IMMIGRANT DEFENSE PROJECT

September 10, 2023

FAQ AND "HOW TO USE":

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")[1]

What is the purpose of this sample motion?

In a precedent decision issued on September 6, 2023, the U.S. Court of Appeals for the Second Circuit ruled that New York's statutory definition of "cocaine" is categorically broader than the federal Controlled Substances Act ("CSA"). *See United States v. Minter*, No. 21-3102, 2023 WL 5730084 (2d Cir. Sept. 6, 2023). This motion may be used by noncitizens with prior removal orders where conviction under New York "cocaine" or "narcotic drug" convictions were at issue for removability or ineligibility for relief from removal, and who may now be no longer removable or ineligible for relief, in light of *Minter*. This motion provides arguments for reconsidering and/or reopening these removal proceedings so they can be terminated, or so that they can be remanded for an application and hearing on relief from removal. The regulations and requirements for motions to reconsider and reopen before the BIA are available at 8 C.F.R. § 1003.2.

Are there risks to filing a motion to reconsider and/or reopen in cases affected by *United States v. Minter*?

Yes. There is risk that filing a motion to reconsider and/or reopen might trigger arrest by U.S. Immigration and Customs Enforcement for certain groups of noncitizens. Specifically, this risk might be present for a noncitizen who has a removal order, has not departed the United States, and has not

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

 This FAQ and How to Use and Sample Motion were written by Andrew Wachtenheim, Litigation Director, Immigrant Defense Project. Many thanks to Paige Austin, Danny Habib, Kristin Macleod-Ball, Marie Mark, Manny Vargas, and Isaac Wheeler. Questions about this resource may be sent to info@immdefense.org or attorneyadvice@immdefense.org.

already been interacting with ICE. There is a risk that ICE will become aware of the presence of these noncitizens and will choose to detain them while the motion is pending and/or during any immigration proceedings.

If a noncitizen is no longer removable under *Minter*, or is eligible for relief from removal under *Minter*, by law the BIA *should* reconsider and reopen removal proceedings. However, the BIA does not always correctly apply the law, and there are instances where the BIA denies meritorious motions. In such a case, a noncitizen would need to file a petition for review with the U.S. Court of Appeals that has jurisdiction over the location of their removal proceedings, and with that motion should move for a judicial stay of removal. In addition, there remains a risk that noncitizens will be detained during such proceedings, or deported during such proceedings. **IDP encourages immigration advocates counseling noncitizens about these motions to consider and advise about the strengths and weakness of an argument in an individual's case, and to advise noncitizens about any heightened or diminished risk of arrest and/or detention by U.S. Immigration and Customs Enforcement should they choose to pursue this option.**

Who might this sample motion apply to?
• A noncitizen who was found removable and/or ineligible for relief and ordered removed due to a post-1978 New York "cocaine" conviction found to be a drug trafficking aggravated felony under INA § 101(a)(43)(B) or (U), and/or offense relating to a controlled substance under INA §§ 237(a)(2)(B)(i) or 212(a)(2)(A)(i)(II).
• A noncitizen who was found removable and/or ineligible for relief due to a post-1978 New York "narcotic drug" conviction found to be a drug trafficking aggravated felony under INA § 101(a)(43)(B) or (U), and/or offense relating to a controlled substance under INA §§ 237(a)(2)(B)(i) or 212(a)(2)(A)(i)(II)
• This motion may also be adapted for two other less common categories of noncitizens – (1) those found removable or ineligible for relief due to a post-1978 New York "controlled substance" conviction that preceded the overbreadth-triggering 1990 addition of chorionic gonadotropin to the definition of this term, and (2) those found removable and/or ineligible for relief due to a New York "methamphetamine" conviction who have an analogous argument to that raised in the *Minter* case for "cocaine" convictions that the New York

definition of the "methamphetamine" term similarly includes isomers not included in the federal definition of the term. For further guidance on motions for these categories of noncitizens, contact IDP.

Is there a deadline for filing this motion?

IDP recommends filing this motion within 30 days of the *Minter* decision, or within 30 days of learning of the *Minter* decision. The INA imposes a 30-day deadline for filing motions to reconsider, a deadline that is subject to equitable tolling. Because the BIA is likely to treat this motion as a motion to reconsider (in contrast to a motion to reopen), filing within 30 days of *Minter* or learning of *Minter* is likely favorable.

Where (what agency or court) can this motion be filed?

This sample motion is intended for filing with the BIA, i.e., for noncitizens who appealed their removal orders to the BIA. This motion can be *adapted* for noncitizens who did not appeal their Immigration Court removal order to the BIA and therefore must file this motion with the Immigration Court. *See* 8 C.F.R. § 1003.23 (providing the regulation for Immigration Court motions to reconsider and reopen).

Does this motion apply for a noncitizen currently in removal proceedings before the Immigration Court or the BIA?

For noncitizens in removal proceedings before the Immigration Court, the arguments in this motion can be adapted for a motion to terminate removal proceedings, or for an argument to support eligibility for relief from removal. Reconsidering or reopening removal proceedings will be unnecessary.

For noncitizens in removal proceedings before the BIA, similarly, the arguments in this motion can be adapted for a motion to terminate removal proceedings, or for a motion to remand for purposes of a relief hearing.

Does this motion apply for noncitizens who have a petition for review pending before the U.S. Court of Appeals for the Second Circuit?

This motion may be filed with the BIA while a petition for review is pending before the Second Circuit. In such a case, it may be advisable to seek to hold the petition for review in abeyance

pending BIA decision on the motion; the Office of Immigration Litigation will often agree or not oppose such requests. When such requests are granted, often the court will request the parties file periodic updates with the court about the pending BIA motion.

Alternatively, it may be advisable to seek a stipulated remand to the BIA for purposes of termination or a relief hearing, in light of *Minter*. Where termination is the remedy, it is possible to move for summary disposition of the petition for review as well, citing *Minter*.

What evidence should be attached to a motion to the BIA?

For noncitizens seeking only termination of removal proceedings, they should ideally attach a copy of the *Minter* decision, a Respondent's declaration regarding their diligence in pursuing relief, any corroborating declarations regarding Respondent's diligence, and any documentation of personal equities in support of the *sua sponte* component of the motion. In addition, relevant documentation from the underling removal proceedings—such as the Notice to Appear, Immigration Judge decision, and BIA decision—would be useful to attach. **However, because the BIA can treat the statutory filing deadlines severely (inappropriately so), it is recommended to file this motion within 30 days of learning of the *Minter* decision, and to soon supplement the motion with any additional evidence that could not be obtained within that 30 day period.**

For noncitizens seeking to apply for relief from removal, they should attach completed relief applications with as much supporting evidence as is possible. **However, because the BIA can treat the statutory filing deadlines severely (inappropriately so), it is recommended to file this motion within 30 days of learning of the *Minter* decision, and to soon supplement the motion with any additional evidence that could not be obtained within that 30 day period.**

Are there reasons to seek to file a joint motion to reconsider and/or reopen?

Yes, there can be significant advantages to filing this motion as a joint motion pursuant to 8 C.F.R. § 1003.2(c)(3)(iii). Doing so may render any time or number limitations inapplicable, and otherwise favorably dispose the BIA to reconsider and/or reopen removal proceedings.

Are there other resources to assist me with these issues?

- More information and resources about the *Minter* decision and the immigration consequences of drug offenses is available on IDP's website at https://www.immigrantdefenseproject.org/drug-offenses-2/.

- For more information about the *Minter* decision itself, IDP recommends you subscribe to and consult *Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses* (2023), *available at* https://www.immigrantdefenseproject.org/product/updated-new-york-quick-reference-chart-2023-edition/.
- For more information about motions to reconsider and reopen, IDP recommends you consult *The Basics of Motions to Reopen EOIR-Issues Removal Orders* (Apr. 25, 2022), *available at* https://immigrationlitigation.org/wp-content/uploads/2022/04/MTR-Updated-FINAL.pdf.
- For noncitizens directly impacted by the *Minter* decision, IDP has provided these additional resources in both English and Spanish, and noncitizens may call IDP's helpline at 212-725-6422 for brief advice and potentially for a referral to a legal services provider.
- For immigration advocates seeking assistance with the filing requirements for motions to reconsider and reopen, IDP recommends you join the National Immigration Litigation Alliance, https://immigrationlitigation.org/.

Can this sample motion and the *Minter* decision be used to modify federal sentences for individuals (regardless of immigration status) serving federal sentences enhanced by prior New York "cocaine" or "narcotic drug" convictions under the Armed Career Criminal Act ("ACCA") or Sentencing Guidelines?

Yes, parts of this motion may be adaptable for use in federal habeas corpus petitions under 28 U.S.C. § 2255, and applications for compassionate release under 18 U.S.C. § 4205(g) or 18 U.S.C. § 3582(c)(1)(A). For assistance with such motions, IDP recommends you contact the Federal Defenders of New York practicing in the SDNY, EDNY, WDNY, and NDNY.