No. 18-60170

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASMIRO CRUZ TELLEZ,
also known as Casimiro Cruz, also known as Casimiro Cruz Tellez,
Petitioner,

v.

JEFFERSON B. SESSIONS, III,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

CONSENTED TO BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE IMMIGRANT DEFENSE PROJECT AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Amici Curiae hereby certify that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Jefferson B. Sessions, III, U.S. Attorney General,

2. Petitioner Casimiro Cruz Tellez

3. Counsel for Respondent, Sharon Michele Clay, U.S. Department of Justice, Office of Immigration Litigation,

4. Counsel for Petitioner, Javier N. Maldonado,

5. Amicus Curiae the American Immigration Council, and

6. Amicus Curiae the Immigrant Defense Project.

s/ Trina Realmuto

Trina Realmuto
American Immigration Council

Dated: May 28, 2018

CORPORATE DISCLOSURE STATEMENTS UNDER FRAP 26.1

I, Trina Realmuto, attorney for Amicus American Immigration Council, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: May 28, 2018 *s/ Trina Realmuto*

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I, Andrew Wachtenheim, attorney for Amicus Immigrant Defense Project, certify that Immigrant Defense Project is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: May 28, 2018 *s/ Andrew Wachtenheim*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION AND STATEMENT OF AMICI[1]

Amici curiae the American Immigration Council (Council) and the Immigrant Defense Project (IDP) proffer this brief to assist the Court in reviewing the Board of Immigration Appeals' (BIA or Board) decision affirming the denial of Petitioner's statutory motion to reopen pursuant to 8 U.S.C. § 1229a(c)(7). *See* ROA.6-11. In this case, two Board members refused to reach the merits of Petitioner's motion because it was untimely. ROA.6-8. A dissenting Board member would have found that Petitioner had established that the deadline should be equitably tolled, and therefore, would have granted reopening in his case. ROA.9-11. Amici agree with the dissent and urge the Court to vacate the decision and remand this case.

To be "entitled to equitable tolling," 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." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotation omitted). The BIA must "take care not to apply the equitable

[1] No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amici, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

tolling standard too harshly . . . .” *Lugo-Resendez v. Lynch*, 831 F.3d 337, 345 (5th Cir. 2016) (quotation omitted).

Here, the BIA misapplied equitable tolling law to those of Petitioner’s claims that it elected to address. Namely, it misapplied case law which recognizes that interference, misadvice, or errors by courts and other government officials that stand in the way of timely filing can constitute an extraordinary circumstance. Likewise, the BIA acted erroneously by entirely failing to address key arguments and evidence that Petitioner presented both with respect to demonstrating both extraordinary circumstances and reasonable diligence.

Finally, the BIA erroneously applied the wrong legal standard to its diligence analysis. The BIA applied a clear error standard of review when it should have applied a bifurcated standard, reviewing the steps Petitioner took to pursue his case prior to seeking reopening for clear error and reviewing *de novo* whether those steps constituted reasonable diligence.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants.

The IDP is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert

legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

Amici have a direct interest in ensuring that noncitizens are not prevented from having statutory motions adjudicated.

II. ARGUMENT

A. THE BOARD MISAPPLIED RELEVANT LAW AND FAILED TO CONSIDER ALL ARGUMENTS AND EVIDENCE DEMONSTRATING EXTRAORDINARY CIRCUMSTANCES

Petitioner provided a detailed account of the extraordinary circumstances that prevented him from filing his motion earlier. *See* ROA.36-53. In a single paragraph, the BIA held only that this Court's decision in *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), could not amount to an extraordinary circumstance because it was issued more than 90 days after Petitioner's final order and, arguably, that Petitioner had not provided evidence to support his citizenship claim. ROA.8 & n.4. In so holding, the BIA misapplied equitable tolling law to the claims that it did mention and wholly failed to address Petitioner's other claims.

1. The BIA Erred by Finding that the State of the Law Prior to this Court's Issuance of *United States v. Hinkle* Could Not Constitute an Extraordinary Circumstance

A range of circumstances, "individually and cumulatively," ROA.36, prevented timely filing in Petitioner's case. These include the courts' ongoing misapplication of the law related both to aggravated felonies and motions to

reopen, as well as Petitioner's personal circumstances, errors by the IJ in the underlying proceeding, and bad legal advice Petitioner received. ROA.36-53. However, the BIA reasoned only that *United States v. Hinkle*, the case which makes clear that Petitioner was never convicted of an aggravated felony, *see infra* Section II.A.1.b, "could not have served as an 'extraordinary circumstance,'" because it was issued after Petitioner's original filing deadline had elapsed. ROA.8.

The BIA misapprehended Petitioner's claim related to *Hinkle*. Petitioner did not argue that *Hinkle* itself was an extraordinary circumstance—rather, the extraordinary circumstance was the pre-*Hinkle* case law that misinterpreted the relevant statutes and led to DHS improperly charge Petitioner as having been convicted of an aggravated felony and the IJ to improperly sustain those charges. *See, e.g.*, ROA.36, 37, 38 (relevant circumstances included "Circuit precedent barring reopening," "uncertainty in the law," and pre-*Hinkle* "obstacle[s] to reopening"). It was this line of cases that the Supreme Court corrected in *Mathis v. United States*, 136 S. Ct. 2243 (2016), on which the *Hinkle* Court then relied to ultimately correct the ongoing legal error the lower courts and Board had been applying.

The Board should have assessed whether—and concluded that—the erroneous interpretation of law in place from the time Petitioner was ordered

removed until *Hinkle* was issued amounted to an extraordinary circumstance. *See* ROA.10 (dissenting BIA opinion "would conclude that the state of the law between January 2000 . . . and 2016, when the Fifth Circuit issued *Hinkle*, was an 'extraordinary circumstance'"). Because the BIA failed to do so, this Court should vacate the Board's order.

a. Agency Error and Interference Can Constitute an Extraordinary Circumstance

A wide range of conduct by individuals or entities other than the party seeking to file after a deadline can create a sufficiently extraordinary circumstance to warrant tolling. Relevant here, interference, misadvice, or errors by courts and other government officials that stand in the way of timely filing can constitute an extraordinary circumstance. *See, e.g.*, *Prieto v. Quarterman*, 456 F.3d 511, 515 (5th Cir. 2006) (tolling warranted where a prior court decision was "crucially misleading"); *In re Wilson*, 442 F.3d 872, 876-77 (5th Cir. 2006) (tolling warranted where since amended procedural rule prevented timely filing); *United States v. Patterson*, 211 F.3d 927, 931-32 (5th Cir. 2000) (equitable tolling based on shared "mistaken impression" between court and petitioner that petitioner relied upon to his detriment); *Torabi v. Gonzales*, 165 Fed. Appx. 326, 331 (5th Cir. 2006) (unpublished) (granting tolling based on petitioner's inability "to obtain

information vital to her . . . claim" because agency did not provide notice of relief eligibility until after the filing deadline).[2]

Significantly, such conduct need not be fraudulent or purposefully misleading to provide a basis for tolling. *See, e.g.*, *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) (affirming equitable tolling finding where a court "unwittingly hindered" litigant from pursuing his claims); *see also Veltri v. Bldg. Serv. 32b-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004) ("The relevant question is . . . whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.").

Similarly, the agency's misinformation about removability and/or eligibility for relief coupled with application of an erroneous legal interpretation can constitute an extraordinary circumstance. The misapplication of the categorical approach by the IJ and by the Board and federal courts in the years leading up to the *Mathis* and *Hinkle* decisions is precisely this type of legal error. Decisions like *Hinkle* clarify that prior interpretations of the law were incorrect at the time they

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[2] *See also Luna v. Holder*, 637 F.3d 85, 99 (2d Cir. 2011) (recognizing tolling warranted where a noncitizen "exercises due diligence . . . and shows that he was prevented by . . . governmental interference from filing the motion on time."); *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008) (granting tolling due to the BIA's failure to notify a noncitizen of appeal decision and subsequent erroneous advice that the case was still pending); *Socop-Gonzales v. INS*, 272 F.3d 1176, 1181, 1193 (9th Cir. 2001) (en banc) (finding tolling due to INS officer's "incorrect advice" and that a party's inability to timely file "need not be caused by the wrongful conduct of a third party").

were issued.[3] *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) ("[I]t is not accurate to say the [court's ruling] 'changed' the law . . . . Rather . . . [the] opinion finally decided what [the statute] had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress.") (emphasis in original); *cf. Mathis*, 136 S. Ct. at 2253.

Here, the agency's misadvice to Petitioner regarding the nature of the conviction was conveyed through the government attorneys prosecuting his case, as well as the IJ accepting and echoing their characterization of the conviction as an aggravated felony. Moreover, this misapplication of the law was compounded by the misadvice from the IJ regarding Petitioner's U.S. citizenship claim, his eligibility to apply for cancellation of removal under 8 U.S.C. § 1229b(a), and his ability to access the administrative appeal process. The agency's advice thus led Petitioner, who appeared pro se, to believe he had no way to remain in the country. *See* ROA.193 (based on IJ's statements, Petitioner understood "that [he] was being deported and that there was no way for [him] to stay in the United States"), 42-47.

This analysis is consistent with decisions of this Court addressing motions to

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[3] BIA decisions demonstrate that, prior to the issuance of *Mathis* and *Hinkle*, erroneous interpretation of the immigration statute would have prevented Petitioner from reopening to seek cancellation of removal. *See Jose Luis Serrano-Fonseca*, A045-181-375, 2007 Immig. Rptr. LEXIS 9077, *2-4 (BIA Jul. 2, 2007) (unpublished) (finding that an offense under Petitioner's statute of conviction was an aggravated felony); *see also infra* Section II.A.1.b.

reopen filed outside of the 90-day filing deadline. This Court has remanded motions to reopen with equitable tolling claims based on prior erroneous interpretations of law to the Board for further consideration. *See, e.g.*, *Lugo-Resendez*, 831 F.3d 337; *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Barajas-Flores v. Sessions*, 702 Fed. Appx. 193 (5th Cir. 2017) (unpublished); *Villegas v. Sessions*, 693 Fed. Appx. 352 (5th Cir. 2017) (unpublished). Were misapplication of law and the misadvice to noncitizens that stemmed from such legal misinterpretations never a valid extraordinary circumstance, these remands would have been futile. *See* ROA.9-10 n.1 (dissenting BIA opinion noting that majority's extraordinary circumstances holding "cannot be logically reconciled with," inter alia, *Lugo-Resendez* and thus "must be incorrect"); *see also* Exh. A, *Sergio Lugo-Resendez*, A034-450-500, *3 (BIA Dec. 28, 2017). Furthermore, factors that this Court found relevant to equitable tolling analysis specifically apply to tolling claims related to changes in law. *Lugo-Resendez*, 831 F.3d at 345 (requiring the BIA to "give due consideration to the reality that many departed [noncitizens] are . . . effectively unable to follow developments in the American legal system"); *id.* (requiring careful consideration of tolling claims "because denying [a noncitizen] 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").

Motions to reopen are well suited to tolling after courts have recognized an error in their prior legal interpretation because they are *intended* to provide litigants with the opportunity to present information and arguments that only became available after the conclusion of their initial proceedings. *See* 8 C.F.R. §§ 1003.2(c), 1003.23(b)(3). In codifying the right to file such motions, Congress created a mechanism with the purpose of "ensur[ing] a proper and lawful disposition" of removal proceedings. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008). Thus, unsurprisingly, the Board regularly reassesses its decisions based on subsequently issued precedent that corrects improper interpretations of law via motions to reopen, including those filed well after the filing deadline. *See, e.g.*, Exh. A, *3 (reopening where "respondent's 2002 conviction no longer renders him removable as charged"); *J. Marcos Cisneros-Ramirez*, A090 442 154, 2016 Immig. Rptr. LEXIS 6189, *1 (BIA Aug. 9, 2016) (unpublished) (reopening based on "intervening changes in the law," including *Garcia-Carias*); *Jose Jesus Zuniga Jaime*, A090 896 200, 2014 Immig. Rptr. LEXIS 6151, *1 (BIA Jan. 4, 2014) (unpublished) (same); *Mario Ruidupret*, A036-066-095, 2007 Immig. Rptr. LEXIS 4300, *2 (BIA May 10, 2007) (unpublished) (reopening to assess eligibility for cancellation because "respondent's controlled substances violation is not an aggravated felony").

b. *Hinkle* Corrected Legal Error by the Board and Demonstrates Prior Agency Action in Petitioner's Case Was an Extraordinary Circumstance

In *Hinkle*, this Court corrected prior errors of district courts and the Board that had improperly classified convictions like Petitioner's as aggravated felonies that preclude cancellation of removal under 8 U.S.C. § 1229b(a)(3). The legal import of *Hinkle* is that it recognized that Petitioner's conviction is subject to the strict categorical approach, is indivisible, and is categorically not an aggravated felony. The *Hinkle* Court reached this conclusion by applying guidance from *Mathis v. United States*, where the Supreme Court corrected errors of the "court[s] below … in applying the modified categorical approach." 136 S. Ct. at 2253. The *Mathis* decision explicitly laid out the proper functioning of the categorical approach and its modified variant.

The Supreme Court in *Mathis*—and this Court in *Hinkle*—was not issuing new law; rather, the courts explained for adjudicators below the correct manner in which to apply "[t]he only use of [the categorical] approach [the Court has] ever allowed." *Id*. (quoting *Descamps v. United States*, 570 U.S. 254, 263 (2013); citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). Thus, "[i]n light of the Supreme Court's recent decision in *Mathis v. United States*, . . . [Petitioner's] conviction for delivery of [marihuana] is not" an aggravated felony, *Hinkle*, 832 F.3d at 571, even at the time the IJ ordered him removed.

Petitioner was convicted for the "Delivery of Marihuana" under Tex. Health & Safety Code § 481.120. *See* ROA.191, 210, 221-222. Central to its holding in *Hinkle*, this Court recognized that Texas's definition of "deliver," defined at Tex. Health & Safety Code § 481.002(8), covers a broader range of conduct than the federal definition of delivery (or other distribution) under 8 U.S.C. § 1101(a)(43)(B), the provision on which the IJ relied.[4] *See Hinkle*, 832 F.3d at 572. The *Hinkle* Court further held that, under *Mathis*, the different kinds of conduct criminalized under § 481.002(8) are alternative means of committing the singular crime of "delivery" under Texas law, rather than alternative elements. *Id*. at 576. The Court held that "[t]he decision in *Mathis* plainly and unmistakably leads to the conclusion that the definition of 'delivery' in section 481.002(8), as authoritatively interpreted by the Texas Court of Criminal Appeals, sets forth various means of committing an offense and does not set forth in the disjunctive separate offenses." *Id*. at 574. Thus, under *Mathis*, Texas's definition of "delivery" is indivisible as to

[4] Though *Hinkle* arose in the context of comparing the Texas definition of deliver at § 481.002(8) to the federal definition of a "controlled substance offense" in the U.S. Sentencing Guidelines, this Court already has decided that "the Guidelines definition of 'controlled substance offense' is nearly identical to the definition of" a drug trafficking aggravated felony under the INA. *Vasquez-Martinez v. Holder*, 564 F.3d 712, 719 (5th Cir. 2009). Thus, under *Hinkle*, a conviction for delivery under § 481.002(8) is categorically not an aggravated felony. Moreover, it is incontrovertible that the categorical approach functions in the same way across immigration and criminal sentencing adjudications. *See Mathis*, 136 S. Ct. at 2251 n.2; *see also, e.g.*, *Gomez-Perez v. Lynch*, 829 F.3d 323, 325 (5th Cir. 2016).

whether it is an immigration aggravated felony and categorically not an aggravated felony.

The misapplication of law in Petitioner's proceedings, as identified in *Hinkle*, and the misleading information that Petitioner received from the IJ because of that error is an extraordinary circumstance warranting equitable tolling. For the years in between Petitioner's removal order and this Court's decision in *Hinkle*, he could not have filed a motion to reopen because the basis for the motion—*i.e.*, this Court's decision in *Hinkle* which relied on *Mathis*—did not yet exist. As the dissenting Board member recognized, failing to find an extraordinary circumstance in Petitioner's case would swallow the protections this Court established in *Lugo-Resendez*. *See* ROA.9 n.1.

2. The BIA Erred by Failing to Address Petitioner's Arguments and Evidence in Support of an Extraordinary Circumstance Finding

In his appeal, Petitioner argued that a confluence of factors "individually and cumulatively" amounted to extraordinary circumstances that prevented timely filing of his motion to reopen. ROA.36. These factors included improper application of the law regarding the classification of aggravated felonies prior to 2016, improper application of the law regarding the availability of motions to reopen for noncitizens who had departed the United States prior to 2016,[5] incorrect

[5] Petitioner could not have moved to reopen prior to *Hinkle* because this Court had not yet corrected the way in which it and the BIA applied the categorical

advice regarding his case from several lawyers he consulted, incorrect advice from the IJ regarding his citizenship claim, failure of the IJ to obtain a sufficient waiver of his administrative appeal rights, and his lack of sophistication and legal knowledge. ROA.36-53. The Board considered *only* Petitioner's contention regarding classification of aggravated felonies prior to 2016 and, arguably, the IJ's incorrect advice regarding his citizenship claim. ROA.8 & n.4.

By failing to "address meaningfully all material factors" raised in noncitizens' claims, the Board erred. *Diaz-Resendez v. INS*, 960 F.2d 493, 495 (5th Cir. 1992)*; see also Abdel-Masieh v. INS*, 73 F.3d 579, 585 (5th Cir. 1996) (requiring BIA decisions to "reflect meaningful consideration of the relevant substantial evidence supporting the [noncitizen]'s claims").

Where the BIA entirely fails to consider arguments or evidence put forth by a noncitizen presenting his case, it fails this basic test. *See*, *e.g.*, *Hernandez v. Lynch*, 825 F.3d 266, 271-72 (5th Cir. 2016) (remanding where BIA failed to "consider[] all relevant evidence" in support of noncitizen's motion to reopen based on lack of

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approach. Furthermore, however, the Court's since-corrected interpretations both of regulations barring reopening after departure and of the availability of tolling the motion to reopen deadline also precluded Petitioner from reopening his case prior to 2016. *See Garcia-Carias*, 697 F.3d 257 (overturning departure bar for noncitizens filing statutory motions); *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015) (barring Fifth Circuit practice of treating equitable tolling claims as requests to reopen sua sponte); *Lugo-Resendez*, 831 F.3d 337 (recognizing that the motion to reopen deadline is subject to tolling); *see also* Exh. A, *3.

notice); *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 387 (5th Cir. 2016) (remanding where BIA and IJ "failed to consider factors central to" the motivation behind mistreatment of noncitizen for purposes of his asylum claim); *see also Sylejmani v. Sessions*, No. 16-60556, 2018 U.S. App. LEXIS 9173, *7, *9-10 (5th Cir. Apr. 12, 2018) (unpublished) (remanding after BIA failed to "meaningfully address" "key elements" of noncitizen's equitable tolling claim). By not addressing Petitioner's arguments regarding the availability of post-departure motions to reopen, the incorrect advice Petitioner received from four immigration lawyers, the IJ's failure to obtain a sufficient appeal waiver, and his lack of sophistication and legal knowledge, the BIA ignored key arguments and evidence. ROA.36-53.

While the BIA is not required to "address evidentiary minutiae or write any lengthy exegesis" on claims raised by a party, *Abdel-Masieh*, 73 F.3d at 585, it "must do more than just refer to relevant factors in passing." *Diaz-Resendez*, 960 F.2d at 497; *see also Ramos v. INS*, 695 F.2d 181, 189-90 (5th Cir. 1983) (requiring the Board to "meaningfully consider[] and evaluate[] each of [a noncitizen's] contentions" and explain why those contentions do not merit relief "individually and in the aggregate"); *Mohideen v. Gonzales*, 416 F.3d 567, 571 (7th Cir. 2005) ("Although the BIA may have some reason for discounting the . . . record evidence, it is not sufficient simply to ignore it when announcing a conclusion."). Thus, the Board may not simply ignore record evidence and

arguments when assessing extraordinary circumstances.

Rather, the BIA must address all relevant arguments in part to ensure that federal courts can meaningfully review its decisions. Where the Board fails to address arguments and evidence, a reviewing court would have to look beyond the agency decision to affirm. But, as the Supreme Court has held:

> [i]f th[e] grounds [an agency invokes for its decision] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Securities and Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947); *see also Abdel-Masieh*, 73 F.3d at 585 ("Where an agency has failed to comply with its responsibilities, we should insist on its compliance rather than attempt to supplement its efforts.") (quotation omitted); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 679 (5th Cir. 2010) ("We may not affirm the BIA's decision except on the basis of the reasons it provided.").[6]

Thus, this Court also should vacate the BIA's decision because it failed to consider all relevant arguments and evidence presented. *Cf.* ROA.10-11 (dissent

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[6] *See also Mekhael v. Mukasey*, 509 F.3d 326, 328 (7th Cir. 2007) ("[T]he Department of Justice cannot be permitted to defeat judicial review by refusing to staff the Immigration Court and the Board of Immigration Appeals with enough judicial officers to provide reasoned decisions."); *Panrit v. INS*, 19 F.3d 544, 545 (10th Cir. 1994) (requiring the BIA to "consider the issues and announce its decision in terms sufficient to enable . . . a reviewing court[] to perceive that it has heard and considered the arguments rather than merely reacted").

would have found Petitioner's motion timely and granted the motion "[c]onsidering the totality of the circumstances").

B. THE BOARD APPLIED AN ERRONEOUS LEGAL STANDARD AND FAILED TO CONSIDER ALL RELEVANT ARGUMENTS AND EVIDENCE DEMONSTRATING DILIGENCE

The BIA should have reviewed whether Petitioner acted with reasonable diligence under a bifurcated standard of review rather than exclusively for clear error. The history and plain language of 8 C.F.R. § 1003.1(d), the relevant regulatory provision governing the standards the BIA must employ when reviewing appeals, as interpreted by the BIA itself, demonstrate that clear error review is reserved for *pure* questions of fact, as distinct from questions *mixed* questions of fact and law, which are reviewed under a bifurcated standard of review. Although the BIA may review the steps Petitioner took to pursue his case for clear error, because they present a purely factual issue, the BIA erred when it failed to apply *de novo* review to whether those steps met the legal standard for reasonable diligence. Had the BIA applied the correct review standard, it would have reviewed all Petitioner's efforts and would have determined that those efforts cumulatively constituted reasonable diligence under his particular circumstances. In addition, in conducting the diligence analysis, the BIA applied reasoning that conflicts with Supreme Court and circuit court precedent.

1. The BIA Reviewed Petitioner's Diligence Claim Under Applied the Wrong Standard of Review

a. The Clear Error Standard of Review Is Reserved for Purely Factual Questions, Whereas Mixed Questions of Law and Fact Are Subject to *De Novo* Review

Historically, the BIA reviewed all aspects of immigration judge decisions *de novo*. *Matter of S-H-*, 23 I&N Dec. 462, 463-64 (BIA 2002). In 2002, the Department of Justice promulgated regulations providing a new standard of review for factual findings and credibility determinations. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002). Under the current regulations, the BIA reviews findings of fact and credibility determinations to determine whether they are clearly erroneous, and reviews *de novo* all other issues, including questions of law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

Notably, when the current regulations were first proposed, commenters expressed concern that the clearly erroneous standard would provide insufficient scrutiny of IJ decisions. 67 Fed. Reg. at 54,888-89. In response, the Justice Department emphasized in the preamble accompanying the final rule that the BIA only would apply clear error review to pure questions of fact, as distinct from questions requiring the exercise of discretion or legal judgment. For instance, the preamble states:

> Where the Board reviews what was previously called a mixed question of law and fact in the proposed rule, and is now referred to as a discretionary decision, the Board will defer to the factual findings of the immigration judge unless clearly erroneous, but the Board members will retain their "independent judgment and discretion," subject to the applicable governing standards, regarding the review of pure questions of law *and the application of the standard of law to those facts*.

Id. (emphasis added); *see also* 67 Fed. Reg. at 54,890 ("[P]roperly understood, the 'clearly erroneous' standard will only apply to the specific findings of fact by the immigration judges, and will not limit the Board to reviewing discretionary determinations."). The Justice Department also explained the respective review standards that would apply in cases involving claims for asylum or cancellation of removal for nonpermanent residents. In asylum cases, determinations of "what happened" to the applicant would be regarded as factual findings reviewed for clear error, while determinations of whether the harm rose to the level of "persecution" would be regarded as a legal question reviewed *de novo*. 67 Fed. Reg. at 54,890. In cancellation cases, the BIA would regard determinations of whether an applicant had one or more qualifying relatives as factual findings and review for clear error, while it would consider whether the relative(s) would suffer "exceptional and extremely unusual hardship" as a legal finding reviewed *de novo*. *Id*.

Subsequent BIA decisions have adhered to this approach, employing a bifurcated standard of review for issues that do not present pure questions of fact.

See, e.g., *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590-91 (BIA 2015) (stating that predictions of what may occur are findings of fact reviewed for clear error, but whether fear of persecution is "well-founded" is a question of law); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390-91 (BIA 2014) (stating that whether a person is member of group is a factual question, while whether that group qualifies as a particular social group is a matter of law); *Matter of Islam*, 25 I&N Dec. 637, 638-69 (BIA 2011); *Matter of A-G-G-*, 25 I&N Dec. 486, 488 (BIA 2011). This is also the approach Petitioner took in his appeal brief to the BIA. *See* ROA.19.

b. The BIA Erroneously Relied on *Penalva* to Support Application of the Clear Error Standard

Petitioner was required to show he pursued his claim with "reasonable diligence," but not "maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotations omitted); *Lugo-Resendez*, 831 F.3d at 344 (same, quoting *Holland*). The BIA erroneously treated the reasonable diligence determination as factual for purposes of administrative review and thus reviewed only for clear error, based on its misapplication of *Penalva v. Sessions*, 884 F.3d 521 (5th Cir. 2018). ROA.7 (citing *Penalva* and 8 C.F.R. § 1003.1(d)(3)(i)). In *Penalva*, this Court considered whether the petitioner's challenge—on a petition for review—of the BIA's conclusion that he failed to exercise diligence in pursuing an ineffective assistance of counsel claim was a question of law or fact. *Penalva*, 884 F.3d at 525. Although it determined that, for purposes of *federal court review*, the Board had made a

factual determination, the Court expressly left open the issue presented here: whether, for purposes of *administrative review*, the Board had applied the wrong legal standard in its review of Petitioner's diligence claim. *See id*. ("Penalva does not allege that the BIA applied the wrong legal standard when it determined that Penalva 'failed to exercise due diligence in pursuing her claim of ineffective assistance of counsel . . . .'"). Specifically, the Court was not presented with, and therefore did not address, whether the BIA is bound by the regulations governing the standards of its review.[7]

Thus, the BIA was wrong to apply *Penalva* – which classified the nature of the BIA's diligence determination as factual when challenged on petition for review – to the nature of determination on administrative review. *Accord Medina-Herrera v. Gonzales*, 162 Fed. Appx. 329, 331 (5th Cir. 2006) (unpublished) (finding that "where the facts on the record are undisputed, and the result is inarguable, the BIA may determine *as a matter of law* that a party failed to exercise due diligence") (emphasis added).[8]

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[7] Amici believe that *Penalva* was wrongly decided. However, because the Court did not address the specific issue Petitioner presents, it does not limit the Court in this case, regardless. *Accord Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding that *stare decisis* is not applicable unless the issue was "squarely addressed" in the prior decision); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[8] Citing *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005), *Former*

c. Whether Petitioner Demonstrated Reasonable Diligence Is a Mixed Question of Fact and Law Which Required the BIA to Apply a Bifurcated Standard of Review

Whether Petitioner met the reasonable diligence standard is a mixed question of fact and law for which the BIA should have employed a bifurcated standard of review. *See* 67 Fed. Reg. at 54,88-89 (requiring clear error review of "factual findings" and *de novo* review of "the application of the standard of law to those facts"). Specifically, while the BIA must review the IJ's factual findings regarding the steps Petitioner took to pursue his case prior to seeking reopening for clear error, it should have employed *de novo* review in assessing whether those steps met the reasonable diligence standard. If the Court finds that the BIA employed the wrong standard of review, the Court must remand the case for the BIA to apply the correct standard of review.

A mixed question of fact and law is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). Mixed questions must be reviewed "under a hybrid

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Employees of Sonoco Prods. Co. v. Chao, 372 F.3d 1291, 1295 (Fed. Cir. 2004), and *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) and considering 8 C.F.R. § 1003.1(d), the Court found that *for the purposes of determining what standard of review applied to the Board's assessment of diligence*, the BIA may make a diligence finding as a matter of law. *Medina-Herrera*, 162 Fed. Appx. at 331.

standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining de novo the legal conclusions derived from those facts." *United States HHS v. Smitley*, 347 F.3d 109, 116 (4th Cir. 2003) (quotation omitted).

Whether Petitioner's efforts to address his removal order were reasonably diligent is a mixed question of fact and law for which the BIA should have applied a bifurcated review standard. The term "reasonable diligence" reflects a legal standard that must be applied in light of specific "historical facts." *Pullman-Standard*, 456 U.S. at 289 n.19. For instance, Petitioner's age and education, the fact that he was detained between issuance of the removal order and execution of that order, what the immigration judge told (or failed to tell) Petitioner about his immigration options (including, inter alia, his right to appeal the IJ's finding of deportability), and the efforts Petitioner took to address his removal order (including contacting four attorneys), all are factual findings which the BIA was required to have considered and reviewed for clear error.

By contrast, whether those factual findings—as determined by the IJ and found not to be clearly erroneous by the BIA—demonstrate that Petitioner acted with "reasonable diligence" requires examination of the legal conclusion derived from those facts. *See, e.g.*, *Holland*, 560 U.S. at 653 (providing diligence standard) As such, it is a mixed question of fact and law that the Board reviews *de novo*. *See*

supra Section II.B.1.a. This *de novo* standard of review for mixed questions is consistent with this Court's precedent. *See, e.g., Gandy v. United States*, 234 F.3d 281, 284 (5th Cir. 2000) ("We review the district court's conclusion that agents McPherson and Sanders acted in good faith as a mixed question of fact and law. We review the court's subsidiary fact findings for clear error and its legal conclusions and application of law to fact de novo."); *Houston Sportsnet Finance, L.L.C. v. Houston Astros, L.L.C.*, 886 F.3d 523, 527 (5th Cir. 2018) ("[V]aluation is a mixed question of law and fact, the factual premises being subject to review on a clearly erroneous standard, and the legal conclusions being subject to *de novo* review.") (quotations omitted); *Davis v. Heyd*, 479 F.2d 446, 450-51 (5th Cir. 1973) (listing mixed questions of law and fact and noting that they "call[] ultimately for a legal determination"); *cf. Medina-Herrera*, 162 Fed. Appx. at 331 (agreeing with circuit cases recognizing that "whether a party exercised due diligence may be a conclusion of law").[9]

This Court has held that "the BIA is not entitled to state the correct legal standard but actually apply an incorrect standard." *De Rodriguez v. Holder*, 585

[9] As discussed *supra*, the Court in *Penalva* reached a different conclusion and treated diligence determinations as findings of facts for the purposes of federal court review. However, *Penalva*, unlike *Medina-Herrera*, did not address whether diligence analysis should be treated as factual or legal under the BIA's regulations for purposes of determining the standard of review for administrative review by the BIA. *See also supra* Section II.B.1.b.

F.3d 227, 235 (5th Cir. 2009). In *De Rodriguez*, this Court reversed and remanded a petition for review "[b]ecause the BIA applied the incorrect legal standard to conclude that the marriage was not entered into in good faith." *Id*. at 230.[10] Here, the BIA both has stated *and* applied the incorrect legal standard. As such, the BIA's decision warrants reversal and remand. *See Eduard v. Ashcroft*, 379 F.3d 182, 194 (5th Cir. 2004) ("[T]he IJ's denials of Petitioners' applications for asylum and withholding of removal . . . are reversed and remanded for a determination under the proper legal standards."); *Mikhael v. INS*, 115 F.3d 299, 305 (5th Cir. 1997) (remanding petition for review where "the IJ applied the wrong standard of proof in determining Mikhael's claim of a well-founded fear of persecution."); *Upatcha v. Sessions*, 849 F.3d 181, 182 (4th Cir. 2017) (granting petition for review and remanding case where BIA applied the wrong standard of review on appeal); *Santos-Guaman v. Sessions*, No. 16-2204, _ F.3d _, 2018 U.S. App. LEXIS 13491, *12 (1st Cir. 2018) (remanding case "to the BIA for it to apply the correct standard" applicable to child asylum claims); *Rizal v. Gonzales*, 442 F.3d 84, 89 (2d Cir. 2006) ("This Court will similarly vacate and remand BIA decisions that result from flawed reasoning or the application of improper legal standards.").

[10] Although the BIA recites the standard of review at 8 C.F.R. § 1003.1(d), *see* ROA.6, the BIA specifically stated it was applying a clear error standard to its diligence determination, ROA.8.

2. In the Alternative, the BIA's Diligence Determination Was Insufficient and Erroneous

Alternatively, the BIA both failed to consider arguments and evidence Petitioner presented in support of his diligence claim and improperly applied case precedent involving diligence.

First, in holding that Petitioner was not sufficiently diligent, the BIA *solely* based its decision on whether Petitioner made efforts to address his removal order in the 90 days between January 2000, the date of his deportation order, and April 2000. ROA.7-8. The BIA ignored other arguments Petitioner put forward and record evidence of the IJ's role in misleading him into believing nothing could be done in his case. *See supra* Section II.A.2. The Board's failure to review arguments and evidence presented warrants remand. *Id*.

Second, the BIA's analysis conflicts with precedent. The doctrine of equitable tolling is rooted in common law principles of equity, defined as "[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances. . . ." Black's Law Dictionary (10th ed. 2014). This requires an analysis of "whether the claimant could reasonably have been expected to have filed earlier," rather than "the length of the delay in filing." *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005).

As this Court has indicated, a person's particular circumstances with respect to learning of the availability of a motion to reopen is critical to the diligence

analysis. *See Gonzalez-Cantu v. Sessions*, 866 F.3d 302, 305 (5th Cir. 2017) (affirming BIA's finding that petitioner failed to demonstrate diligence because she had not filed motion to reopen within 90 days of having "actually learned" of a circuit decision enabling her to seek reopening); *Lugo-Resendez*, 831 F.3d at 340 (remanding case to BIA where petitioner attempted to demonstrate diligence through an affidavit addressing the date he "bec[a]me aware" of the possibility of reopening and that he acted immediately to pursue reopening upon confirmation that such a motion was "possible."); *cf.* ROA.9-10 n.1 (noting that the majority's analysis treats the tolling discussion in *Gonzalez Cantu* as dicta). Here, Petitioner demonstrated that he filed his motion to reopen within 90 days of "first learning" that he had a legal claim. ROA.10; *see* ROA.48, 72, 179-80, 195. Filing within this 90-day period meets the diligence standard set forth in *Gonzalez-Cantu* and *Lugo-Resendez*.

Finally, the BIA's conclusion that tolling is never warranted based on events occurring after the deadline has passed, *see* ROA.7 (referring to retroactive application of the tolling deadline) – is inconsistent with decisions which, in practice, extend statutes of limitations where a subsequent decision reveals an error of law. *See generally Heck v. Humphrey*, 512 U.S. 477, 489-90 (1992) ("[C]ause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated."); *Hamilton v.*

Lyons, 74 F.3d 99, 102-03 (5th Cir. 1996) (applying *Heck* to a claim challenging pretrial detainee's confinement).

III. CONCLUSION

The Court should grant the petition for review, vacate the Board's decision, and remand this case.

Respectfully submitted,

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Dated: May 28, 2018

CERTIFICATE OF SERVICE

I, Trina Realmuto, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 28, 2018. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(g) AND 5TH CIR. R. 32.3

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 Times New Roman.

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Dated: May 28, 2018

EXHIBIT A, *Sergio Lugo-Resendez*, A034-450-500 (BIA Dec. 28, 2017)

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.

EXHIBIT A

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