

September 10, 2023

**SAMPLE STATUTORY AND *SUA SPONTE* MOTION TO RECONSIDER AND/OR REOPEN REMOVAL PROCEEDINGS FOR PURPOSES OF TERMINATION OR REMAND FOR A RELIEF HEARING, IN LIGHT OF *UNITED STATES V. MINTER***

**(FOR FILING WITH THE BOARD OF IMMIGRATION APPEALS—“BIA”)**

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UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

In the Matter of: )

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 )

 **[NAME]**  ) **A-Number [XXX-XXX-XXX]**

 )

 )

In RemovalProceedings. )

**STATUTORY AND *SUA SPONTE* MOTION TO RECONSIDER AND/OR REOPEN REMOVAL PROCEEDINGS FOR PURPOSES OF [TERMINATION AND/OR PURSUING RELIEF], IN LIGHT OF *UNITED STATES V. MINTER***

**INTRODUCTION**

Respondent, **[Name]**, hereby submits this statutory and *sua sponte* motion to reconsider and/or reopen removal proceedings for purposes of **[termination of removal proceedings and/or pursuing relief]**. *See* Immigration and Nationality Act (“INA”) § 240(c)(6)-(7) (providing the statutory authority for a motion to reconsider or reopen); 8 C.F.R. 1003.2 (providing the *sua sponte authority* for a motion to reconsider or reopen).

Respondent seeks **[reconsideration]** **[or] [reconsideration and reopening]** in light of the U.S. Court of Appeals for the Second Circuit’s precedent decision in *United States v. Minter*, No. 21-3102, 2023 WL 5730084 (2d Cir. Sept. 6, 2023). **[IF CONVICTION IS UNDER “COCAINE” PROVISION NYPL § 220.06(5), OR IF CONVICTION IS UNDER “NARCOTIC DRUG” PROVISION AND RECORD OF CONVICTION INDICATES COCAINE:** Under *Minter*, the statutory term “cocaine” under New York Penal Law is categorically overbroad and indivisible as compared to the removability provisions at INA §§ 212(a)(2)(A)(i)(II) (providing for inadmissibility for a conviction relating to a federally controlled substance), 237(a)(2)(B)(i) (proving for removability for a conviction relating to a federally controlled substance, 101(a)(43)(B), (U) (providing for aggravated felony for trafficking federally controlled substance, and for attempt).] **[IF CONVICTION IS UNDER “NARCOTIC DRUG” PROVISION AND COCAINE IS NOT IDENTIFIED IN RECORD OF CONVICTION:** Under *Minter*, the statutory term “narcotic drug” under New York Penal Law (“NYPL”) § 220.00(7) is categorically overbroad as compared to the removability provisions at INA §§ 212(a)(2)(A)(i)(II) (providing for inadmissibility for a conviction relating to a federally controlled substance), 237(a)(2)(B)(i) (proving for removability for a conviction relating to a federally controlled substance, 101(a)(43)(B), (U) (providing for aggravated felony for trafficking federally controlled substance, and for attempt). And the “narcotic drug” term is indivisible under *Harbin v. Sessions*,860 F.3d 58 (2d. Cir. 2017).**]**

This Board issued a final order of removal against Respondent after finding the conviction under NYPL § **[insert specific statute and subsection of conviction, e.g. 220.06(5) or 220.39(1)]** is categorically an **[aggravated felony] [and/or] [offense relating to a controlled substance]**. The statute of conviction is a **[“cocaine or “narcotic drug”]** statute and is therefore overbroad an indivisible under *Minter*, making clear that the Board’s decision in Respondent’s case was a legal error.

For three reasons, this Board must **[reconsider and terminate removal proceedings] [and/or] [reconsider, reopen, and remand removal proceedings for purposes of relief]** in Respondent’s case. First, this Board is unauthorized to **[persist with a removal order where the noncitizen is not removable] [and/or] [persist with pretermitting an application for statutory relief where a statutory bar to relief does not exist]**. Second, **[this is a timely filed statutory motion] [or] [this Board must equitably toll any applicable time or number requirements because Respondent exercised reasonable diligence in filing this motion after learning of the Second Circuit’s decision in *Minter*, and because the decision in *Minter* is an extraordinary circumstance and Respondent could not have filed this motion prior to *Minter*, and so this motion must be treated as timely filed under the statute]**. Third, in the alternative, this Board should reconsider or reopen removal proceedings *sua sponte* because the removal error was issued due to legal error and because Respondent’s personal equities require *sua sponte* reconsideration or reopening.

**[IF RESPONDENT IS OUTSIDE OF THE UNITED STATES, ADD:** Further, the instant motion is not barred pursuant to the regulatory departure bar, 8 C.F.R. § 1003.2(d), because the departure bar is unauthorized as applied to motions filed by the parties, under *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In addition, the Second Circuit has held that the departure bar is invalid for statutory motions. *See Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (*overruling Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 653-60 (BIA 2008)).**]**.

**STATEMENT OF FACTS AND STATEMENT OF THE CASE**

 **[ADD: Facts regarding Respondent’s prior immigration status; date of removal order; date of conviction; NYPL statute and subsection of conviction.]** In Respondent’s removal proceedings, the BIA found or held Respondent’s prior conviction to render Respondent **[removable] [and/or] [ineligible for relief]**.

**STANDARDS FOR RECONSIDERATION AND REOPENING**

 A statutory motion to reconsider “shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.” INA § 240(c)(6)(C); *see also* 8 C.F.R. § 1003.2(b)(1). In general, a respondent may file one motion to reconsider, which must be within 30 days of the date of entry of a final removal order. *See* INA § 240(c)(6)(A)-(B); 8 C.F.R. § 1003.2(b)(2). Both the time and number limitations are subject to equitable tolling. *See* *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *Zhao v. INS*, 452 F.3d 154, 158-59 (2d Cir. 2006).

 A statutory motion to reopen “shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.” INA § 240(c)(7)(B); *see also* 8 C.F.R. § 1003.2(c)(1). In general, a respondent may file one motion to reopen, which must be within 90 days of the date of entry of a final removal order. *See* INA § 240(c)(7)(A)-(C); *see also* 8 C.F.R. § 1003.2(c)(2). Both the time and number limitations are subject to equitable tolling. *See* *Iavorski*, 232 F.3d at 134; *Zhao*, 452 F.3d at 158-59.

The INA does not vest the BIA or Immigration Court with authority to impose “conviction”-based statutory removability or relief ineligibility where a conviction does not correspond to a removability provision. *See Woodby v. I.N.S.*, 385 U.S. 276, 277 (1966) (“The question presented by these cases is what burden of proof the Government must sustain in deportation proceedings. We have concluded that it is incumbent upon the Government in such proceedings to establish facts supporting deportability by clear, unequivocal, and convincing evidence.”).

**[IF APPLYING FOR RELIEF, ADD:** “A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation.” 8 C.F.R. § 1003.2(c)(1).**]**.

“[A] panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.” 8 C.F.R. § 1003.1(d)(1)(ii).

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 Pursuant to 8 C.F.R. § 1003.2(e), Respondent believes that 1) the validity of the removal order is not the subject of a judicial proceeding (and Respondent will update this Board if Respondent learns of judicial proceedings); 2) Respondent is not currently the subject of a criminal proceeding under the INA; and 3) Respondent is not currently the subject of any pending criminal prosecution.

**ARGUMENT**

1. **This Motion to Reconsider and/or Reopen Must Be Granted Because It Specifies an Error of Law in the Board’s Decision Ordering Respondent Removed and Is Supported by Pertinent Authority (the *Minter* Decision), the Holding of Which Renders New York’s Statutory Definition of [“Cocaine”** **or** **“Narcotic Drug”] Overbroad and Indivisible, and Thus Respondent’s Conviction Is Categorically not an Aggravated Felony or Controlled Substance Offense and Respondent Is [Not Removable] [and/or] [Eligible for Relief], and Because If Necessary the Fact of the *Minter* Decision Will Be Proven at a Hearing [as Well as the Facts Established in the Relief Application and Evidence Attached to This Motion]**

The Second Circuit’s decision in *Minter* renders the New York statutory term **[“cocaine” or “narcotic drug”]** categorically overbroad and indivisible as compared to the federal controlled substance schedules. The decision therefore corrects the errors of fact and law in the Board’s prior decision in Respondent’s case by clarifying that the **[“cocaine” or “narcotic drug”]** statute of conviction in Respondent’s case is categorically not an aggravated felony or controlled substance offense.

New York defines the term “narcotic drug” at NYPL § 220.00(7). The term “narcotic drug” is defined as “any controlled substance listed in schedule I(b), I(c), II(b), or II(c) other than methadone” in New York’s controlled substance schedules. *Id.* (including cocaine at Schedule II(b)). New York law defines the statutory term “cocaine” at N.Y. Pub. Health Law § 3306, Schedule II(b)(4). In *Minter*, the Second Circuit compared this definition of “cocaine,” which has been in effect since May 2, 1978, against the definition of “cocaine” in the federal Controlled Substances Act (“CSA”) and implementing regulations. *See Minter*, 2023 WL 5730084 at \*3 (comparing N.Y. Pub. Health Law § 3306, Schedule II(b)(4), with the federal CSA, 21 C.F.R. § 1308.12(b)(4)). The court held that the “plain text of the two statutes thus compels the conclusion that New York’s definition of cocaine is categorically broader than the federal definition.” *Minter*, 2023 WL 5730084 at \*4. The court held that the “New York statute applies on its face to all cocaine isomers; the CSA does not.” *Id.* at \*5. The court concluded, “Because we hold that New York’s definition of cocaine is categorically broader than its federal counterpart” the prior cocaine conviction under NYPL § 220.39 (providing an NYPL provision for distribution of a “narcotic drug”) “is categorically broader than its federal counterpart” and therefore “cannot serve as a predicate [Armed Career Criminal Act] offense.” *Id.* at \*1. The ACCA and INA both cross-reference the federal CSA. *Compare* 18 U.S.C. § 924(e)(2)(A) (cross-referencing 21 U.S.C. § 802), *with* INA §§ 212(a)(2)(A)(i) (same), 237(a)(2)(B)(i) (same), 101(a)(43)(B) (same)). Consequently, the New York definition of **[“cocaine” or “narcotic drug”]** is categorically broader than its definition under both the ACCA and the INA. *See also, e.g.*, *United States v. Myers*, 56 F.4th 595, 599 (8th Cir. 2022) (holding that Missouri’s definition of cocaine, which does not define “isomer,” is not a serious drug offense under the ACCA); *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022) (same, with respect to Minnesota); *United States v. Ruth*, 966 F.3d 642, 648 (7th Cir. 2020) (holding that the Illinois definition of cocaine, which includes positional isomers, rendered its controlled substances law overbroad compared to the CSA); *United States v. Fernandez-Taveras*, 511 F. Supp. 3d 367 (E.D.N.Y. 2021); *United States v. Gutierrez-Campos*, No. 21-CR-40 (JPC), 2022 WL 281582 (S.D.N.Y. Jan. 31, 2022); *United States v. Holmes*, No. 21-CR-147 (NGG), 2022 WL 1036631 (E.D.N.Y. Apr. 6, 2022); Sentencing Tr., *United States v. Ferrer*, No. 20-CR-650, ECF No. 25 at 45-6 (S.D.N.Y. July 21, 2021); Sentencing Tr., *United States v. Baez-Medina*, No. 20-CR-24 (JGK), ECF No. 50 at 6-11 (S.D.N.Y. July 1, 2021); Sentencing Tr., *United States v. Louissaint*, No. 20-CR-685 (PKC), ECF No. 35 at 9-26 (S.D.N.Y. Nov. 17, 2021); Sentencing Tr., *United States v. Simmons*, No. 20- CR-294 (PKC), ECF No. 43 at 6-7 (S.D.N.Y. Dec. 14, 2021). In addition, at least three New York Immigration Judges and one additional BIA panel have found New York’s definition of cocaine categorically broader than the federal CSA because it includes isomers that are not covered by the federal CSA. *See, e.g.*, *B-P-*, AXXX-XXX-XXX (BIA July 24, 2023), *available at* https://www.immigrantdefenseproject.org/wp-content/uploads/BIA-Remand-Order-1\_Redacted.pdf; *X-X-X-*, AXXX-XXX-976 (BIA Aug. 16, 2023), *available at* <https://www>.immigrantdefenseproject.org/wp-content/uploads/2023.08.16-BIA-Decision-Redacted-2.pdf ; Decision of IJ Alice Segal (N.Y. Imm. Ct. Dec. 1, 2021), *available at* <https://www>.immigrantdefenseproject.org/wp-content/uploads/IJ-Segal\_12.1.21.pdf; Decision of IJ Margaret Kolbe (N.Y. Imm. Ct. Dec. 7, 2021), *available at* <https://www>.immigrantdefenseproject.org/wp-content/uploads/IJ-Kolbe\_12.7.21.pdf; Decision of IJ Douglas Schoppert (N.Y. Imm. Ct. Aug. 13, 2020), *available at* <https://www>.immigrantdefenseproject.org/wp-content/uploads/IJ-Schoppert\_8.13.20.pdf.

**[IF CONVICTION IS UNDER “NARCOTIC DRUG” PROVISION, ADD:** Under Second Circuit precedent, the New York term “narcotic drug” is indivisible. *See Harbin v. Sessions*,860 F.3d 58 (2d. Cir. 2017). In *Harbin*, the Second Circuit considered the divisibility of New York’s controlled substance statutes. In that case, the court specifically considered divisibility of the statutory term “controlled substance” at NYPL § 220.00(5). *See Harbin*, 860 F.3d at 64. Like the term “narcotic drug” at issue in *Minter*, the term “controlled substance” in *Harbin* cross-references New York’s drug schedules; the “narcotic drug” term cross-references a slightly smaller subsection of the schedules than the “controlled substance” term.” *Compare* NYPL § 220.00(5) (cross-referencing schedules I, II, III, IV, V), *with* NYPL § 220.00(7) (cross-referencing schedules I(b), I(c), II(b), or II(c) other than methadone). Reviewing the text of New York’s statutory law, New York’s state court decisions, and New York’s jury instructions, the court concluded that New York’s “controlled substance” definition Is indivisible. *See Harbin*, 860 F.3d at 68. The decision in *Harbin* clearly renders the “narcotic drug” term indivisible as well. The text of the statutes in *Harbin* and *Minter* are structured almost identically. *See Harbin*, 860 F.3d at 65; *Minter*, 2023 WL 5730084 at \*3. The decision in *Harbin* rests partially on multiple New York State court decisions interpreting the “narcotic drug” term. *See Harbin*, 860 F.3d at 67 (citing and discussing *People v. Miller*, 15 A.D.3d 265 (1st Dep’t 2005); *People v. Martin*, 153 A.D.2d 807 (1st Dep’t 1989)). Finally, the jury instructions governing “controlled substance” cases are virtually, and in all relevant ways, identical to the jury instructions governing “narcotic drug” cases. *See* New York State Unified Court System, Criminal Jury Instructions & Model Colloquies, Penal Law § 220.31, *available at* <https://www.nycourts.gov/judges/cji/2-PenalLaw/220/art220hp.shtml>; New York State Unified Court System, Criminal Jury Instructions & Model Colloquies, Penal Law § 220.39(1), *available at* <https://www.nycourts.gov/judges/cji/2-PenalLaw/220/220-39%281%29.pdf>. Indeed, when the Second Circuit earlier this year ruled on another New York “narcotic drug” overbreadth issue, the court held that the New York narcotic drug offense at issue in that case was categorically overbroad assuming indivisibility of such a New York “narcotic drug” offense. *See United States v. Gibson*,60 F.4th 720 (2d Cir. 2023) and earlier opinion in the case at 55 F.4th 153 (2d Cir. 2022).**]**.

**[IF CONVICTION IS UNDER “NARCOTIC DRUG” PROVISION AND RECORD OF CONVICTION INDICATES COCAINE, ADD**: In any event, in this case, as in the *Minter* case, the record of conviction shows that the “narcotic drug” at issue was cocaine. *SEE* **[ADD CITES TO RECORD OF CONVICTION]**. Consequently, as in *Minter*, Respondent’s “cocaine” conviction is categorically broader than the federal CSA and therefore not an aggravated felony or offense relating to a controlled substance.**]**.

**[IF CONVICTION IS POST-JANUARY-23-2015 UNDER “NARCOTIC DRUG” PROVISION, ADD**: In addition, under the Second Circuit’s precedent in *U.S. v. Gibson*, which considered a New York “narcotic drug” provision (NYPL § 110/220.39), Respondent’s statute of conviction is further overbroad as compared to the federal CSA because Respondent’s conviction occurred after January 23, 2015, and after that date New York’s definition of “narcotic drug” further diverges from the CSA because of New York’s inclusion and the CSA’s exclusion of Naloxegol. *See United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022). In *Gibson*, the Second Circuit recognized that the federal government removed Naloxegol from the CSA’s schedules on January 23, 2015. 55 F.4th at 163 (quoting 21 C.F.R. § 1308.12(b)(1)) (“[O]n Janaury 23, 2015, the DEA issued the Naloxegol Delisting Rule, revising CSA Schedule II’s paragraph (b)(1) introductory text to list as controlled ‘(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding . . . naloxegol.’”). The Second Circuit further recognized that Naloxegol is “an opium alkaloid derivative” that is controlled under “New York law. *Gibson*, 55 F.4th at 157 (citing N.Y. Pub. Health Law § 3306 Schedule II(b)(1) (McKinney 2002); NYPL § 220.00(7) (defining “narcotic drug” to include any derivative of opium)). The Second Circuit consequently found that conviction under the New York “narcotic drug” provision is categorically broader than the federal CSA. *See Gibson*, 55 F.4th at 166 (holding that, under the Sentencing Guidelines which cross-reference the federal CSA, “conviction under [NYPL] § 220.39(1) and 110, was “not a “predicate” offense). Because Respondent was convicted under a “narcotic drug” provision after the January 23, 2015 removal of Naloxegol from the federal CSA, under *Gibson* Respondent’s conviction is clearly not for an aggravated felony or offense relating to a controlled substance.]

Respondent’s conviction is categorically not for an aggravated felony or offense relating to a controlled substance. By treating the conviction as an aggravated felony or offense relating to a controlled substance, this Board committed legal error which it is now obligated to correct by reconsidering the removal order and terminating or remanding these removal proceedings.

1. **This Motion to Reconsider and/or Reopen Must Be Granted Because the Board’s Prior Conclusion That Respondent’s Conviction Was an Aggravated Felony or Offense Relating to a Controlled Substance Was Legal and Factual Error, Now Made Clear and Corrected by *Minter*, and Because the INA Does not Authorize the Board to Perpetuate a Removability or Relief Ineligibility Holding Where No Such Basis Exists, Which Is the Case Here**

Where a “conviction” does not operate to render a noncitizen removable or ineligible to apply for statutory relief, this Board may not perpetuate a removability charge or relief bar. Because *Minter* makes clear that Respondent’s conviction is not an offense relating to a controlled substance or aggravated felony, the removal order in this case was based on legal error and removal proceedings must be terminated or reopened and remanded for a relief hearing.

The Department of Homeland Security (“Department”) “has the burden of establishing by clear and convincing evidence that” an admitted noncitizen “is deportable.” INA § 240(c)(3)(A). “No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.” *Id.* Where a conviction clearly falls outside of a removability category, there is no evidence to satisfy this burden.

A noncitizen “applying for relief or protection from removal has the burden of proof to establish that the” noncitizen “satisfies the applicable eligibility requirements.” INA § 240(c)(4)(A). Under *Minter*, a **[“cocaine” or “narcotic drug”]** conviction does not trigger ineligibility provisions for a drug trafficking aggravated felony or offense relating to a controlled substance. Consequently, the noncitizen’s burden in such cases is satisfied.

The INA unambiguously states the circumstances where the burden is satisfied for a prior conviction to render a noncitizen removable or ineligible for relief. Under *Minter*, **[“cocaine” or “narcotic drug”]** convictions cannot trigger removability or relief ineligibility for a drug trafficking aggravated felony or offense relating to a controlled substance provisions, and thus the Board must reconsider and/or reopen the removal proceedings and removal order in Respondent’s case.

1. **The Instant Motion Is a Timely Filed Statutory Motion [IF FILED MORE THAN 30 DAYS AFTER REMOVAL ORDER, ADD: Because Respondent Merits Equitable Tolling of Any Time and Numerical Limitations]**

 The Second Circuit has held that the statutory time and number limitations on statutory motions to reopen and reconsider are subject to equitable tolling. These time and number limitations in Respondent’s case must be equitably tolled. Thus, Respondent’s motion is a timely motion and not barred by any one-motion rule, and must be granted.

1. **Standard for Equitable Tolling**

 To be “entitled to equitable tolling,” it must be shown that a litigant “(1) 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) (cleaned up). *See also Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). Diligence requires “reasonable diligence,” not “maximum feasible diligence.” *Holland*, 560 U.S. at 653 (cleaned up).

 The Second Circuit recognizes that INA motion deadlines are subject to equitable tolling. *See Iavorski*, 232 F.3d 134. Nine Circuit Courts of Appeals do too. *Cf*. *Bolieiro v. Holder*, 731 F.3d 32, 39 n.7 (1st Cir. 2013) (“Notably, every circuit that has addressed the issue thus far has held that equitable tolling applies to . . . limits to filing motions to reopen.”).[[1]](#footnote-2) The Second Circuit and multiple federal courts likewise recognize that the numeric limit on motions is subject to equitable tolling. *See Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006). *See also, e.g.*, *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002). Thus, any time and numeric requirements as to motions to reconsider or reopen in this case are subject to equitable tolling.

1. **Respondent Has Diligently Pursued [His/Her/Their] Rights and Extraordinary Circumstances Prevented Filing of This Motion Within 30 or 90 Days of the Removal Order**

 The Second Circuit’s decision in *Minter* constitutes an extraordinary circumstance that calls for equitable tolling of the motion deadline in this case. Respondent has acted with the requisite reasonable diligence that further calls for equitable tolling of the motion deadline in this case.

 Respondent vigorously pursued defenses to removal as best possible **[and all the way through the petition for review stage]**. This Board nevertheless applied what it believed to be the law in place at the time and ordered Respondent removed after holding or treating Respondent’s prior **[“cocaine” or “narcotic drug”]** conviction as an aggravated felony or offense relating to a controlled substance. *Minter* is now the first and only case where the Second Circuit has expressly decided that New York’s definition of “cocaine” is categorically overbroad, rendering the term “narcotic drug” also overbroad beginning in 1978. The extraordinary circumstance in this case is that the Second Circuit has now issued a clear holding that dictates that grounds for Respondent’s removal order no longer apply. That the court’s new holding on this question did not issue until 2023 is the only reason that Respondent did not and could not file this motion within 30 or 90 days of the removal order. Respondent diligently pursued **[his/her/their]** rights prior to the issuance of *Minter*.

 Since the *Minter* decision, Respondent has also exhibited the requisite diligence. Respondent first learned of the decision on **[date]**. Respondent is filing the instant motion within **[number]** days of discovering that the Second Circuit has now clarified that the BIA was wrong as a matter of law in finding Respondent’s prior conviction to be an aggravated felony or offense relating to a controlled substance. Respondent is doing so as soon as practicable and therefore has displayed reasonable diligence in pursuing rights.

1. **[IF DEPARTED, ADD: The Regulatory “Departure Bar” Does not Apply to or Bar Respondent’s Motion]**

**[**A regulation has been read to prescribe that a motion to reconsider or reopen should not be accepted by an individual who has been subject to removal proceedings and has departed from the United States. *See* 8 C.F.R. § 1003.2(d). However, the Second Circuit has invalidated this regulation in the context of statutory motions. *See Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011) (*overruling Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 653-60 (BIA 2008)). The court in *Luna* further clarified that this includes motions where a filing deadline is equitably tolled. *Id.* at 95. Because the instant motion is a statutory motion, this regulation does not apply.**]**

In addition, the departure bar regulation, 8 C.F.R. § 1003.2(d), does not bar the *sua sponte* component of this motion. Under the plain language of the regulation, it applies only to only to motions filed by the parties. *See Reyes-Vargas v. Barr*, 958 F.3d 1295, 1305-06 (10th Cir. 2020); *Rubalcaba v. Garland*, 998 F.3d 1031 (9th Cir. 2021). Requests that the BIA exercise its *sua sponte* authority are authorized by separate authority and are not constrained by the regulation. *Id*. Although the Second Circuit has deferred to the BIA’s interpretation that the departure bar applies to *sua sponte* reopening, *see Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010), that decision was superseded by the Supreme Court’s decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (narrowing deference provided to agency interpretations of regulations).**]**.

1. **[IF A PRIOR MOTION TO RECONSIDER OR REOPEN WAS FILED, ADD: Respondent Merits Equitable Tolling on Any Numerical Limitations on Motions to Reconsider or Reopen Because the Second Circuit’s Decision in *Minter* Is an Extraordinary Circumstance That Could not Have Been Raised in Any Previously Filed Motion to Reconsider and/or Reopen]**

**[**Any number-limitation on motions to reconsider or reopen must be equitably tolled because the Second Circuit holds that the number-limitation on such motions is subject to equitable tolling, and because it is warranted in Respondent’s case because Respondent could not have raised the *Minter* decision in any previously filed motion to reconsider or reopen. In general, a respondent may file one statutory motion to reconsider and one statutory motion to reopen. *See* INA §§ 240(c)(6)(A), 240(c)(7)(A); 8 C.F.R. §§ 1003.2(b)(2), 1003.2(c)(2). Both the time and number limitations are subject to equitable tolling. *See* *Iavorski*, 232 F.3d at 134 (holding the statutory deadlines are subject to equitable tolling; *Zhao*, 452 F.3d at 158-59 (holding the number limitations are subject to equitable tolling). Respondent could not have raised the *Minter* decision in any previously filed motion because the Second Circuit did not decide *Minter* until September 6, 2023, and this is Respondent’s first motion to reconsider and/or reopen since that date. Equitable tolling of the one-motion limitation is warranted in this case and thus Respondent’s motion is not barred.**]**

1. **[IF OTHER BASES FOR RECONSIDERATION OR REOPENING EXIST, ADD THEM IN THIS SECTION, INCLUDING ANY APPLICABLE OR REQUIRED EQUITABLE TOLLING ARGUMENT]**
2. **In the Alternative, the Board Should Reconsider Respondent’s Removal Order *Sua Sponte***

 An immigration judge or the Board may reopen or reconsider a case on its own motion at any time. *See* 8 C.F.R. §§ 1003.23(b)(1) (establishing immigration judge authority), 1003.2(a) (establishing BIA authority).[[2]](#footnote-3) The Board invokes its authority to reopen or reconsider a case following fundamental changes in law. *See Matter of G-D-*, 22 I&N Dec. 1132, 1135 (BIA 1999). The decision in *Minter* is a fundamental change in law, as it has clarified that prior Board holdings—such as in Respondent’s case—were incorrect. Consequently, the Board must follow its own precedent regarding *sua sponte* reconsideration and reopening and do so in Respondent’s case.

In addition is warranted in this case given Respondent’s personal circumstances. **[Describe personal equities, such as family ties, work history, tax history, community service, church or community group participation, medical conditions, mental health conditions, family members who are dependent, length of time since conviction, any evidence of relevant rehabilitation].**

This Board should reconsider or reopen Respondent’s case *sua sponte*.[[3]](#footnote-4)

1. **[IF RELIEF ELIGIBILITY ISSUE, ADD: At a Removal Hearing, Respondent Will Prove Relief Should Be Granted]**

If Respondent’s removal proceedings are reopened and remanded for a relief hearing, at that hearing Respondent will prove that **[he/she/they]** should be granted relief in the exercise of discretion, or if applicable as a matter of law.

**[Describe contents of relief application and the facts established in the relief application]].**

**CONCLUSION**

 Under the Second Circuit’s decision in *Minter*, Respondent’s New York **[“cocaine” or “narcotic drug”]** conviction is not for an aggravated felony or offense relating to a controlled substance. Because the Board erroneously treated the prior conviction as an aggravated felony or offense relating to a controlled substance, the Board must **[reconsider and terminate removal proceedings] [and/or] [reopen and remand removal proceedings for purposes of relief]**.

Dated: **\_\_\_\_\_\_\_\_\_\_\_\_** Respectfully submitted,

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **[NAME]**

 **[ADDRESS OF ATTORNEY, OR SAFE MAILING ADDRESS]**

**PROOF OF SERVICE**

I, **[Name]**, hereby certify that on **[date]**, I mailed a copy of this motion by first class mail to:

Office of the Chief Counsel

Immigration and Customs Enforcement

**[ADDRESS OF ICE OPLA OFFICE WHERE IMMIGRATION COURT REMOVAL PROCEEDINGS TOOK PLACE]**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**[Name]**

1. *See also* *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005); *Ortega-Marroquin v. Holder*, 640 F.3d 814,819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) *overruled in part on other grounds* by *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1363 n.5 (11th Cir. 2013) (en banc). [↑](#footnote-ref-2)
2. In December 2020, the Department of Justice proposed regulatory changes to eliminate the Board’s authority to reconsider or reopen removal proceedings *sua sponte*, but those proposed regulations have been enjoined since 2021 and the longstanding *sua sponte* regulation at 8 C.F.R. § 1003.2(a) remains in effect. *See Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919 (N.D. Cal. 2021). On September 8, 2023, the Department of Justice issued a “Notice of proposed rulemaking” that would largely rescind the regulations proposed in 2020 and restore the longstanding regulation at 8 C.F.R. § 1003.2(a). *See* Department of Justice, Executive Office for Immigration Review, DE: 4410-30, Notice of Proposed Rulemaking, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure* (Sept. 8, 2023), *available at* https://public-inspection.federalregister.gov/2023-18199.pdf. [↑](#footnote-ref-3)
3. The departure bar regulation at 8 C.F.R. § 1003.2(d) does not bar *sua sponte* reconsideration and/or reopening in this case. *See supra* Section III. [↑](#footnote-ref-4)