**SAMPLE**

**Motion to Reconsider OR 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 the noncitizen was found removable due to a drug trafficking aggravated felony under INA § 101(a)(43)(B) or offenses relating to controlled substances under INA § 237(a)(2)(B)(i) for a narcotics conviction and, as a result of *United States v. Gibson*, the person is no longer deportable or is eligible for relief.

Accordingly, the motion seeks reconsideration and termination of removal proceedings or remand to the Immigration Judge.

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 a drug trafficking aggravated felony *and* some other ground of removability, counsel should assess whether the person now is eligible for relief from removal as a result of *United States v. Gibson*. These respondents would need to seek reconsideration and the opportunity to apply for relief from removal.

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. )

)

**STATUTORY MOTION TO RECONSIDER AND [REOPEN] [TERMINATE] REMOVAL PROCEEDINGS IN LIGHT OF *UNITED STATES V. GIBSON*, AND IN THE ALTERNATIVE *SUA SPONTE* MOTION TO RECONSIDER AND [REOPEN] [TERMINATE] REMOVAL PROCEEDINGS IN LIGHT OF *UNITED STATES V. GIBSON***

**INTRODUCTION**

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (“INA”), Respondent, X, (hereinafter “Mr. X), hereby seeks reconsideration in light of the U.S. Court of Appeals for the Second Circuit’s precedent decision in *United States v. Gibson*, No. 20-3049, 2023 WL 2125248 (2d Cir. Feb. 21, 2023), holding that New York “narcotic” offenses are categorically broader than the federal controlled substance schedules. As a result, New York narcotic convictions such as Mr. X’s are overbroad and indivisible and categorically not aggravated felonies under INA § 101(a)(43)(B) or offenses relating to controlled substances under INA § 237(a)(2)(B)(i). This Board issued a final order of removal against Mr. X, previously a lawful permanent resident, after finding his conviction under N.Y. Penal Law § [statute with subsection], [name of statute], was categorically [an “aggravated felony” under INA § 101(a)(43)(B) and § 237(a)(2)(A)(iii)] [a “controlled substance offense” under INA § 237(a)(2)(B)(i)] and otherwise upholding his order of removal. The Second Circuit, under whose jurisdiction Mr. X’s removal proceedings arise, has now held that New York narcotic convictions are categorically broader than federal controlled substance schedules following January 23, 2015 removal of naloxegol, an opiate derivative, from the federal schedule. Mr. X’s conviction postdates the removal of naloxegol from the federal schedule. *See* [citation for certificate of disposition and date of conviction]; 80 Fed. Reg. 3468, 3469, 2015 WL 273535 (F.R.) (Jan. 23. 2015) (reflecting removal of naloxegol from the federal schedule on January 23, 2015. *Gibson* makes clear that the Board’s decision in Mr. X’s case was a legal error.

Accordingly, [statute] is an overbroad, indivisible offense that does not trigger the removal ground charged in Mr. X’s proceedings. The Board must reconsider its decision and [reopen] [terminate] the removal proceedings against Mr. X. The Board should consider this a timely filed statutory motion to reconsider because the Second Circuit’s decision in *Gibson* is an extraordinary circumstance and because he has acted diligently in moving for reconsideration since learning of the *Gibson* decision. In the alternative, the Board should reconsider the decision under sua sponte.

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

[Facts regarding respondent’s immigration status, dates of removal proceedings and order of removal, date and statute of conviction, prior briefing re: narcotics overbreadth, etc.]

**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).

The Board issued its decision in Respondent’s case on [date]. The Board should treat the instant motion as a timely filed statutory motion to reconsider because Respondent merits equitable tolling of the time and numeric limitations. *See infra* § X *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.”).

[Further, the instant motion is not barred pursuant to the regulatory departure bar because the Second Circuit has held that the departure bar is invalid for statutory motions. 8 C.F.R. § 1003.2(d); *see infra* § X.]

**ARGUMENT**

1. **The Second Circuit Held in *Gibson* That, as a Matter of Law, New York’s Definition of Narcotic Is Overbroad as to the Federal Controlled Substance Schedule as of January 23, 2015, Making Mr. X Clearly [Not Removable] [Eligible for Relief]**

On February 21, 2023, the Second Circuit issued a precedential opinion holding that a conviction under N.Y.P.L. §§ 110-220.39(1) for attempted criminal sale of a controlled substance in the third degree—which exclusively covers New York narcotic drugs— is not a proper predicate controlled substance offense under § 4B1.1 of the advisory Sentencing Guidelines, because the January 23, 2015 removal of naloxegol from the federal controlled substances schedules “rendered those schedules categorically narrower than the New York drug schedules.” *United States v. Gibson*, No. 20-3049, 2023 WL 2125248, \*1 (2d Cir. Feb. 21, 2023). The decision granted a government petition for rehearing after a prior decision in the case but denied the request for an amended opinion. In so doing**,** the Second Circuit made clear that its ruling that the January 23, 2015 exclusion of naloxegol from the federal schedules made the New York drug schedules categorically broader as to this substance is a precedential circuit holding.

In the prior decision on December 6, 2022, the Second Circuit stated that “the New York schedule was broader than the [federal] schedules” at the relevant time of comparison.[[1]](#footnote-2) *United States v. Gibson*, 55 F.4th 153, 155 (2d Cir. 2022). The conviction was therefore “not a controlled substance offense” under the sentencing guidelines, as the removal of naloxegol made “federal law categorically narrower than the state-law counterpart.” *Id.* at 155, 167. However, the court emphasized in its decision that “the government did not [, in *Gibson*,] argue that the New York law was not broader than the current federal schedules,” thereby indicating that the December 6, 2022 decision may not have been a definitive determination as to the overbreadth of the New York Schedule. *Id.* at 158-59. *Bingham v. United States*, 296 U.S. 211, 218 (1935) (“[Q]uestions 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.”) (internal citation omitted). As such, the government filed a petition for rehearing in the case, arguing that the December 6, 2022 overbreadth was dictum rather than a holding and asking the court to issue an amended opinion so stating.

In the February 21, 2023 decision denying the request for an amended opinion, the Second Circuit stated:

The fact that the government elected not to contest the divergence did not mean that “the issue” did not exist or that the district court was relieved of its normal obligation to calculate the applicable Guidelines range. …

Plainly, the comparability of the New York's 2002 drug schedules and the current federal drug schedules was an issue that the district court was required to, and did, decide in order to make a determination as to what Gibson's Guidelines sentence would be. This Court was required to, and did, determine whether the district court's decision was correct. The government's request for an amended opinion suggesting that these rulings were not holdings is denied.

*Gibson*, No. 20-3049, 2023 WL 2125248 at \*3. This decision holds -- now as a matter of clear circuit precedent – that post-January 23, 2015, the New York definition of “narcotic” is in fact broader than the federal definition of “a controlled substance.”[[2]](#footnote-3)

The *Gibson* decision immediately and necessarily has the same impact on the removal grounds under INA § 237(a)(2)(A)(iii) and INA § 101(a)(43)(B) for drug trafficking aggravated felony convictions and INA § 237(a)(2)(B)(i) for controlled substance offense convictions. Just as § 4B1.1 of the advisory Sentencing Guidelines, the INA requires that a drug trafficking aggravated felonies and controlled substance offenses involve a “controlled substance” as defined at 21 U.S.C. § 802, the federal Controlled Substances Act. *See* INA § 101(a)(43)(B), INA § 237(a)(2)(B)(i). Under *Gibson*, Mr. X’s conviction plainly falls outside both grounds of removability, as it postdates the removal of naloxegol from the federal schedule on January 23, 2015. As such, the Board should grant reconsideration and [terminate removal proceedings against Mr. X [remand to the Immigration Judge for consideration of Mr. X’ application for X].

1. **The Board Should Treat the Instant Motion as a Timely Filed Statutory Motion because Respondent Merits Equitable Tolling of the Time and Numerical Limitations.**
2. **Standard for Equitable Tolling**

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, *see* 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[[3]](#footnote-4), including the Second Circuit where Mr. X’s case arises, 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.). *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.”). The federal courts, including the Second Circuit, likewise 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.

1. **Respondent Is Diligently Pursuing His Rights and Extraordinary Circumstances Prevented Timely Filing of this Motion.**

The Second Circuit’s decision in *Gibson* constitutes an extraordinary circumstance that calls for equitable tolling of the motion to reconsider deadline in this case.

Mr. X vigorously pursued defenses to removal [all the way through the petition for review stage]. His arguments, under the law in place at the time, were rejected by the [Board]. *Gibson* is the first and only case where the Second Circuit clearly considered overbreadth of the New York narcotics definition for naloxegol. The extraordinary circumstance in this case is that the Second Circuit has now issued a clear holding that dictates that grounds for Mr. X’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 Mr. X did not timely move to reconsider his removal order.

*Gibson* was decided on February 21, 2023. Mr. X has exhibited the requisite diligence both before and after learning of the decision. He first learned of the decision on [date] when he was contacted by present counsel. He is filing the instant motion to reopen within X days of discovering that he is not deportable and within 30 days of the Second Circuit’s decision. Mr. X attempted to challenge the Immigration Judge’s decision by [appealing the decision to this Board]. Mr. X is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing his rights.

1. **[If applicable] Respondent’s Motion is Not Barred by the Departure Bar.**

A regulation prescribes that a motion to reconsider should not be accepted by an individual who is subject to removal proceedings and has departed from the United States. 8 C.F.R. § 1003.2(d). However, the Second Circuit has invalidated the so-called “departure bar” in the context of statutory motions to reopen. *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 BIA retains jurisdiction over statutory motions even post-departure). The Court in *Luna* clarified that such statutory motions include motions filed outside of the filing deadlines but which are equitably tolled. *Id.* at 95.

The instant motion is a statutory motion, filed pursuant to INA § 240(c)(6)(C). As such, the instant motion is not barred by the departure bar.

1. **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 Second Circuit’s decision in *Gibson* amounts to a fundamental change in law warranting sua sponte reopening or reconsideration. *See supra* § X. Reconsideration is especially warranted in this case given [equities].

[Equities]

Given the above, the Board should sua sponte reconsider his removal order [and allow him to return to the United States and his family.]

**CONCLUSION**

The Board should reconsider its prior decision in this case and [terminate removal proceedings against Respondent] [remand for consideration of his application for cancellation of removal].

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

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

1. The government argued in *Gibson* that the appropriate point of comparison of the state and federal schedules was the time of Mr. Gibson’s New York conviction in 2002. The court rejected that argument, but found it unnecessary to decide whether the correct time of comparison is the commission of the federal offense or the conviction of the federal offense, as the New York schedule was overbroad as to the federal schedule regardless of which applied. 55 F.4th at 166. The timing of comparison is not at issue in immigration cases. *See Doe v. Sessions*, 886 F.3d 203, 208 (2d Cir. 2018) (holding that in immigration cases the proper comparison is between the state and federal drug schedules as they were at the time of conviction). [↑](#footnote-ref-2)
2. The Second Circuit’s previous decision in *Harbin v. Sessions*,860 F.3d 58 (2d. Cir. 2017) also dictates that [statute] is indivisible as to the particular substance. *Harbin* in fact uses cases involving narcotics, rather than the broader term “controlled substance,” to reach its indivisibility finding. *Id.* at 67 (“Several cases in the Appellate Division have considered NYPL § 220.16(1), a statute comparable to NYPL § 220.31 except that it deals with possession instead of sale—and deals with the possession of narcotics in particular.”). Therefore, the particular substance indivisibility holding applies equally to all New York drug statutes, including those using the term “narcotics.”  
    [↑](#footnote-ref-3)
3. ;*See* *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). [↑](#footnote-ref-4)