**APPENDIX B**

**SAMPLE**

**Motion to Reconsider To TERMINATE REMOVAL PROCEEDINGS**

**(FOR FILING WITH THE BIA)**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.  It is not intended as, nor does it constitute, legal advice.  DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

This motion is applicable to:

Cases in which an aggravated felony for “sexual abuse of a minor” under INA § 101(a)(43)(A) was the sole ground of removability and, as a result of *Esquivel-Quintana v. Sessions*, the person is no longer deportable

Accordingly, the motion seeks reconsideration and termination of removal proceedings.

This sample motion is intended for filing with the Board of Immigration Appeals (BIA). If the person did not appeal to the BIA, the motion should be filed with the Immigration Court and different regulations apply.

In cases where the person was deportable based on an aggravated felony for sexual abuse of a minor *and* some other ground of removability, counsel should assess whether the person now is eligible for relief from removal as a result of *Esquivel-Quintana v. Sessions*. These respondents would need to seek reconsideration and the opportunity to apply for relief from removal.

[If applicable: DETAINED]

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

In the Matter of: )

)

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,** ) A Number:**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

)

Respondent. )

)

In RemovalProceedings. )

)

**MOTION TO RECONSIDER AND TERMINATE**

**IN LIGHT OF *ESQUIVEL-QUINTANA v. SESSIONS***

**I.** **INTRODUCTION**

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, \_\_\_\_\_\_, hereby seeks reconsideration in light of the Supreme Court’s recent precedent decision in *Esquivel-Quintana v. Sessions,* No. 16-54, -- U.S. --, 2017 WL 2322840 (May 30, 2017). In *Esquivel-Quintana*, the Supreme Court held that the aggravated felony of “sexual abuse of a minor” does not reach state statutory rape offenses focused solely on the age of the participants where the younger participant could have been age 16 or over. 2017 WL 2322840 at \*10. Furthermore, the Court’s holding overrules the Board’s contrary decision in *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015).

The Board should reconsider its decision and terminate removal proceedings against Respondent because the Court’s decision in *Esquivel-Quintana* controls this case.

**II.** **STATEMENT OF FACTS AND STATEMENT OF THE CASE**

The Department of Homeland Security (DHS) alleged that Respondent was admitted as a lawful permanent resident on \_\_\_\_\_. *See* Notice to Appear, dated \_\_\_\_. DHS charged Respondent with deportability for an aggravated felony under INA § 101(a)(43)(A) for sexual abuse of a minor.

On \_\_\_\_\_\_\_, the Immigration Judge (IJ) found Respondent deportable as charged. *See* IJ Decision. This Board affirmed the IJ’s decision on \_\_\_\_\_\_**.** *See* BIA Decision.

Pursuant to 8 C.F.R. § 1003.2(e), Respondent declares that:

(1) The validity of the removal order [has been or is OR has not been and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The proceeding took place on: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The outcome is as follows \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

(2) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

(3) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

**III.** **STANDARD FOR RECONSIDERATION**

A 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); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider within 30 days of the date of a final removal order. INA § 240(c)(6)(A)&(B), 8 C.F.R. § 1003.2(b)(2).

[If motion is filed within 30 days of BIA’s decision] The Board issued its decision in Respondent’s case on \_\_\_\_\_\_. This motion is timely filed within 30 days of the date of that decision].

[If more than 30 have elapsed since the date of the Board’s decision] The Board issued its decision in Respondent’s case on \_\_\_\_\_\_. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time [if applicable: and numeric] limitations. *See* § IV.B., *infra*; *see also* 8 C.F.R. § 1003.1(d)(1)(ii) (“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.”).

**IV. ARGUMENT**

1. **As a Matter of Law, the Board Erred in Finding that Respondent’s Conviction Categorically Qualified as an Aggravated Felony for “Sexual Abuse of a Minor.”**

In *Esquivel-Quintana v. Sessions*, the Supreme Court addressed the aggravated felony of “sexual abuse of a minor,” defined in INA § 101(a)(43)(A).

In 2009, Mr. Esquivel-Quintana pleaded no contest in California to “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” under Cal. Penal Code Ann. §261.5(c) (West 2014). *Esquivel-Quintana v. Sessions,* 2017 WL 2322840 at \*3. For purposes of that offense, California defines “minor” as “a person under the age of 18 years.” *Id.* Notwithstandingthat the California offense here involved or could have involved consensual sex with a person who was age 16 or 17, conduct which would not have constituted a crime under federal and most states’ statutory rape laws, the IJ found that the conviction qualified categorically as an aggravated felony for “sexual abuse of a minor.” *Id*. Both this Board and the Sixth Circuit Court of Appeals affirmed the IJ’s deportability finding.

The Supreme Court reversed, concluding that the petitioner was not deportable for the aggravated felony of “sexual abuse of a minor.” In doing so, the Court rejected the Board’s erroneous conclusion that a statutory rape offense involving a 16- or 17-year-old victim could qualify as “sexual abuse of a minor” where the statute required a meaningful age difference between the victim and offender. *Matter of Esquivel-Quintana*, 26 I&N Dec. 469, 477 (BIA 2015).

The Court concluded that in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of “sexual abuse of a minor” requires the age of the victim to be less than 16. *Esquivel-Quintana v. Sessions,* 2017 WL 2322840 at \*10. The Court based its holding on the text of the statute, the structure of the INA, and evidence from the federal and state criminal codes, all of which confirmed that the generic age of consent in statutory rape laws is 16. *Id*. at \*5-9.

[Insert if applicable] Like the petitioner in *Esquivel-Quintana*,Respondent was charged with and found deportable for the aggravated felony of “sexual abuse of a minor,” under INA § 101(a)(43)(A). *See* BIA Decision at p. \_\_. As in *Esquivel Quintana*, Respondent’s statute of conviction covers statutory rape based solely on the age of the participants where the younger participant could have been age 16 or over. In light of the Supreme Court’s decision in *Esquivel-Quintana*, the Board should grant reconsideration and terminate removal proceedings against Respondent.

[If more than 30 days have elapsed since the BIA’s decision, insert section B]

**B. THE BOARD SHOULD TREAT THE INSTANT MOTION AS A TIMELY FILED STATUTORY MOTION BECAUSE RESPONDENT MERITS EQUITABLE TOLLING OF THE TIME AND NUMERICAL LIMITATIONS**.

**1. Standard for Equitable Tolling**

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), or, under the doctrine of equitable tolling, as soon as practicable after finding out about an extraordinary circumstance that prevented timely filing.

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. Florida*,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 Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007). The Supreme Court also requires that those seeking equitable tolling pursue their claims with “reasonable diligence,” but they need not demonstrate “maximum feasible diligence.” *Holland*, 560 U.S. at 653 (internal quotations omitted).

The Supreme Court also has recognized a rebuttable presumption that equitable tolling is read into every federal statute of limitations. *Holland*, 560 U.S. at 631. Thus, ten courts of appeals have recognized that motion deadlines in immigration cases are subject to equitable tolling. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *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); *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); *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.”). [If applicable] Similarly, federal courts recognize that the numeric limit on motions is subject to tolling. *See Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) Thus, the time and numeric limitations on motions to reconsider at issue in this case are subject to equitable tolling.

**2. Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary**

**Circumstances Prevented Timely Filing of this Motion.**

The Supreme Court’s decision in *Esquivel-Quintana* constituted an extraordinary circumstance that prevented Respondent from timely filing a motion to reconsider and he/she pursued his/her case with reasonable diligence. Equitable tolling of the motion to reconsider deadline is warranted in this case.

The Supreme Court’s decision in *Esquivel-Quintana* rejected the Board’s erroneous interpretation of the aggravated felony of “sexual abuse of a minor,” defined in INA § 101(a)(43)(A), which was previously applied in Respondent’s case. *See* [if applicable] Underlying decision (*citing Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015)); *supra* Section IV.A. [Also include if there was a relevant binding courts of appeals decision that had an improper interpretation of the aggravated felony definition.] This extraordinary circumstance prevented Respondent from timely filing his/her motion to reconsider.

*Esquivel-Quintana* was decided on May 30, 2017. Respondent has exhibited the requisite diligence both before and after learning of the decision. She/he first learned of the decision on \_\_\_\_\_\_\_\_\_\_\_ when \_\_\_\_\_\_\_\_\_\_\_\_\_. *See* Declaration of Respondent. She/he is filing the instant motion to reopen within \_\_\_ days of discovering that [she/he] is not deportable [insert if true] and within 30 days of the Supreme Court decision. As set forth in Respondent’s accompanying declaration, Respondent attempted to challenge the Immigration Judge’s decision by appealing the decision to this Board, [if applicable] and later via Petition for Review to the U.S. Court of Appeals for the \_\_\_\_\_ Circuit. [If Respondent did not seek circuit review, explain the reason why and support claims with corroborating evidence if possible; If Respondent sought review, explained what happened]. [Include any other steps Respondent took to pursue case prior to the *Esquivel-Quintana* decision including contacting attorneys.] Respondent is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing his/her rights.

**C. 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); 1003.2(a). 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 Supreme Court’s decision in *Esquivel-Quintana* amounts to a fundamental change in law warranting sua sponte reopening or reconsideration. *See supra* Section IV.A. Reconsideration is especially warranted in this case because [include other equitable factors]. *See* Respondent’s Declaration.

**V. CONCLUSION**

The Board should reconsider its prior decision in this case and terminate removal proceedings against Respondent.

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

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

[Attach proof of service on opposing counsel]