, in May 2014, Lugo-Resendez "first learned that the law affecting his case had changed," and "[a]bout 2 months later … filed his motion to reopen." *Id.* In light of the previously insurmountable legal obstacles, the Board was not concerned that he had "abandoned" attempts to pursue his case after a few years of "repeated efforts." *Id.* at 2. Because the respondent "filed his motion within a reasonable period of time after he learned of the change in law," and his "conviction no longer render[ed] him removable," it reversed the IJ, found the motion timely, and granted reopening. *Id.* at 3. Indeed, the Board said it "cannot" reach a different conclusion about tolling under those circumstances. *Id.*

Under both of these cases, Mr. Andrews should have—and would have—been granted relief.

The BIA has remanded for consideration of tolling in cases where the movant waited years to file his motion.

The Board has also reversed and remanded due to an immigration judge's failure to consider whether a motion, filed years after removal and the relevant change in law, could be found timely by equitable tolling. And it remanded for the same determination in several additional cases. Those decisions are set out in the table below. Because the Board does not remand for futile decision-making, *see Matter of Coelho*, 20 I. & N. Dec. 464, 473 (BIA 1992) ("[I]f we conclude that our decision on the appeal would be the same … we will deny the motion to remand."), these decisions are another clear indication that the Board sees no inherent obstacle to granting tolling under circumstances less favorable than those presented here.

Case	**Facts**
In Re: Benito Barajas-Flores, A026 556 982 (BIA Feb. 15, 2018) (attached at Add. 2)	Tolling Possible Even Eight Years After Change In Law The respondent was removed in 2003 "as an alien convicted of a controlled substance violation." Under a 2006 Supreme Court decision, the underlying felony was not actually an aggravated felony. Although the respondent "did not file the motion to reopen until 2014," the Board remanded for "additional fact-finding … to determine whether equitable tolling should be applied."

Case	Facts
In Re: Victor Hernandez Villegas, A091 216 266 (BIA Jan. 16, 2018) (attached at Add. 6)	Tolling Possible To Revisit 15-Year-Old Removal Order The Board remanded to consider whether the respondent, who had been deported in 2000, was eligible for equitable tolling in light of intervening changes in law.
In Re: Jose Guerrero-Soto, A091 225 150, 2015 WL 8561164, at *1 (BIA Nov. 17, 2015)	Tolling Possible For Motion Filed Two Years After Change In Law The applicant filed his motion to reopen two years after relevant change in law. The Board remanded "[t]o determine whether the motions deadline can be equitably tolled," explaining that "the Immigration Judge will need to make direct findings on the factors that would or would not permit equitable tolling in this case."
In Re: Siththar Bin, A025 386 935, 2017 WL 5377618, at *1-2 (BIA Sept. 27, 2017)	Tolling Possible For Motion Filed Seven Years After Order Of Removal The respondent's 2006 state-law conviction provided the basis for his 2009 order of removal. In 2016, a federal appeals court held that the state statute was not an "aggravated felony" for INA purposes, and the respondent filed a motion to reopen "based on an intervening change in law." The IJ denied the motion, but the BIA remanded because the IJ "did not consider whether the respondent's motion to reopen is subject to equitable tolling and whether there has been a fundamental change in the law."

The BIA has denied tolling due to years of delay between a change in law and the filing of a motion—the opposite of what happened here.

In yet another set of cases, the Board has explicitly recognized the possibility of tolling, but found it not warranted because the individual in question waited *years*

after the change in law before acting. Examples are laid out in the following table. Under the standard applied by the BIA in each of these cases, Mr. Andrews's motion, filed *within a month* of the change in law, would have been granted.

Case	**Facts**
In Re: Juan Beltran Ortiz, A091 241 425 (BIA Jan. 23, 2018) (attached at Add. 4)	Three-Year Delay In Filing Not Diligent The Board denied tolling because "[t]he unexplained three-year delay between the issuance of the case" that changed the law "and the respondent's filing of this motion does not persuade us he has shown reasonable diligence."
In Re: Neville Ochieng Ratego, A203 300 412 (BIA Nov. 28, 2017) (attached at Add. 12)	Nine-Month Delay In Filing Not Diligent The Board denied tolling because, in addition to "the other circumstances of [his] case," the respondent "did not file his motion until April 10, 2017, almost 9 months after the purported change in law."
In Re: Alberto Perez Mata, A042 330 528, 2017 WL 6555117, at *2 (BIA Sept. 29, 2017)	Multi-Year Delay Not Diligent The Board denied tolling of the deadline to file a motion to reopen for failure to "ac[t] with diligence" when the "intervening change of law" occurred seven years earlier, in 2010, and respondent did "not provid[e] any explanation as to why he did not file his motion to reopen sooner."
In Re: Jose Teofilo Quinteros, A090 750 918, 2017 WL 4418311, at *1 (BIA July 28, 2017)	Three-Year Delay In Filing Not Diligent The Board denied tolling of the deadline to file a motion to reopen because the applicant did not "demonstrate the necessary due diligence" for equitable tolling when his motion "does not include what … steps, if any, [he] took" between learning of the change of law and "filing of this motion three years later."

Case	Facts
In Re: Iovani Comas-Monzon, A097 177 196, 2017 WL 3382691, at *1 (BIA June 15, 2017)	Three-Year Delay In Filing Not Diligent The Board denied tolling because the applicant had not demonstrated due diligence in "wait[ing] three years after the" change in law "to file his motion to reopen."

The BIA has granted patently untimely motions without requiring tolling at all.

In a final set of cases, the BIA granted a motion to reopen or reconsider based on a change in controlling law long after the final order of removal, either without even addressing timeliness at all, or recognizing the motion was untimely but granting it without explanation:

Case	Facts
In Re: J. Marcos Cisneros-Ramirez, A090 442 154, 2016 WL 6137092, at *1 (BIA Aug. 9, 2016)	Granting Motion 15 Years After Removal The respondent was ordered "removed on December 13, 2000." The IJ denied a motion to reopen in 2015, but "in light of the totality of circumstances presented in this matter, including intervening case law," the BIA reopened and terminated.
In Re: Francisco Bautista-Lara, A041 780 351, 2014 WL 3698183, at *1 (BIA May 30, 2014)	Granting Motion 13 Years After Removal The respondent was ordered "removed on December 21, 2000." The IJ denied a motion to reopen in 2013. But because "intervening changes in the law have affected his removability as charged," the BIA "conclude[d] that reopening and termination of th[e] proceedings [wa]s warranted."

Case	Facts
In Re: Victor Manuel Parada-Villegas A.K.A. Victor Parada, A091 223 049, 2013 WL 5872093, at *1 (BIA Sept. 23, 2013)	Granting Motion 13 Years After Removal The respondent was ordered removed in 2000, and the IJ denied motions to reopen and reconsider in May 2013. However, because "intervening changes in the law have affected his removability as charged," the BIA "conclude[d] that reopening and termination of these proceedings is warranted."
In Re: Ricardo Duran-Santana, A043 162 229, 2009 WL 523138, at *1 (BIA Feb. 18, 2009)	Granting "Untimely" Motion The Board had issued a final order of removal on September 29, 2008, followed by a change in law, and an "untimely motion" to reopen "based on intervening case law," which DHS joined, and the BIA granted.
In Re: Antonio De Chaves Melo A.K.A. Anthony Mello, A17 275 734, 2008 WL 1734639, at *1 (BIA Mar. 24, 2008)	Granting "Untimely" Motion The Board explained that it had previously granted respondent's "untimely motion to reopen" based on a "fundamental change in law that likely would affect the outcome of [his] case."

Each of the above cases establishes that tolling was appropriate (or at the very least, it was available) in Mr. Andrews's case. As they demonstrate, the BIA has repeatedly found that it is proper to grant tolling to allow relief based on a change in law years after the final order of removal, *if* the respondent acted promptly after the new decision (and sometimes even if he did not). Mr. Andrews acted promptly, filing within a month of this Court's *Harbin* decision. But the Board denied him relief, and then a few days later granted an admittedly "untimely" motion to reconsider and terminate based on *Harbin*. *See* Add. 14. This "application of agency

standards in a plainly inconsistent manner across similar situations evinces such a lack of rationality as to be arbitrary and capricious." *Zhao*, 265 F.3d at 95. Reversal is required.

Moreover, there is no need for the agency to engage in further fact-finding or other deliberation on remand. When a motion to reconsider or reopeon based on a change in law is timely, it is routinely granted. The agency has already clearly recognized the implication of *Harbin*, terminating multiple removal proceedings premised on conviction under the same New York law. *See supra* at 16 & n.4. And even if somehow Mr. Andrews was still viewed as removable, *but see supra* at 15 (explaining why conviction is no longer a basis for removal in the first place) the existing record is clear that the IJ would have granted cancellation of removal had he thought it available. As Judge Abrams explained after extensive fact-finding, given the equities, "[i]f this were a cancellation of removal case, it would have taken [him] 15 seconds to" grant relief. AR000477; *see also* AR000478 ("[U]nfortunately, based on the relief that you're seeking, I cannot grant your request.").

Accordingly, the Court should vacate the BIA's order and remand with instructions to reopen, vacate the order of removal, and terminate the removal proceedings.

II. Alternatively, the Court should vacate for failure to provide an adequate explanation of its decision.

In the alternative, the Court should vacate and remand for a reasoned decision. The Board's decision is "arbitrary and capricious" and an "abuse of discretion" because it "provides no rational explanation," "is devoid of any reasoning," and "contains only summary or conclusory statements." *Zhao*, 265 F.3d at 93 (internal citations omitted). As a result, "the proper course," at a minimum, "is to remand to the agency for additional explanation or investigation." *Twum*, 411 F.3d at 61 (quotation omitted).

A. The Board acted arbitrarily and capriciously by failing to articulate any reasoned basis for its decision.

The Board provided *no* actual explanation whatsoever for denying Mr. Andrews's request for reconsideration, and it gave no sign that it even considered his compelling argument for equitable tolling.

It is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (emphasis added). That rule is fully applicable to the BIA, which has a "duty to … provide a rational explanation for its ruling." *Sheng Gao Ni v. BIA*, 520 F.3d 125, 129-30 (2d Cir. 2008) (quotation omitted). The Board's "denial of relief can be affirmed only on the basis articulated in the decision," *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) (quotation

omitted), and "it is not [the Court's] task to search the record for reasons why a decision of the … BIA should be affirmed." *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 337 (2d Cir. 2006). Thus, if the decision's "reasoning proves inadequate for denying a petitioner's claim, [the Court] will not hesitate to reverse." *Id.*

Here, the BIA did not "articulat[e]" *any* "basis" "in [its] decision" for its holdings, so there are *no* grounds on which its "denial of relief can be affirmed." *Anderson*, 953 F.2d at 806. The sum total of the BIA's "explanation" for the denial of Mr. Andrews's motion for reconsideration is seven words: "We find that reopening is not warranted." AR000003. It is difficult to fathom a holding that is more "conclusory" or "devoid of reasoning." *Zhao*, 265 F.3d at 93 (internal citations omitted). Indeed, the Board appears to have "failed to consider the arguments at the heart of the … clai[m]"—that equitable tolling *was* warranted. *Jourbina v. Holder*, 532 F. App'x 1, 2 (2d Cir. 2013) (vacating and remanding BIA decision).

The Board did not even mention tolling until the end of the next paragraph of the decision, where it stated that Mr. Andrews "has not otherwise shown that equitable tolling is warranted." AR000003. But that makes matters worse, not better. It is just as conclusory as the unexplained holding that "reopening is not warranted," not to mention that it appears in a paragraph in which the Board rejects Mr. Andrews's request for something *different*: sua sponte reconsideration. Tolling is ig-

nored altogether in the preceding paragraph—the one addressing the statutory motion to reconsider, in which Mr. Andrews explicitly requested tolling. That makes the use of the word "otherwise" in the quoted text all the more puzzling in that it invites the reader to look earlier in the decision for a discussion of equitable tolling that simply does not exist.[8]

Such "cursory, summary [and] conclusory statements from the Board leave [the Court] to presume nothing other than an abuse of discretion." *Zhao*, 265 F.3d at 97.

B. Remand for lawful agency action is not futile because the BIA has regularly granted relief in similar (and less compelling) circumstances.

This is not one of the rare cases in which "remand to the agency for additional explanation or investigation," *Twum*, 411 F.3d at 61 (quotation omitted), would be "futile." *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009). That rule applies

[8] This lack of rigor by the Board is reflective of the government's overall approach to Mr. Andrews's case. As noted previously, the BIA first opined that the motion should have been captioned as one to reopen rather than to reconsider, directly contradicting its own clear precedents. *See supra* note 3. Then, in this Court, the government labeled Mr. Andrews "detained" on the cover of the administrative record (*see* Dkt. 11-1), and inexplicably declared Mr. Andrews to be a DHS "enforcement priority." Dkt. 26. Mr. Andrews has been in Guyana since the government deported him more than four years ago, in January 2014 (AR000003), making it difficult to fathom the Department's reasoning. *See* Mem. from Sec'y of Homeland Sec'y John Kelly at 2 (Feb. 20, 2017) (explaining that the "Department's enforcement priorities" are to "prioritize for *removal*" various groups of individuals (emphasis added; capitalization altered)), http://bit.ly/2miirQd.

when the Court "can predict with confidence that the agency would reach the same result." *Id.* Quite to the contrary here. As explained in detail above, it would actually be reversible error to reach the same conclusion again because the BIA has repeatedly found tolling appropriate under facts much less compelling than those in this case. *See supra* at 18-30. (That is also why the first form of relief—reversal—is the proper course.)

Because it would *not* be an "empty and unnecessary formality," "remand is *necessary*" if the Court does not remand with instructions to vacate the removal order and terminate proceedings. *Diallo v. U.S. Dep't of Justice*, 548 F.3d 232, 235 (2d Cir. 2008) (emphasis added; quotation omitted).

III. The BIA erred in failing to address Mr. Andrews's request for *nunc pro tunc* relief.

Independent of the two fatal flaws already discussed, the Board further erred in its denial of Mr. Andrews's separate request for sua sponte relief, *nunc pro tunc*, because the Board addressed neither Mr. Andrews's argument nor this Court's case law.

As this Court has previously explained, although it lacks jurisdiction over "questions relating to the manner in which the BIA exercises its sua sponte authority," it can review "questions relating to the BIA's understanding of the regulation governing the scope of this authority, which present interpretive issues that are squarely within" the Court's "province." *Zhang v. Holder*, 617 F.3d 650, 667 n.16

(2d Cir. 2010). The Board's conclusion that it is legally "prohibited" from exercising its sua sponte authority falls within the latter, reviewable category. *See* AR000003.

In denying sua sponte relief, the Board offered two authorities: its own regulation imposing a "departure bar" on sua sponte reconsideration and this Court's decision *Zhang* upholding that regulation. *See* AR000003 (citing *Zhang*, 617 F.3d at 655-65 and 8 C.F.R. § 1003.2(d)). Mr. Andrews directly addressed the law on which the Board relied. AR000026. And he explained that he was relying on a *different* part of the very same opinion (*Zhang*) to explain that *nunc pro tunc* relief was potentially available as a different mode of exercising the Board's sua sponte authority. *Id.* As this Court explained at length in *Zhang*, it is "beyond question that an award of *nunc pro tunc* may, *in an appropriate circumstance*, be granted as a means of rectifying error in immigration proceedings," and it is an open question whether that mechanism is available for a "motion to reopen." 617 F.3d at 665 (quotation omitted; emphasis original).

But, despite it being an open question, the Board did not address *nunc pro tunc* relief at all. As the Court recently held, a "failure to provide any basis for finding *nunc pro tunc* relief unavailable to excuse the filing deadline for [a] motion to reopen requires remand." *Diaz-Tineo v. Sessions*, 689 F. App'x 34, 37 (2d Cir. 2017). In *Diaz-Tineo*, the BIA had at least addressed *nunc pro tunc* relief, explicitly

holding it was unavailable. That was not enough, the Court held, because missing from the Board's ruling was *why* it was unavailable. The failure here even to acknowledge the argument is worse. It is an independent basis for remand.

* * *

This Court's decision in *Harbin* establishes that Mr. Andrews was removed based on a conviction for an offense that does not trigger removal, and regardless he was improperly classified as ineligible for cancellation of removal, a form of relief that the immigration judge would have granted had he thought the law allowed it. Promptly after the Court handed down *Harbin*, Mr. Andrews requested relief from the Board. Despite the Board having repeatedly articulated an approach to equitable tolling under which his motion would have been granted, the Board denied it. It compounded its error by failing to provide a reasoned explanation for either that decision or for denying Mr. Andrews's separate request for *nunc pro tunc* relief. Such inconsistent and cursory decision-making is arbitrary and capricious, and requires reversal.

CONCLUSION

For the foregoing reasons, the Court should vacate the Board's decision and remand with instructions to reopen, vacate the order of removal, and terminate the proceedings, or, in the alternative, vacate the decision and remand for further proceedings.

Respectfully submitted.

/s/ David Debold

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Dated: March 26, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Second Circuit Rules 32.1(a)(4), because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 8,990 words, as determined by the word-count function of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ David Debold
David Debold

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished on them via the appellate CM/ECF system.

/s/ David Debold
David Debold

ADDENDUM

File: [redacted] – New York, NY Date: OCT 25 2017

In re: Churchill Leonard Spencer ANDREWS a.k.a. Churchill Lenard Andrews

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Andrew B. Wachtenheim, Esquire

ON BEHALF OF DHS: M. Samer Budeir
Assistant Chief Counsel

APPLICATION: Reconsideration; reopening

ORDER:

On July 18, 2017, the respondent submitted a "motion to reconsider and terminate" proceedings wherein the Board dismissed the respondent's appeal on October 25, 2011.[1] The Department of Homeland Security opposes the motion. The motion is denied.

The respondent's motion is more accurately characterized as one seeking reopening as he does not allege error in the Board's decision, but instead seeks to have the Board consider the effect of a subsequently issued case. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992). Whether treated as a motion to reopen or one seeking reconsideration, it is untimely as it was filed more than 5 years after the Board's decision. Sections 240(c)(6), (7) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(6), (7); 8 C.F.R. §§ 1003.2(b), (c)(2). However, the respondent seeks reopening in light of *Harbin v. Sessions*, 860 F.3d 58, 63 (2d Cir. 2017) (finding that a criminal conviction under N.Y. Penal Law § 220.31, the statute under which the respondent was convicted, is not categorically an aggravated felony for immigration purposes). *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 1003.2(a). We find that reopening is not warranted.

Contrary to the respondent's arguments otherwise, as he has departed the United States, the Board is prohibited from sua sponte reopening proceedings (Motion at 10-12). *See Luna v. Holder*, 637 F.3d 85, 100–02 (2d Cir. 2011) (invalidating departure bar with respect to statutory motions to reopen); *Zhang v. Holder*, 617 F.3d 650, 655–65 (2d Cir. 2010) (upholding departure bar with respect to regulatory reopening); *see also* 8 C.F.R. § 1003.2(d). Thus, the departure bar divests us of jurisdiction to consider his motion sua sponte. *Id.*; *see also Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008). He has not otherwise shown that equitable tolling is warranted. Accordingly, the respondent's motion is denied.

FOR THE BOARD

[1] The respondent was removed to his native Guyana in January 2014 (Motion at 4).

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A026 556 982 – Los Fresnos, TX

Date: FEB 15 2018

In re: Benito BARAJAS-FLORES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF DHS: Lisa Putnam
Deputy Chief Counsel

APPLICATION: Reopening

The respondent's case was last before the Board on January 2, 2015, when we dismissed his appeal from the Immigration Judge's August 13, 2014, decision denying his motion to reopen, finding that it was untimely. The respondent thereafter petitioned the United States Court of Appeals for the Fifth Circuit for review of our decision. On July 6, 2017, the Fifth Circuit granted the respondent's petition. In view of its intervening precedent decision in *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016) (holding that the 90-day deadline for filing a motion to reopen removal proceedings is subject to equitable tolling), the Fifth Circuit found that the Board erred in failing to analyze whether the deadline for the filing of the motion to reopen should have been equitably tolled. *See Barajas-Flores v. Sessions*, No. 15-60064, 2017 WL 2882694 (5th Cir. July 6, 2017). This case is now before the Board on remand from the Fifth Circuit to determine whether equitable tolling should apply to the delay between the date of the respondent's removal order and the date he filed the motion to reopen.

To be allowed equitable tolling, the respondent must establish: (1) that he had been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing of the motion to reopen. *See Lugo-Resendez v. Lynch*, 831 F.3d at 343-45; *Mata v. Lynch*, 135 S.Ct. 2150, 2155-56 (2015).

In 2001, the respondent was convicted of possession of a controlled substance. In 2003, he was found removable and he was removed as an alien convicted of a controlled substance violation. In 2006, the Supreme Court issued *Lopez v. Gonzalez*, 549 U.S. 47 (2006), which held that possession of a controlled substance does not constitute an aggravated felony. The decision of the Supreme Court potentially rendered the respondent eligible for cancellation of removal. The respondent, however, did not file the motion to reopen until 2014.

We find that, pursuant to the Fifth Circuit's decision in this case and that court's decision in *Lugo-Resendez v. Lynch*, 831 F.3d at 344, additional fact-finding will be necessary to determine whether equitable tolling should be applied in this case. This Board has limited fact-finding ability on appeal. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3) (2017). Consequently, this matter will be remanded to the Immigration Judge for further consideration and entry of a decision on the issue of equitable tolling, and on other issues as relevant.

A026 556 982

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision and the decision of the Fifth Circuit.

Molly Dwyer Clark
FOR THE BOARD

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A091 241 425 – Houston, TX

Date: JAN 23 2018

In re: Juan BELTRAN ORTIZ a.k.a. Juan Beltran

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

APPLICATION: Reopening

This matter was most recently before us on June 6, 2016. We then denied reconsideration of a decision affirming the denial of the respondent's first, untimely motion to reopen and again denied a renewed request for reopening. The final administrative decision remains the Immigration Judge's removal order of September 25, 2000. The respondent's current motion, submitted on November 7, 2017, is both untimely and number-barred. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The record does not contain a response from the Department of Homeland Security. The motion will be denied.

The respondent contends current counsel and prior counsel both rendered ineffective assistance by first failing to raise, and then failing to perfect, an argument in the first untimely motion to reopen that equitable tolling was warranted based on a change in law. Specifically, the respondent argues that under intervening case law he would no longer be removable as an aggravated felon based on his Texas conviction for driving under the influence. The respondent also points to *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012), in which the Fifth Circuit held that the "departure bar" regulation at 8 C.F.R. § 1003.2(d) did not impact statutorily authorized motions to reopen. *See also Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016) (concluding that equitable tolling of the time limits may be warranted based on a change in law).

We are not persuaded that equitable tolling of the time limits is warranted in this case. The most recent change in law affecting the respondent's ability to file a motion to reopen was issued in 2012, but the respondent's first motion was not filed until October 2015. While the respondent states that he was unaware of the relevant change in law until August or September of 2015, the respondent has not stated how he finally learned about *Garcia-Carias* or what efforts he was undertaking prior to that point to investigate, address, or correct the issues in his removal proceedings. The unexplained three-year delay between the issuance of the case and the respondent's filing of this motion does not persuade us he has shown reasonable diligence.

Additionally, the respondent has not demonstrated that the change in law would affect the outcome of his proceedings. The respondent was found removable on two separate charges, not only the aggravated felony charge addressed in his motion but also under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i). This motion does not allege that the respondent is no longer removable under that charge. Accordingly, as the respondent has not shown the change in law is material to the outcome of his proceedings, equitable tolling is not warranted in this case.

091 241 425

Finally, the respondent again reiterates his request that the Board exercise our discretionary authority to reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a). As the Board has noted in prior decisions in the respondent's case, the departure bar at 8 C.F.R. § 1003.2(d) is a non-jurisdictional limitation on our discretionary authority to sua sponte reopen. The request for reopening sua sponte will be denied, and the motion to reopen will be denied as untimely and number-barred.

ORDER: The motion to reopen is denied.

FOR THE BOARD

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A091 216 266 – Houston, TX

Date: JAN 16 2018

In re: Victor Hernandez VILLEGAS a.k.a. Victor Villegas

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Amanda Lea Waterhouse, Esquire

APPLICATION: Reconsideration; reopening

This matter is before the Board on remand from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's decision, dated July 17, 2017, remanded the case to the Board for the limited purpose of considering the respondent's equitable tolling claim in light of intervening precedents in *Mata v. Lynch*, 135 S.Ct. 2150 (2015), and *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

In *Lugo-Resendez v. Lynch*, 831 F.3d at 344-45, the Fifth Circuit, following the United States Supreme Court's *Mata* decision, held that the limitations on motions to reopen may be equitably tolled 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. Whether equitable tolling is appropriate in a case depends on the individual facts and circumstances of the case. *Id.* at 345.

In view of the court's decision, and the need for further fact-finding as to whether the motions time limits should be equitably tolled in this case, we will remand the record to the Immigration Judge to address the respondent's equitable tolling argument in the first instance in light of *Lugo-Resendez v. Lynch*, 831 F.3d 337, and the Fifth Circuit's decision in this case. Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and the opinion of the Fifth Circuit, and for the entry of a new decision.

FOR THE BOARD

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A034 450 500 – Los Fresnos, TX

Date: DEC 28 2017

In re: Sergio LUGO-RESENDEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF DHS: Mark Morais
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on November 21, 2016, when we remanded the record for further consideration of the respondent's request to reopen his removal proceedings in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Lugo-Resendez v. Lynch*, 831 F.3d 337, 340 (5th Cir. 2016). In a decision dated April 17, 2017, the Immigration Judge denied the respondent's motion to reopen. The respondent, a native and citizen of Mexico, has appealed from that decision. The appeal will be sustained, the motion to reopen will be granted, and the record will be remanded for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States as a lawful permanent resident in 1973 (IJ at 1, Apr. 17, 2017; Tr. at 17, 27). In 2002, he was convicted of a drug offense (IJ at 1, Apr. 17, 2017). In 2003, the respondent was placed in removal proceedings and ordered removed after he conceded that he was removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), as an alien convicted of an aggravated felony drug trafficking crime (IJ at 1, Apr. 17, 2017; Tr. at 17-18, 27). The respondent did not appeal his order of removal and was removed to Mexico that same year (IJ at 1, Apr. 17, 2017; Tr. at 18, 27).

In 2006, the Supreme Court issued *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (IJ at 1, Apr. 17, 2017; Tr. at 18, 27). The holding in that decision indicates that the respondent's drug offense is not a conviction for an aggravated felony under the Act (IJ at 1, Apr. 17, 2017; Tr. at 18, 27). In 2012, the Fifth Circuit "held in *Garcia-Carias v. Holder*[, 697 F.3d 257 (5th Cir. 2012)] that an alien has the right to file a motion to reopen under [section 240(c)(7) of the Act, 8 U.S.C.] § 1229a(c)(7) even if he has departed the United States" (IJ at 1, Aug. 7, 2014; Tr. at 18, 27; Respondent's Mot. at 2, July 21, 2014). *Lugo-Resendez v. Lynch*, 831 F.3d at 340.

On July 21, 2014, the respondent filed for reopening, arguing that the 90-day filing deadline for his motion to reopen should be equitably tolled in light of the fact that he filed his motion as soon as he learned of the change in law embodied in *Lopez* and *Garcia-Carias* (IJ at 1, Apr. 17, 2017; Tr. at 19, 27; Respondent's Mot. at 2, July 21, 2014). The Immigration Judge denied the respondent's motion because it was untimely filed, the filing deadline could not be equitably tolled, and the motion was subject to the so-called "departure bar" (IJ at 1-2, Aug. 7, 2014; Tr. at 19, 27). We affirmed the Immigration Judge's decision (BIA at 1, Nov. 6, 2014).

The respondent timely filed a petition for review of our decision, and, on July 28, 2016, the Fifth Circuit held that the 90-day filing deadline for motions to reopen set forth in section 240(c)(7) of the Act "is subject to equitable tolling." *Id.* at 344. The court additionally stated that an alien "is entitled to equitable tolling of a statute of limitations only if [he] 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.'" *Id.* (footnote and citation omitted). "The first element requires the [alien] to establish that he pursued his rights with '"reasonable diligence," not "maximum feasible diligence."'" *Id.* (same). "The second element requires the [alien] to establish that an 'extraordinary circumstance' 'beyond his control' prevented him from complying with the applicable deadline." *Id.* (same).

In light of this holding, the court concluded that we had improperly disregarded the respondent's argument for equitable tolling of the filing deadline for his motion to reopen. *Id.* At 343. The court granted the respondent's petition for review and remanded the record for us to consider whether equitable tolling was appropriate. *Id.* at 345. On November 21, 2016, we remanded the record, in turn, to the Immigration Judge to make additional findings of fact and determine whether equitable tolling was appropriate in the first instance (BIA at 1, Nov. 21, 2016).

On remand, the Immigration Judge heard testimony from the respondent and his daughter and deemed their testimony to be credible, but he concluded that equitable tolling was not appropriate (IJ at 3-5, Apr. 17, 2017). More precisely, the Immigration Judge determined that the respondent had not shown that he filed his motion within a reasonable period of time after the Supreme Court issued its decision in *Lopez* and thus the importance of finality outweighed the arguments the respondent had presented in favor of equitable tolling (IJ at 4-5, Apr. 17, 2017).

However, we conclude, upon de novo review, that equitable tolling of the reopening deadline is appropriate in this case (IJ at 4-5, Apr. 17, 2017; Respondent's Br. at 7-10). The record reflects that, following his removal from the United States in 2003, the respondent made repeated efforts over the course of approximately 3 years to learn whether his proceedings could be reopened (IJ at 2, 4, Apr. 17, 2017; Tr. at 37-40). However, he abandoned these efforts in about 2006 because he was told on multiple occasions that there was nothing that could be done about his case and he was unaware that the law affecting his removability could change (IJ at 2, 4, Apr. 17, 2017; Tr. at 40-41, 47-52). The respondent testified that no one in his family has attended law school or become an attorney, he was unable to follow legal developments in the United States, and neither he nor his family could afford to regularly consult with an attorney (IJ at 2, 4, Apr. 17, 2017; Tr. at 28-29, 31-33, 46-47).

In about May 2014, after he first learned that the law affecting his case had changed, the respondent immediately contacted his United States citizen daughter, who went to the respondent's counsel and asked her to look into the respondent's case (IJ at 2, 4, Apr. 17, 2017; Tr. at 30, 35-41, 46-47, 52-53). About 2 months later, the respondent filed his motion to reopen (IJ at 1, Apr. 17, 2017). Based on this record, we agree with the respondent that he was pursuing his rights with "reasonable diligence" for purposes of equitable tolling. *Id.* (holding that we should give "due consideration to the reality that many departed aliens are poor . . . and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions").

We additionally agree with the respondent that "extraordinary circumstances . . . beyond his control" prevented him from filing his motion until July 2014 (Respondent's Br. at 9-10). *Id.* The Immigration Judge is correct that the Supreme Court's 2006 decision in *Lopez* established that the respondent's 2002 conviction is not a conviction for an aggravated felony under section 237(a)(2)(A)(iii) of the Act (IJ at 4, Apr. 17, 2017). However, the law relating to the respondent's removability was not the only obstacle to his filing for reopening. Between the time of the respondent's removal to Mexico in 2003 and 2012, applicable circuit law precluded aliens like the respondent, who had departed the United States, from filing for reopening. *See id.* At 341-42 (citing *Garcia-Carias v. Holder*, 697 F.3d at 260-64 & n.1).

Because the respondent filed his motion within a reasonable period of time after he learned of the change in law embodied in both *Lopez* and *Garcia-Carias*, we cannot uphold the Immigration Judge's determination that equitable tolling is not warranted in this case (IJ at 4-5, Apr. 17, 2017). *See id.* at 345 (admonishing us to "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'" (footnote and citation omitted)). Applying the principle of equitable tolling to this case, we conclude, upon de novo review, that the respondent's motion is timely. *See id.* at 344-45.

Considering the totality of the circumstances, including the fact that the respondent's 2002 conviction no longer renders him removable as charged, we will grant the respondent's timely motion to reopen. *See* 8 C.F.R. § 1003.2(c). We will therefore remand the record for further consideration of the respondent's removability, his eligibility for relief from removal, and any other issues the Immigration Judge deems appropriate. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: These proceedings are reopened and the record is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A041 595 509 – New York, NY

Date: DEC - 1 2017

In re: Iankel ORTEGA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paige P. Austin, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals the Immigration Judge's decision dated January 5, 2016, terminating removal proceedings. The respondent has filed a brief in opposition to the DHS's appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review questions of law, discretion, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of the Dominican Republic, and lawful permanent resident, who pled guilty on June 22, 2010, and June 27, 2011, to criminal possession of a controlled substance in the seventh degree in violation of New York Penal Law section 220.03 (IJ at 1; Exhs. 1, 2-Tabs B and C).

We agree with the Immigration Judge's ultimate determination that the respondent's convictions are not controlled substance related offenses under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), and that the respondent is not removable as charged.

During the pendency of the respondent's appeal, the United States Court of Appeals for the Second Circuit issued a decision which controls the respondent's case. *See Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017). In *Harbin*, the court held that fifth-degree criminal sale of a "controlled substance" under section 220.31 of the New York Penal Law is overbroad and indivisible when compared to the aggravated felony definition. *See Harbin v. Sessions*, 860 F.3d at 58. In particular, it held that NYPL § 220.31 criminalizes a controlled substance, human chorionic gonadotropin, which is not criminalized under the Federal Controlled Substance Act ("CSA") schedule, and thus NYPL § 220.31 was not a categorical match to the removability ground. *See Harbin v. Sessions*, 860 F.3d at 68. The Second Circuit further held that NYPL § 220.31 "defines a single crime and is therefore an 'indivisible' statute." *See Harbin v. Sessions*, 860 F.3d at 61.

Although the DHS asserts that we should not recognize *Harbin v. Sessions*, we are bound by the Second Circuit's decision as it is the law of the controlling Federal Circuit (DHS Reply to Supplemental Br. at 2-7; Respondent's Supplemental Br. at 2-5). *See Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002). We agree with the respondent that because NYPL §§ 220.31 and 220.03 define "controlled substance" with reference to the same statute, *Harbin v. Sessions* controls the respondent's case (Respondent's Supplemental Br. at 3). NYPL § 220.03 is not a categorical match to section 237(a)(2)(B)(i) of the Act because the New York statute defining controlled substance is overbroad when compared to the definition of controlled substance as defined in the CSA. *See Harbin v. Sessions*, 860 F.3d at 68. NYPL § 220.03 also defines a single crime and is an indivisible statute regarding the substance involved. *See Harbin v. Sessions*, 860 F.3d at 64-68. Because the respondent's offense is not divisible by controlled substance, we cannot apply the modified categorical approach in this instance. *See generally Descamps v. United States*, 133 S. Ct. 2276 (2013).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

Ellen Pribowitz
FOR THE BOARD

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A203 300 412 – Dallas, TX

Date: NOV 28 2017

In re: Neville Ochieng RATEGO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Nicolas Chavez, Esquire

APPLICATION: Reopening

This case was last before us on January 9, 2015, when we dismissed the respondent's appeal from an Immigration Judge's decision finding him ineligible for adjustment of status due to his failure to establish that he was not inadmissible under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who had made a false claim to United States citizenship for any purpose of benefit under federal or state law. On April 10, 2017, the respondent filed an untimely motion to reopen based on a change in law. The record does not contain a response from the Department of Homeland Security (DHS). The respondent's motion to reopen will be denied.

The respondent is a native and citizen of Kenya. In his motion, the respondent asks that his case be remanded to the Immigration Judge to redetermine whether he is inadmissible under section 212(a)(6)(C)(ii) of the Act in light of our recent decision in *Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016). The respondent argues that he is entitled to equitable tolling of the motions deadline due to the change in law created by *Matter of Richmond*. In the alternative, he maintains that he is entitled to sua sponte reopening due to the change.

In *Matter of Richmond,* we looked more closely at the language of section 212(a)(6)(C)(ii) of the Act. In particular, we considered the meaning of the phrases "for any purpose or benefit" and "under this Act . . . or any other Federal or State law." *Matter of Richmond,* 26 I&N Dec. at 784-86. Based on our analysis, we concluded that section 212(a)(6)(C)(ii) of the Act only applies to false claims to United States citizenship that meet two requirements. First, there must be direct or circumstantial evidence demonstrating that the false claim was made with the subjective intent of achieving a purpose or obtaining a benefit under the Act or any other federal or state law. Second, United States citizenship must actually affect or matter to the purpose or benefit sought. *Id.* at 786-87.

Both the Immigration Judge's decision and our decision dismissing the respondent's appeal were issued before *Matter of Richmond.* The deadline for filing a motion to reopen with this Board also passed before we issued *Matter of Richmond* on July 28, 2016. Nevertheless, the respondent did not file his motion until April 10, 2017, almost 9 months after the purported change in law. Given this fact, and the other circumstances of the respondent's case, we are not persuaded that he has been pursuing his rights with reasonable diligence, a showing required to obtain equitable tolling of the motions deadline. *See Lugo-Resendez v. Lynch*, 831 F.3d 337, 343-45 (5th Cir. 2016).

In addition, even if we assume that the respondent has acted with reasonable diligence he has not shown that the change in law accomplished by *Matter of Richmond* alters the outcome of his proceedings. He therefore is not entitled to reopening even if his motion is considered timely. *See, e.g., Matter of Coelho*, 20 I&N Dec. 464, 471-73 (BIA 1992) (indicating that an alien seeking reopening for further consideration of an application for relief bears a "heavy burden" and must present evidence of such a nature that the Board is satisfied that if proceedings are reopened, the new evidence would likely change the result in the case). Further, he has not established that the change in law is sufficiently compelling to justify sua sponte reopening. *See Matter of G-D-*, 22 I&N Dec. 1132, 1134-35 (BIA 1999) (discussing circumstances under which this Board will reopen proceedings *sua sponte* due to a change in law).

In this case, the Immigration Judge does appear to have made findings that amount to a conclusion, based on direct or circumstantial evidence, that the respondent made a false claim to citizenship on an employment application in 2008 with the subjective intent of obtaining a purpose or benefit under the Act (I.J. at 4-6). The respondent further concedes that the evidence of record satisfies this first requirement of *Matter of Richmond* (Respondent's Motion at 8). The respondent, however, argues that the record must be remanded to the Immigration Judge to determine if the respondent's false claim to citizenship satisfies *Matter of Richmond*'s second requirement, the requirement that the citizenship claim actually affected the employment decision.

The respondent maintains that the mere checking of a box on a private employment application to indicate that he was a United States citizen did not, in fact, affect his ability to obtain employment from the employer because there was a second question asking if he was legally authorized to work in the United States. The respondent contends that it was the second question, not the citizenship question, that mattered to the employer. He claims that he still could have obtained employment if he had stated he was not a United States citizen. Further, he asserts that the question about his citizenship was illegal and discriminatory.

We disagree with the respondent's claim that his citizenship claim did not affect his ability to obtain employment from Skyview Living Center. This determination is made objectively, and the respondent's claim that his response to a second question on the employment application was determinative is not persuasive. Accordingly, the respondent has not established that our decision in *Matter of Richmond* alters the outcome of his proceedings. *See Matter of Coelho*, 21 I&N Dec. at 471-73; *see also* 8 C.F.R. § 1240.8(d) (stating that, if the evidence indicates that one or more of the grounds for mandatory denial of relief may apply, the respondent bears the burden of proving by the preponderance of evidence that the ground does not apply). The respondent therefore has not met his burden of establishing that reopening is warranted, and we will deny his motion to reopen.

ORDER: The respondent's motion to reopen is denied.

FOR THE BOARD

File: – New York, NY Date: OCT 3 1 2017

In re:

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Michael Z. Goldman, Esquire

APPLICATION: Reopening

This case was last before us on November 18, 2016, when we denied the respondent's motion to reopen proceedings. The respondent has now filed an untimely motion to reconsider this decision and terminate proceedings, on July 10, 2017. *See* 8 C.F.R. § 1003.2(b). The Department of Homeland Security has not responded to the motion.

In his motion, the respondent argues that he is no longer removable under sections 237(a)(2)(A)(iii) and (a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (a)(2)(B)(i), based on *Harbin v. Sessions,* 860 F.3d 58 (2nd Cir. 2017). Therein, the United States Court of Appeals for the Second Circuit found that New York Penal Law § 220.31 did not constitute an aggravated felony under section 237(a)(2)(A)(iii) of the Act. In so finding, the Court first found the statute indivisible because it created a single crime which could be committed using multiple means, including the type of drug involved. *See Harbin v. Sessions*, 860 F.3d at 66-67. Secondly, the Court found, from a categorical approach, that the statute was overbroad because it relied on N.Y. Pub. Health Law § 3306, which lists drugs not listed on the federal schedules in the Controlled Substances Act. *See* 21 U.S.C. § 802.

While the respondent's conviction falls under NYPL § 220.06(1), rather than NYPL § 220.31, we find the reasoning of *Harbin v. Sessions*, 860 F.3d at 66-69, applicable to the respondent's conviction and removability.[1] Like NYPL § 220.31, the respondent's conviction relies on NYPHL § 3306 to define a controlled substance; thus, NYPL § 220.06(1) is also overbroad for purposes of removability under sections 237(a)(2)(A)(iii) and (a)(2)(B)(i) of the Act. As such, we will terminate the respondent's proceedings, and the following order will be entered.

ORDER: The respondent's motion is granted.

FURTHER ORDER: The Board's November 18, 2016, decision is vacated.

[1] NYPL § 220.06(1) states that "(a) person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses … a controlled substance with intent to sell it …"

[redacted]

FURTHER ORDER: The Board's November 24, 2015, decision is vacated.

FURTHER ORDER: The proceedings are terminated without prejudice.[2]

FOR THE BOARD

[2] If the respondent's Petition for Review remains pending in the U.S. Court of Appeals for the Second Circuit, the parties should inform the court of the Board's decision in this case.

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A044 480 297 – New York, NY Date: SEP 29 2017

In re: Ariel Jonathan DIAZ VARGAS a.k.a. Ariel Diaz

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jessica A. Swensen, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

APPLICATION: Reconsideration; reopening

The Department of Homeland Security appeals from the Immigration Judge's order of July 27, 2016, in which the Immigration Judge denied the DHS's motion to reconsider a prior decision terminating proceedings and to reopen removal proceedings in the alternative. The respondent has filed a brief in opposition to the appeal. The appeal will be dismissed.

The DHS contends it did not waive an argument that the respondent is removable based on a conviction under New York Penal Law § 220.31, as an alien convicted of a controlled substance offense and an alien convicted for an aggravated felony as defined in 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). *See* sections 237(a)(2)(B), (a)(2)(A)(iii) of the Act, 8 U.S.C. §§ 1227(a)(2)(B), (a)(2)(A)(iii). The DHS also argues the Immigration Judge erred in not reopening proceedings to permit DHS to lodge an additional charge under section 237(a)(2)(A)(ii) of the Act.

We need not address whether the DHS waived arguments regarding the respondent's removability. Since the time of the Immigration Judge's decision in this case the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has concluded that the New York statute at issue is overbroad as an aggravated felony drug trafficking offense. *See Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017). Specifically, the Second Circuit concluded that the statute is indivisible and not subject to a modified categorical approach, as New York criminalizes the sale of substances which are not federally controlled substances and the various substances constitute means by which the New York statutes can be violated rather than specific and separate elements of the offense. *See also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016).

The same legal reasoning fatally undermines any assertion that the respondent's conviction constitutes a controlled substance offense within the meaning of section 237(a)(2)(B) of the Act. Therefore, the appeal from the denial of the DHS's reconsideration request will be dismissed.

We agree with the Immigration Judge that DHS did not establish that reopening was warranted. A motion to reopen requires the party seeking reopening present new or previously unavailable, material evidence. 8 C.F.R. § 1003.2(c)(1). The DHS did not present any additional evidence in company of the motion, instead relying exclusively on documents previously in the record. While the regulations provide DHS with broad ability to lodge additional charges "at any time during a

hearing," proceedings in this case had ended by the time DHS sought to lodge the charge. *See* 8 C.F.R. § 1240.48(d). As DHS's motion did not meet the basic requirements for a motion to reopen, we likewise will dismiss the appeal of the denial of the motion to reopen.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: [redacted]

In the Matter of:

[redacted]

Respondent.

IN REMOVAL PROCEEDINGS

CHARGES: INA § 237(a)(2)(B)(i) Controlled Substance Offense

APPLICATIONS: 8 C.F.R. § 1003.23(b)(2) Motion to Reconsider and Terminate

ON BEHALF OF RESPONDENT:

Carmen I. Rodriguez-Arroyo, Esq.
The Bronx Defenders
360 East 161st Street
New York, NY 10451

ON BEHALF OF DHS:

_____, Esq.
Assistant Chief Counsel
26 Federal Plaza, Room 1130
New York, NY 10278

DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[redacted] ("Respondent") is a native of Jamaica and a citizen of Jamaica. (Exh 1.) On February 24, 2011, Respondent adjusted his status to that of lawful permanent resident ("LPR"). Exh 3. On October 3, 2012 Respondent was convicted of criminal possession of a controlled substance in the seventh degree in violation of New York Penal Law ("NYPL") § 220.03. (Ex. 1; 4).

On September 25, 2014, the Department of Homeland Security ("DHS") served Respondent with a Notice to Appear ("NTA"), charging him with removability pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("INA") for having been convicted of a

controlled substance offense as defined in § 102 of the Controlled Substances Act ("CSA.") (Exh. 1).

On December 1, 2014, Respondent filed a motion to terminate his removal proceedings, arguing that he is not removable because NYPL § 220.31 does not constitute a controlled substances offense under the INA because the statute is overbroad and criminalizes the possession of substances that are not prohibited under the federal schedules, specifically chorionic gonadotropin. *See* Respondent's Motion to Terminate Proceedings ("Resp. Mot."). On December 8, 2014, DHS filed its opposition to Respondent's Motion to Terminate Proceedings. *See* DHS' Opposition Brief ("DHS Brief"). On December 14, 2014, former Immigration Judge ("IJ") Page took pleadings and denied Respondent's motion to terminate, finding the respondent removable pursuant to INA § 237(a)(2)(B)(i) based on his conviction for possession of a controlled substance in the seventh degree in violation of NYPL § 220.03. Respondent, through counsel, admitted factual allegations one, three, and four in the NTA, admitted allegation five in part and denied allegation five in part.[1] The Respondent also denied the charge of removability. The Respondent declined to designate a country of removal, so the Court designated Jamaica at the request of the Department. *See* INA § 241(b)(2).

On August 19, 2017, Respondent submitted a motion to reconsider the Court's April 18, 2016 decision. To date, the Court has not received a reply from the Department in response to the instant motion to reconsider. For the reasons stated below, Respondent's motion to reconsider will be granted and the Court will terminate these removal proceedings.

II. EXHIBITS[2]

Exhibit 1: NTA, served on the respondent on September 25, 2014;
Exhibit 2: TECS printout;
Exhibit 3: IJ Order dated February 24, 2011 granting adjustment of status to the Respondent ;
Exhibit 4: Certificate of Disposition and Complaint relating to the respondent's conviction for possession of a controlled substance in the seventh degree in violation of NYPL § 220.03. (Ex. 1; 4); and
Exhibit 5: RAP sheet dated September 26, 2014.

III. LEGAL STANDARDS AND ANALYSIS

A. Motion to Reconsider

An alien may file only one motion to reconsider, and such motion must be filed within thirty days of the date of entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1). However, an IJ may *sua sponte* or on the motion of either party

[1] The respondent admits that he was convicted of was convicted of criminal sale of a controlled substance in the seventh degree in violation of NYPL § 220.03. However, he denies that the drug he possessed was Oxycodone, as alleged in the NTA.
[2] The Court considered all of the exhibits, proffers and testimony heard in this case regardless of whether expressly cited in this decision or not.

reconsider any case in which he has made a decision unless jurisdiction has vested with the BIA. *Id.*

A motion to reconsider is a "request that the [BIA] reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006) (quoting *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002)). Here, Respondent argues that the prior IJ's decision should be reconsidered in light of a change in law, namely, the Second Circuit's subsequent decision in *Harbin v. Sessions*, 860 F.3d 58, (2d Cir. 2017). For the reasons set forth below, the Court will grant Respondent's motion to reconsider.

When an alien has been admitted to the U.S., DHS bears the burden of establishing that he is removable as charged. *See* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Thus, to sustain the charges in the NTA, DHS must establish Respondent's alienage and removability by clear and convincing evidence. *See* 8 C.F.R. § 1240.8(c); *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1991) (citing *Woodby v. INS*, 385 U.S. 276 (1966). Respondent has been charged with removability pursuant to INA § 237 (a)(2)(B)(i), a controlled substance offense. In order to support these charges, DHS cites to Respondent's October 3, 2012 conviction for criminal possession of a controlled substance in the seventh degree in violation of NYPL § 220.03.

The Court reviews Respondent's removability under INA § 237(a)(2)(B)(i) in light of the Supreme Court's decision in Mellouli v. Lynch, 135 S. Ct. 1980 (2015). The Court notes that INA § 237(a)(2)(B)(i) was the same removability charge at issue in Mellouli. In Mellouli, the Supreme Court concluded that a conviction for possessing drug paraphernalia was only a removable offense if it could be demonstrated that the conviction related to a federally controlled substance. *Id.* at 1991 ("[T]he Government must connect an element of the alien's conviction to a drug 'defined in [21 U.S.C. § 802].' "). If a state statute lists controlled substances not included on the federal list of controlled substances, the state statute could be overbroad. In evaluating whether a particular conviction involved a substance on the federal list, the Supreme Court instructed courts to use the categorical approach, Mellouli, 135 S. Ct. at 1986-87, but did not reach the issue of whether the modified categorical approach was also appropriate. *Id.* at 1986, n.4. Under the categorical approach, the Court looks not to the particular facts of the case but instead to the minimum conduct required for a conviction, and then the Court decides whether that conduct necessarily involves facts that equate to the generic definition. Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). In general, if the statute of conviction is not a categorical match, because it is broader than the federal offense, the analysis proceeds to divisibility. Descamps v. United States, 133 S. Ct. 2276, 2284 (2013). If the statute is divisible, the Court proceeds to the modified categorical approach, under which the Court looks at specific documents in the record of conviction only to determine which alternative statutory element formed the basis of the respondent's conviction. *Id.* at 2279. The Court cannot apply the modified categorical approach when the underlying crime "has a single, indivisible set of elements." *Id.* at 2282.

Since the Supreme Court's decision in Mathis v. United States, 136 S. Ct. 2243 (2016), for divisibility analysis, this Court must now determine whether the statute is divisible as to as to *elements* or as to *means*. Mathis, 136 S. Ct. at 2251-53. If the statute is divisible as to elements,

then the Court may proceed to the modified categorical approach. *Id.* at 2251-53. If, however, the statute is divisible as to means, the Court cannot use the modified categorical approach. *Id.*

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." . . . At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant . . . and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty . . . . Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements.

Id. at 2248 (internal citations omitted). The Supreme Court in Mathis provided guidance on how to determine if a particular portion of a statute is an element or a means of the offense. First, the plain text of statute might resolve the issue. *Id.* at 2256. For example, if statutory alternatives carry different punishments, they must be elements. *Id.* at 2256 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)). If a statute lists "illustrative examples," these are means of commission. *Id.* If a statute itself might also specify "which things must be charged (and so are elements) and which need not be (and so are means)." *Id.* In addition, a court looks to state law, including authoritative cases. *Id.* at 2256-57. If state law fails to provide clear answers, the Court can "peek" at documents in the record of conviction for the "sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Id.*

For the "peeking" process, the Supreme Court laid out further indicators of whether a statutory subpart is an element or a means that may come from documents in the record of conviction.[3] *Id.* at 2257. For instance, if a single count in an indictment or jury instructions charges a defendant using a list of items, that is a "clear indicator each alternative is only a possible means." *Id.* Likewise, if these documents use a single "umbrella term" to describe alternatives listed in the statute, this is evidence that those alternative items under that umbrella term are means. *Id.* Moreover, if an indictment and jury instructions "reference one alternative term to the exclusion of all others," this indicates "the statute contains a list of elements, each one of which goes toward a separate crime." *Id.* Finally, if the documents in the record of conviction do not "speak plainly" to the issue (when "peeking"), then the inquiry ends because the "demand for certainty" required by Taylor v. United States, 495 U.S. 575, 598 (1990). *Id.* (citing Shepard v. United States, 544 U.S. 1254, 1260 (2006)).

In the instant case, the respondent was convicted of possession of a controlled substance in the seventh degree in violation of NYPL § 220.03. A person is guilty of possessing a controlled substance in the seventh degree where he or she knowingly and unlawfully possesses a controlled substance. Id. Further, Under New York law, a controlled substance is defined as, "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana, but including concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of such law." NYPL § 220.00(5).

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[3] The Board of Immigration Appeals ("BIA" or "the Board") has noted "the information that may be gleaned by 'peek[ing]' at the conviction record does not stand on an equal footing with 'authoritative sources of state law.' " *Matter of Chairez-Castrejon*, 27 I&N Dec. 21, 26 n.2 (BIA 2017).

In *Harbin*, the Second Circuit found that New York's schedule of controlled substances is broader than the federal schedules (i.e. some drugs on the New York schedules are not listed on the federal schedules). *Harbin*, 860 F.3d 68.

The Court concludes that the overbroad aspect of the statute of conviction (i.e. "a controlled substance classified in schedule I, II, III, or IV") is an indivisible element. *See* NYPL § 220.03. First, the statutory language itself suggests the alternative substances are means, not elements. The statute does not list separate penalties for each individual substance. Rather, the same punishment applies to any substance under Schedules I through IV (although it carves out an exception for a marijuana, which it excludes from the statute). Therefore, by the logic of *Mathis*, *Apprendi*, and *Harbin* the text of the statute indicates the substances as listed under the different schedules are means of commission.

The Court now turns to New York case law, which also indicates the alternative substances are means, not elements. The Court in *Harbin* conducted an analysis of a similar statute to the one at issue here, except that is criminalized possession of a "narcotic drug" rather than a "controlled substance." The *Harbin* Court found New York case law relating to possession of a narcotic "treats all drugs classified as narcotics interchangeably" and therefore found that this indicates that in New York prosecution of violations of laws related to "controlled substances," would take the same approach "given the similarity of the statutes' language and structure." *Harbin*, 860 F.3d 67 (2d Cir. 2017). Thus, the government need only prove that the defendant possessed *a* controlled substance, not one controlled substance in particular. This makes the controlled substance a means and not an element under *Mathis*, 136 S. Ct. at 2248.

Because the statutory text of NYPC § 220.03 and the relevant Second Circuit case law provide clear answers to the question of whether the statute is divisible as to means or elements, the Court does not need to "peek." The Court also does not proceed to the modified categorical approach. *Mathis*, at 2256-57. Therefore, the inquiry ends, and Court may not look beyond the statutory text at the record of conviction to see which substance Respondent allegedly possessed. *See Id.* at 2253; *See also Descamps*, 133 S. Ct. at 2282 (stating a court cannot apply the modified categorical approach when the underlying crime "has a single, indivisible set of elements."). Because NYPL § 220.03 punishes conduct that is not criminal under the CSA, and the statute is not divisible, it cannot be considered a controlled substance offense under INA § 237(a)(2)(B)(i).[4]

[4] To sustain a charge of removability under INA § 237(a)(2)(B)(i), DHS must establish by clear and convincing evidence that a respondent "at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of thirty grams or less of marijuana." INA § 237(a)(2)(B)(i). A controlled substance is any substance that appears in Schedules I-V under 21 U.S.C. § 812. 21 U.S.C. §802(6) (A "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [including 21 U.S.C. §812]."

Accordingly, in light of *Harbin*, the Court finds that there has been a significant change in the law and that Respondent's motion to reconsider must be granted.

B. Motion to Terminate Removal Proceedings

As stated above, Respondent has separately moved to terminate these proceedings, arguing that he is not removable as charged. DHS bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the U.S. is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a), (c); *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1991) (citing *Woodby v. INS*, 385 U.S. 276 (1966).

In the instant matter, the Respondent has been charged with removability pursuant to INA §§ 237(a)(2)(B)(i). As discussed *supra*, under the Court's reasoning in *Harbin* his conviction can no longer sustain the lodged charges of removability because it is not a controlled substance offense. For these reasons, Respondent is no longer removable under the lodged charge. Therefore, the Court will terminate Respondent's removal proceedings without prejudice.

IV. CONCLUSION

Accordingly, after careful consideration of the record, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's motion to reconsider is **GRANTED.**

IT IS FURTHER ORDERED that these removal proceedings are hereby **TERMINATED.**

Date: 9/15/17

Maria Lurye
U.S. Immigration Judge