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DETAINED

DEPORTATION STAYED BY THE BIA PENDING ADJUDICATION OF THE INSTANT MOTION TO REOPEN

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
[redacted],	)	A Number: A[redacted]
	)	
Respondent,	)	
	)	
In Removal Proceedings.	)	
	)	

REPLY TO DEPARTMENT OF HOMELAND SECURITY'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN TO TERMINATE PROCEEDINGS

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I. INTRODUCTION

Respondent, [redacted], hereby responds to the Department of Homeland Security's (DHS) opposition to his motion to reopen and terminate removal proceedings (hereinafter Mx to Reopen). As noted in his motion, received on February 12, 2014, the Board of Immigration Appeals ("BIA" or "Board") dismissed Respondent's direct appeal and denied his motion to remand on May 22, 2013. Mx to Reopen, Exhibit A (BIA Decision). The validity of that decision currently is pending before the U.S. Court of Appeals for the Second Circuit. [redacted], Case No. [redacted] (2d Cir.); *see also* Mx to Reopen, Exhibit B (Court of Appeals Orders). As explained below, DHS' opposition misapprehends, and consequently, is non-responsive to the arguments set forth in Respondent's motion to reopen.

II. ARGUMENT

DHS' OPPOSITION TO REOPENING THIS CASE LACKS MERIT.

The motion presently before this Board seeks to reopen the Board's May [redacted], 2013 decision because Respondent, a lawful permanent resident since 1989, is not deportable under INA § 237(a)(2)(B)(i) or 237(a)(2)(A)(iii) based on his 2002 and 2008 convictions. *See* Mx to Reopen, pages 9-16. The motion argues that equitable tolling of the time and numeric limitations on statutory motions to reopen is warranted in this case for two reasons. First, Respondent has exhibited the requisite "due diligence" because he is filing his motion within 90 days of discovering from current counsel his claim that he is not deportable; in addition, this motion is being filed within 90 days of the Second Circuit's appointment of undersigned counsel. *See* Mx to Reopen, pages 18-26. Second, reopening is warranted in light of the ineffective assistance rendered by prior counsel and the agency's malfeasance. *See* Mx to Reopen, pages 26-30.

DHS' opposition (DHS Opp.) is a page and a half long, consisting of ten points and exactly twelve sentences, none of which provide any valid basis for opposing reopening.

The first four points (four sentences) of the opposition indicate that DHS is opposed to reopening and restate part of the procedural history of this case, noting the date of the BIA's decision in this case and that the Second Circuit denied Respondent's *pro se* request for a stay of removal and Respondent's subsequent motion to reconsider that decision. DHS Opp. at 2. These points do not require a response.

The fifth and sixth points (two sentences) of DHS' opposition consist of a conclusory statement that the motion to reopen is "untimely" and a factual assertion that the motion was made "beyond 90 days" from this Board's May [redacted], 2013 decision. DHS Opp. at 2. Of course, Respondent acknowledges that the date February [redacted] 2014, the date his motion to reopen was filed, is more than 90 days after May [redacted], 2013, the date of this Board's decision. Importantly, however, Respondent disagrees with DHS' conclusory statement that the motion is "untimely." Respondent argues that the time and numeric limitations on statutory motions to reopen merit equitable tolling based on the ineffective assistance rendered by prior counsel and the agency's malfeasance in this case. *See* Mx to Reopen, pages 17-30.

The seventh point (three sentences) of DHS' opposition appears to respond to Respondent's equitable tolling argument. The first sentence simply states DHS' position in opposition to equitable tolling. DHS Opp. at 2. The second sentence – "DHS concedes the respondent was diligently pursuing his rights before the United States Court of Appeals" – is inapposite and entirely misapprehends the nature of equitable tolling in general, as well as the actual equitable tolling argument before the Board. DHS Opp. at 2. At issue is whether the time

and numeric limitations for filing a statutory motion to reopen (*see* INA §§ 240(c)(7)(A)&(C)) merit equitable tolling; i.e., whether the motion should be treated as a timely and properly filed motion to reopen pursuant to the statute.[1] The fact that Respondent, a pro se detainee, managed to file a petition for review with the Second Circuit of this Board's decision dismissing his direct appeal is irrelevant to any analysis of whether the his statutory motion to reopen before this Board merits equitable tolling. The third sentence is both conclusory and factually inaccurate. It reads: "However, there are no extraordinary circumstances that explain why the respondent was not able to file before this Court, with competent counsel, who was, at the same time, actively pursuing his case before a different court." DHS Opp. at 2-3. As stated on the very first page and throughout Respondent's motion to reopen, the Second Circuit did not appoint undersigned counsel to represent Respondent until November 2013, which is well beyond 90 days from this Board's May 22, 2013 order, and, thus, Respondent did not know he had a strong basis for reopening (the argument that he is not deportable) until *after* counsel's appointment. *See* Mx to Reopen, pages 1, 8, 19, and Exhibits I, M and N. Thus, undersigned counsel began actively litigating the instant case before the Second Circuit following appointment by that Court well after the 90 day deadline for filing a motion to reopen. DHS' opposition incorrectly implies that undersigned counsel represented Respondent before this Board at the time of its May ■, 2013 decision.

More significantly, however, Respondent's motion demonstrates extraordinary circumstances explaining his inability to timely file a motion to reopen in that he did not learn of the argument that he is not deportable within that time period due to his prior counsel's

[1] This requires a showing "'(1) that [Respondent] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 632 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Respondent has made that showing. *See* Mx to Reopen, pages 17-30.

ineffective assistance and due to the agency's malfeasance (including the Immigration Judge's violations of 8 C.F.R. §§ 1240.10(c), 1240.11(a)(2), and misleading statements coupled with the Board's misinterpretation of conviction-based removability grounds). *See* Mx to Reopen, pages 19-30. DHS' opposition provides no response to these arguments.

The *eighth point* (one sentence) of DHS' opposition is conclusory. It simply states that the Board should deny the motion as "without merit." DHS Opp. at 3.

The *ninth point* (one sentence) of DHS' opposition is conclusory and inaccurate. It states that "The respondent has not sought to offer new material facts or evidence that was not available at the prior hearing. *See* 8 C.F.R. § 1003.2(c)(1)." In so stating, DHS ignores Respondent's new factual and legal argument that he is not deportable under either of the grounds charged in the Notice to Appear (*see* Mx to Reopen, pages 9-16) and also ignores both the facts, law and exhibits Respondent submitted in support of his ineffective assistance of counsel and malfeasance claims (*see* Mx to Reopen, pages 18-30), including evidence regarding compliance with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

The *tenth point* (one sentence) of DHS' opposition is conclusory and no longer applicable in that DHS states that the Board should deny Respondent's request for a stay of removal. On March 10, 2014, the Board granted Respondent's stay request, saving him from imminent deportation to [redacted], where he would face torture based on [redacted] and imprisonment amounting to torture based on his status as a criminal deportee.

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III. CONCLUSION

None of DHS' alleged bases for opposing reopen has merit. Thus, for the reasons set forth in his previously-filed motion to reopen and herein, Respondent respectfully requests the Board reopen and terminate removal proceedings against him.

Respectfully submitted,

[redacted]

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Counsel for Respondent

Dated: March 24, 2014

PROOF OF SERVICE

On March 24, 2014, I, Trina Realmuto, served a copy of this Reply to Department of Homeland Security's Opposition to Respondent's Motion to Reopen to Terminate Proceedings by U.S. mail delivery to the following office and address:

Brian J. Counihan, Assistant Chief Counsel
Buffalo Federal Detention Facility
Office of the Chief Counsel
U.S. Immigration and Customs Enforcement
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[redacted]
Trina Realmuto

Date: March 24, 2014