Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8 (tel)
(617) 227-5495 (fax)
trina@nipnlg.org

Attorney for Respondent

**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE OF IMMIGRATION REVIEW**

**OFFICE OF THE IMMIGRATION JUDGE**

**OAKDALE, LOUISIANA**

| | |
|---|---|
| **In the Matter of:** | |
| [redacted], | **File No.:** [redacted] |
| **Respondent.** | |

**RESPONDENT'S STATUTORY MOTION TO REOPEN TO TERMINATE PROCEEDINGS BASED ON VACATED CONVICTION AND ALTERNATIVE REQUEST FOR REGULATORY SUA SPONTE REOPENING**

## TABLE OF CONTENTS

## I. INTRODUCTION

Pursuant to § 240(c)(7)(A) of the Immigration and Nationality Act (INA), Respondent [redacted] (Mr. [redacted]), through counsel, moves this Court to reopen Mr. [redacted]'s removal proceedings, rescind the removal order issued on [redacted] 2007, and terminate proceedings. With this motion, Respondent submits evidence that, on [redacted], 2014, the Massachusetts criminal court vacated the [redacted] 2007 state conviction for drug distribution alleged in the Notice to Appear. *See* Exhibit (Ex.) A3a (order granting motion to vacate); Ex. A3b (Updated Criminal Docket No. [redacted]) and Ex. A4 (Defendant's Motion to Withdraw Guilty Plea in Lawrence District Court). This conviction formed the *sole* basis of Mr. [redacted]'s removal order, which was issued during a group hearing on [redacted], 2007. Ex. A6 (Order of the Immigration Judge); Ex. A7 (Transcript of Hearing). The vacatur of the conviction nullifies the basis for the order of removal. This motion is timely filed within 90 days of that vacatur, and, therefore, the Court should reopen and terminate removal proceedings.

If, and only if, the Court declines to grant Mr. [redacted]'s motion for statutory reopening, Respondent requests that the Court consider sua sponte reopening pursuant to 8 C.F.R. § 1003.23(b)(1). As demonstrated by the Exhibits to Defendant's Motion to Withdraw Guilty Pleas and Admission to Sufficient Facts (Ex. A5) and the additional evidence attached hereto (Exs. B1-B11), Respondent's conviction was part of a massive scandal in a Massachusetts state crime lab. Chemist Annie Dookhan, who was the primary chemist on Respondent's case (Exs. A4 and A5), tampered with drug evidence and fabricated drug test results in thousands of cases leading to her arrest and criminal convictions. Exs. B1-B11. Given the extreme and outrageous state misconduct that led to Respondent's initial conviction and mandated its vacatur, this case merits sua sponte reopening.

## II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. [redacted] is a [redacted] year-old native and citizen of [redacted] born on [redacted] He was admitted to the United States as a lawful permanent resident on [redacted] 2003, when he was 15 years-old, as a beneficiary of a visa petition filed by his mother, [redacted]. Ex. A1 (Notice to Appear). Mr. [redacted]'s mother is a lawful permanent resident and his [redacted] are U.S. citizens.

On [redacted] 2007, when he was 19 years-old, Mr. [redacted] pled guilty to distribution of a class B substance, pursuant to Mass. Gen. Laws ch. 94C, § 32A(a). Ex. A2 (Criminal Docket in Case No. [redacted]). He received three years of probation. *Id.* Following his conviction, Immigration and Customs Enforcement took Mr. [redacted] into custody. He was served with a Notice to Appear alleging he was removable pursuant to INA § 237(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined in INA § 101(a)(43)(B) (trafficking in a controlled substance) on the basis of that conviction. Ex. A1 (Notice to Appear). In [redacted], 2007, during a group hearing, Immigration Judge James Nugent sitting in Oakdale, Louisiana ordered Mr. [redacted] removed. Ex. A6 (removal order); Ex. A7 (Transcript of Hearing). Mr. [redacted] was removed to [redacted] thereafter.

In [redacted] 2012, the Commonwealth of Massachusetts acknowledged that Annie Dookhan, a chemist at the Hinton state crime lab, falsified results of alleged drug samples. *See* Exs. A5 and B1-B11. A criminal investigation of Ms. Dookhan – who subsequently was convicted of 17 counts of Obstruction of Justice, 8 counts of Tampering with Evidence, Perjury, and Falsely Pretending to Hold a Degree from a College or University (Ex. B11) – called into question the reliability of evidence used in scores of criminal prosecutions. *See* Exs. B1-B11.

Ms. Dookhan was the primary chemist on Mr. [redacted]'s case and supplied the information on which the conviction was obtained. Exs. A4 and A5.

On July 19, 2013, Mr. [redacted], through counsel and based on Ms. Dookhan's misconduct, filed a Motion to Withdraw Guilty Pleas and Admission to Sufficient Facts. Ex. A4. On June 12, 2013, the Lawrence District Court vacated Mr. [redacted]'s conviction on the basis of egregious government misconduct. Ex. A3a (handwritten order finding Mr. [redacted]'s guilty plea was not voluntary); Ex. A3b (Updated Criminal Docket No. [redacted], evidencing the state court's grant of the motion to withdraw guilty plea).

## III. STANDARD FOR REOPENING

A motion to reopen pursuant to INA § 240(c)(7) and 8 C.F.R. § 1003.23(b)(1), (3) requests reopening removal proceedings so that the respondent may present new evidence. *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen must provide "new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." 8 C.F.R. § 1003.23(b)(3).

Pursuant to 8 C.F.R. § 1003.23(b)(1)(i), Respondent states that the validity of his removal order is the subject of a criminal proceeding under 8 U.S.C. § 1326.

## IV. ARGUMENT

### A. MR. [redacted] IS NOT REMOVABLE, AND, THEREFORE, THIS COURT SHOULD REOPEN AND TERMINATE PROCEEDINGS.

A conviction that has been vacated on the merits is no longer a conviction as defined in INA § 101(a)(48) for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). To the extent that the Fifth Circuit's decision in *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002), continues to recognize vacated convictions as conviction for immigration purposes, that decision is fundamentally flawed, is "now out of step with the rest of the nation,"

and is not followed outside the Fifth Circuit, if at all. *See Discipio v. Ashcroft*, 369 F.3d 472, 474 (5th Cir. 2004) ("That our Circuit is now out of step with the rest of the nation is punctuated by the fact that the [BIA] applies the broad understanding of 'conviction' embraced in *Renteria-Gonzalez* only in the Fifth Circuit) (citation omitted) *withdrawn by Discipio v. Ashcroft*, 417 F.3d 448, 450 (5th Cir. 2005) ("According to Respondent, the Board's opinion in *In re Pickering* constitutes a permissible construction of the statute because it comprehensively addresses the effect of a vacated conviction."); *Matter of Pickering*, 23 I&N Dec. at 624 n.2 (declining to apply *Renteria-Gonzales* outside the Fifth Circuit). An individual seeking to reopen proceedings bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 274 (BIA 2007). More significantly, however, the Court's decision in *Renteria*, *supra*, does not cover a vacatur like the one in this case, where the state acknowledges widespread governmental misconduct. In *Renteria*, the Court strongly expressed a concern regarding "uniformity of federal law and consistency in enforcement of the immigration laws." 322 F.3d at 814. That concern is not applicable here, however, because neither federal nor state governments have an interest in enforcing convictions arising from egregious prosecutorial misconduct. *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) ("as has been said, the government wins when justice is done"); *Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) ("Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation"). As Massachusetts Attorney General (AG) Martha Coakley aptly stated:

> 'Annie Dookhan's egregious misconduct sent ripple effects throughout our entire criminal justice system,' AG Coakley said. 'Her deliberate decision to tamper with drug evidence and fabricate test results harmed the integrity of the system and put the public's safety at risk.'

Ex. B11.

Respondent's conviction was not vacated solely for immigration purposes; rather, it was based on a substantive and procedural defect in the underlying criminal proceedings because it was obtained through the use of false evidence. The Commonwealth of Massachusetts has actual notice that, during the time the evidence in Respondent's case was stored and tested at the Hinton state crime lab, Ms. Dookhan had unfettered access to the evidence locker and in an unknown numbers of cases (1) tainted evidence, (2) reported substances were positive although they had tested negative, (3) added substances to increase the overall weight, (4) failed in her role as Quality Control/Assurance to run test samples and calibrate the instruments used by all Department of Health chemists, (5) forged the names of her colleagues, (6) left numerous vials open to cross contamination, and (7) perjured herself before the judges and juries of the Commonwealth of Massachusetts as to her testing and her credentials. Exs. A4, A5 and B1-B11. This activity ultimately led to her convictions for 17 counts of Obstruction of Justice, 8 counts of Tampering with Evidence, Perjury, and Falsely Pretending to Hold a Degree from a College or University. Ex. B11.

Given the overwhelming evidence that Ms. Dookhan tampered with evidence and had unsupervised access to the evidence in the lab, in July 2013, Mr. [redacted] filed a Motion to Withdraw Guilty Pleas and Admission to Sufficient Facts, based on the allegations against her at the time. Ex. A4. In his motion, Mr. [redacted] asserted that his plea and admission were not knowing, intelligent, and voluntary and, thus, violated the Fourteenth Amendment to the U.S. Constitution and Article 14 of the Massachusetts Declaration of Rights. Ex. A4. It is on these grounds that the Lawrence District Court allowed Mr. [redacted]'s motion and found that his guilty plea was not voluntary, thereby, vacating the conviction on April 30, 2014. Exs. A3a and A3b.

Mr. [redacted] has thus demonstrated that the vacatur of his conviction was based on serious and extreme defects in the underlying criminal proceedings.

Immigration courts and the Board of Immigration Appeals routinely reopen proceedings where a conviction that formed the basis for a removal order has been vacated due to substantive or procedural defects. *See*, *e.g.*, *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 n.2 (5th Cir. 2008) (listing cases); *Cruz v. AG*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (same); *see also* [redacted], 2012 Immig. Rptr. LEXIS 6015 (BIA, Sept. 28, 2012); [redacted], 2012 Immig. Rptr. LEXIS 27 (BIA, Jan. 18, 2012); [redacted] (BIA Sept. 27, 2011); [redacted], 2014 WL 347664 (BIA Jan. 13, 2014). Indeed, immigration courts have granted reopening in similar cases seeking to reopen proceedings based on Dookhan vacaturs. *See*, *e.g.*, [redacted] (El Paso Immigration Court).

This Court should reopen and terminate Mr. [redacted]'s proceedings in light of the vacatur of the sole conviction that formed the sole basis of the removal order. This motion is timely filed within 90 days of the state court's vacatur. *See*, *e.g.*, *William v. Gonzales*, 499 F.3d 329, 331 (4th Cir. 2007) (treating motion to reopen filed within 90 days of vacatur as timely filed); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011) (same).

Mr. [redacted] is not removable now for the 2007 drug conviction charged on the NTA in this case, nor was he ever removable for it. The fundamental evidentiary basis for Respondent's conviction was predicated on egregious state misconduct, and, as such, the vacatur of the conviction operates ab initio to render the conviction unlawful at the time it was entered. *Accord Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990) ("This and other courts have clearly established that the nullification of a conviction upon which deportability is premised deprives

deportation of a legal basis") (citations omitted); *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. July 1981) ("Once the conviction becomes final, it provides a valid basis for deportation unless it is overturned in a judicial post-conviction proceeding").

## B. THIS MOTION IS TIMELY FILED WITHIN 90 DAYS OF THE STATE COURT ORDER VACATING THE 2007 CONVICTION.

### 1. Importance of Motions to Reopen

The Supreme Court has held that a motion to reopen is an important procedural safeguard intended "to ensure a proper and lawful disposition" and that courts "must be reluctant" to adopt an interpretation of the statute that would limit this "important safeguard." *Dada v. Mukasey*, 554 U.S. 1, 18 (2008); *see also Kucana v. Holder*, 558 U.S. 233, 242 (2010) (reaffirming that a motion to reopen is an "important safeguard"). In *Auburn Reg'l Med. Ctr.*, Justice Sotomayor noted that the failure to recognize equitable tolling in remedial schemes with unsophisticated claimants "could have odd practical consequences and would attribute a strange intent to Congress: to protect a claimant's ability to seek judicial review of an agency's decision by making equitable tolling available, while leaving to the agency's discretion whether the same claimant may invoke equitable tolling in order to seek an administrative remedy in the first place.". 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring). Recognizing equitable tolling in this case is consistent with the purpose of motions to reopen "to ensure a proper and lawful disposition." *Dada*, 554 U.S. at 18.

### 2. Standard for Equitable Tolling

A motion to reopen must be filed within 90 days of entry of a final administrative order of removal, INA § 240(c)(7)(A),(C)(i), 8 C.F.R. § 1003.2(c)(2), or as soon as practicable after discovering facts that merit equitable tolling of the deadline. When a court recognizes that a statute is subject to tolling, it then must determine whether the litigant's circumstances warrant

tolling in the particular case before it. *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013) ("We note that eligibility for equitable tolling is a threshold showing that must be made before the merits of the claim or claims underlying a motion to reopen can be considered."). If the court determines that an individual "qualifies for equitable tolling," the filing will be "treated as if it were the one [he or she] is statutorily entitled to file." *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *see also Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011) (recognizing that equitable tolling of the motion deadline allows it to be treated as though it had been timely filed pursuant to the statute); *cf. Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013) (". . .by contending that equitable tolling should excuse the untimeliness of her motion, Bolieiro's argument is directed at her statutory right to file a motion to reopen, not the agency's sua sponte authority to reopen proceedings.").

The Supreme Court concisely and repeatedly has articulated the standard for determining whether an individual is "entitled to equitable tolling." *See*, *e.g.*, *Holland v. Fla.*, 560 U.S. 631, 632 (2010). Specifically, an individual must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). *See also Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Fla.*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with "reasonable diligence," but petitioners need not demonstrate "maximum feasible diligence." *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court's equitable tolling test accords with the test of all nine circuits that already have recognized that motion deadlines are subject to equitable tolling.[1] *Accord Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which the BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"). *Cf. Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 830 (Sotomayor, J., concurring) (". . . with respect to remedial statutes designed to protect the rights of unsophisticated claimants, . . . agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.").

//

//

---

[1] *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) ("[e]quitable tolling requires a party to pass with reasonable diligence though the period it seeks to have tolled") (internal citations omitted); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) (explaining that equitable tolling is proper when (1) wrongful conduct by the opposing party prevented petitioner from timely asserting her claim or (2) extraordinary circumstances beyond petitioner's control prevented timely filing); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the "doctrine that the statute of limitations will not bar a claim if, despite diligent efforts, litigant did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Ortega-Marroquin,* 640 F.3d at 819-20; *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) (holding that BIA must consider noncitizens' due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1363 n.5 (11th Cir. 2013) (en banc) (explaining that "equitable tolling requires litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way"). *Accord Bolieiro v. Holder* F.3d 32, 39 n.7 (1st Cir. 2013) (noting that "every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen").

### 3. Extraordinary Circumstances Prevented Timely Filing this Motion and Mr. [redacted] Is Diligently Pursuing His Statutory Right to File a Motion to Reopen.

Mr. [redacted] has exhibited the requisite "due diligence" because he is filing the instant motion to reopen within 90 days of the state court's order vacating his 2007 conviction. *See* Exs. A3a and A3b. Significantly, the Board of Immigration Appeals has established a practice of reopening cases where the conviction forming the basis for removal is vacated, even if the motion is filed after 90 days of the removal order. *See Cruz v. AG*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006).

There is rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland*, 560 U.S. at 631 (quoting *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This means that a deadline may be extended where the litigant acted diligently in pursuing his or her rights, but an extraordinary circumstance stood in the way. *See Pace*, 544 U.S. at418. Separately, but relatedly, the INA requires that a motion to reopen state "new facts" and "be supported by affidavits and other evidentiary material." INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). Here, Respondent pursued his statutory right to file a motion diligently. *See* § II (Statement of Facts and Procedural History), *supra*, and discussion below, *infra*. However, as explained above in § I.A., and evidenced by the Exhibits attached to this motion, incorporated herein, an "extraordinary circumstance" and "new facts" prevented Respondent from timely filing this motion converge.

Specifically, Respondent argues that the state government's egregious misconduct merits equitable tolling. Respondent did not know, and could not have possibly known, that the Ms. Dookhan, the primary chemist in his case, was tampering with drug evidence and falsifying test results. Ex. A3a ("obviously this information was not known to the Defendant or his attorney at

the time of his plea/admission"). Thus, he had no possible way of knowing that the 2007 conviction for which he was ordered removed was based on falsified evidence.

Notwithstanding his inability to know about Ms. Dookhan's criminal activity, Respondent filed a motion to vacate as soon as he became aware of this information. Ms. Dookhan was convicted on November 22, 2013 in Suffolk Superior Court. Ex. B11. Mr. [redacted] filed his motion to vacate his criminal conviction on July 13, 2013 (Ex. A4), based on the allegations against Ms. Dookhan, over four months before these allegations were proven and the criminal court accepted her guilty plea. That motion remained pending until April 30, 2014, when the state criminal court allowed the motion. Exs. A3a and A3b. This motion is timely filed within 90 days of the state court's decision. *Accord William*, 499 F.3d at 331; *Pruidze*, 632 F.3d at 235.

In sum, extraordinary circumstances prevented Mr. [redacted] from timely filing this motion and he is diligently pursuing his right to file a motion to reopen under INA § 240(c)(7). Thus, the Court should find that the instant motion is timely filed.

**C. THE DEPARTURE REGULATION IS NOT APPLICABLE.**

The regulation at 8 C.F.R. § 1003.23(b)(1), barring motions before the Immigration Courts following departure, does not apply in this case for at least two reasons. First, the regulation does not apply to timely filed statutory motions to reopen. *See Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (invalidated as contrary to congressional intent, 8 C.F.R. § 1003.2(d), the departure bar regulation applicable to motions before the Board); *see also Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012) (invalidating departure bar regulation with respect to motions to reconsider). Notably, in *Carias*, the Fifth Circuit struck down the departure bar in the context of a motion to reopen that was filed over five years after the petitioner's final administrative order.

*Carias*, 697 F.3d at 260. Here, and as explained above in §§ IV.B.1 and 2, respectively, this motion is timely filed within 90 days of the vacated conviction and, in addition, the 90-day deadline merits equitable tolling. Hence, the departure bar regulation does not apply.

Second, the Court should not apply it to Respondent because a vacated conviction serves as the basis of his timely motion to reopen. Here, the criminal court vacated the conviction that constituted the basis for Respondent's removability. *See* Ex. A3a and A3b. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), one court of appeals held that the departure bar to judicial review did not apply to an otherwise late-filed petition for review where the departure was not "legally executed." *See*, *e.g.*, *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). The court later extended this ruling to the departure bar on (then regulatory) motions to reopen, reasoning that a departure is not "legally executed" when a criminal court subsequently vacates a conviction that constituted a "key part" of the removal order. *See Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. 2006); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *cf. William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (striking down departure bar regulation where petitioner's conviction was vacated); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011) (same); *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013) (same).

In this case, the conviction formed not only a "key part" of the removal order, but it was the sole basis for it. *Cardoso-Tlaseca*, 460 F.3d at 1107. Thus, the regulation is inapplicable to Mr. [redacted], who timely pursued reopening after the criminal court vacated his conviction.[2]

---

[2] Notably, the Fifth Circuit's decision in *Ovalles v. Holder*, 577 F.3d 288, 290 (5th Cir. 2009) is inapposite because the instant motion is timely filed. Furthermore, *Ovalles* involved an untimely motion to reopen based on a change in law. *Id.* Here, the departure bar regulation is

## V. IN THE ALTERNATIVE, THE COURT SHOULD REOPEN THE INSTANT CASE SUA SPONTE.

If this Court declines to grant reopening pursuant to its statutory authority in INA § 240(c)(7)(C), Respondent requests that the Court *sua sponte* reopen his removal case based on a the extraordinary circumstances of this case, which involve egregious state misconduct. *See* 8 C.F.R. § 1003.23(b)(1) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals."); 8 C.F.R. § 1003.10(b) ("In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."). *Cf. Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 n.2 (5th Cir. 2008) ("[T]he BIA has shown a willingness to sua sponte reopen cases where there is evidence that an immigrant's conviction was vacated for substantive or procedural defects")As set forth in §§ IV.A and B, *supra*, Respondent's case merits *sua sponte* reopening.

**//**

**//**

**//**

**//**

**//**

**//**

---

not applicable to Mr. [redacted]'s motion, which is based on a vacated conviction which was invalid at the time of his original removal order.

## VI. CONCLUSION

For the foregoing reasons, Mr. [redacted] asks the Court to reopen the proceedings, rescind the removal order, and terminate proceedings.

Respectfully submitted,

[redacted]

Trina Realmuto
National Immigration Project of the
National Lawyers Guild
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727 ext. 8 (tel)
(617) 227-5495 (fax)
trina@nipnlg.org

Dated: July 28, 2014