17-3827

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Churchill Leonard Spencer ANDREWS, AKA Churchill Lenard ANDREWS,

Petitioner,

v.

Jefferson B. SESSIONS III, U.S. Attorney General,

Respondent.

On Petition for Review from a Decision of the Board of Immigration Appeals, [redacted]

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

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

s/ Trina Realmuto

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I. INTRODUCTION AND STATEMENT OF AMICUS[1]

Pursuant to Federal Rule of Appellate Procedure 29, the American Immigration Council (the Council) proffers this brief to assist the Court in reviewing the Board of Immigration Appeals' (BIA or Board) denial of Petitioner's motion to reconsider and terminate as untimely.

[redacted]

The Department of Homeland Security (DHS) initiated removal proceedings against him based on a conviction under N.Y. Penal Law § 220.31. A.R. 796-98. He contested deportability; however, the BIA and, ultimately, this Court upheld the charge that he had been convicted of a deportable offense, to wit, an aggravated felony and controlled substance offense, and the resulting finding that he was ineligible for cancellation of removal. A.R. 51-54, 66-68, 102. [redacted] After he learned of this Court's decision in

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus states that 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 the brief; and no person — other than amicus, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017), in which this Court ruled that a conviction under N.Y. Penal Law § 220.31 was *not* an aggravated felony, he promptly filed a motion to reconsider the BIA's decision 27 days after the Court issued its decision in *Harbin* and only 19 days after learning of it. A.R. 15-27, 58-59. The statutory deadline for a motion to reconsider is within 30 days of entry of a final order of removal by the BIA. *See* 8 U.S.C. § 1229a(c)(6)(B) (setting 30 day deadline to file motion to reconsider); 8 U.S.C. § 1229a(c)(7)(C)(i) (setting 90 day deadline to file motion to reopen).[2]

Critically, in his motion, Petitioner sought, inter alia, equitable tolling of the statutory deadline for the motion based on the existence of an extraordinary circumstance and his diligence in pursuing his claims. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (recognizing equitable tolling of the motion to reopen deadline). The Board denied Petitioner's motion, based solely on findings that the motion was not timely filed and that reopening was "not warranted." A.R. at 3. The Board did not analyze Petitioner's equitable tolling argument or the evidence he submitted in support of

[2] Amicus agrees with Petitioner that a motion to reconsider is an appropriate vehicle for seeking to correct the legal error in this case. However, regardless whether the underlying motion is characterized as a motion to reconsider or a motion to reopen, the BIA entirely failed to address Petitioner's argument that he merited tolling of either motion deadline and the arguments addressed herein regarding equitable tolling are the same. *See infra* Section II.A.2.

his motion. *Id*. In denying the Petitioner's motion and failing to equitably toll the deadline, the Board committed legal error. In the event the Court does not grant Petitioner's principal request for relief, Amicus urges the Court to grant his secondary request to remand this case to the Board to address the tolling argument in the first instance and to apply a circumstance-specific approach in doing so.

The American Immigration Council ("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 Council previously has appeared as amicus before federal courts in cases addressing the statutory right to file motions to reopen or reconsider removal orders. *See, e.g.*, *Reyes Mata v. Lynch*, 135 S. Ct. 2150 (2015); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2015). The Council has a direct interest in ensuring that noncitizens are not unduly prevented from having statutory motions adjudicated.

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II. ARGUMENT

A. The Board Erred by Failing to Meaningfully Address Petitioner's Tolling Argument.

1. Congress Authorized Statutory Motions to Reopen and Reconsider – Including Motions Based on Meritorious Tolling Arguments – To Provide Important Procedural Safeguards to Noncitizens.

Motions to reopen and reconsider provide noncitizens with a crucial opportunity to present the BIA – or an immigration court – with previously unavailable evidence, information, and arguments after they have been ordered removed. Through 8 U.S.C. §§ 1229a(c)(6) and (c)(7), Congress provided noncitizens in removal proceedings with the statutory right to file one motion to reconsider and one motion to reopen. The statutes state that such motions shall "be filed within [30 or 90 days, respectively] of the date of entry of a final administrative order of removal," subject to certain exceptions not at issue in this case. *See* 8 U.S.C. §§ 1229a(c)(6)(B), (c)(7)(C)(i). Prior to Congress' decision to codify these motions through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), all such motions were merely regulatory in nature. *See* 8 C.F.R. § 3.2(c)(2) (1997); *see also* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (providing separate regulatory authority for sua sponte motions to reopen and reconsider).

The Supreme Court has recognized that *statutory* motions are an integral part of the removal scheme Congress enacted. As the Court held in *Dada v. Mukasey*, "[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition" of removal proceedings. 554 U.S. 1, 18 (2008). Such motions provide an "important safeguard," and the Supreme Court has admonished against any interpretation that would "nullify a procedure so intrinsic a part of the legislative scheme." *Id*. at 18-19 (quotation omitted); *see also Kucana v. Holder*, 558 U.S. 233, 242, 249-51 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions); *Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2153 (2015) (quoting *Dada*, 554 U.S. at 4-5, to recognize that each noncitizen ordered removed "'has *a right* to file one motion' with the IJ or Board to 'reopen his or her removal proceedings.'") (emphasis added).[3]

Through equitable tolling, individuals can exercise their *statutory* right to pursue motions after the 30 or 90 days filing deadline and/or to file a second motion. *See Iavorski*, 232 F.3d at 134 (recognizing equitable tolling of the motion to reopen deadline); *Jin Bo Zhao v. INS*, 452 F.3d 154, 160 (2d Cir. 2006) (finding application of the doctrine justified tolling of the number and time limitations on petitioner's motion). If a movant establishes that he qualifies for equitable tolling

[3] This Court also has recognized the importance of motions to reopen. *See, e.g.*, *Luna v. Holder*, 637 F.3d 85, 102 (2d Cir. 2011) (recognizing a noncitizen's statutory right to file a motion to reopen and citing *Kucana* and *Dada*).

of the filing deadline or one motion limit, the motion is treated as timely filed pursuant to the statute. *See Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011).

Treatment of a motion as statutory – as opposed to regulatory – has several critical advantages for noncitizens. The departure bar regulation at 8 C.F.R. § 1003.2(d), which purports to cut off the Board's ability to review a motion filed by an individual outside of the United States, does not apply to statutory motions. *Compare Luna*, 637 F.3d at 100-02 (statutory motions) *with Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010). Furthermore, as stated above, the Supreme Court has admonished against infringement on statutory motions, whereas the Court previously has referred to regulatory motions as "disfavored." *See INS v. Doherty*, 502 U.S. 314, 323 (1992).[4]

Given the benefits inherent in statutory motions, where an individual seeks statutory reopening or reconsideration with a claim for equitable tolling, the BIA is not free to simply ignore the individual's equitable tolling arguments.

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[4] The Supreme Court cases underlying this proposition, *see Doherty*, 502 U.S. at 323, were decided prior to Congress' codification of the right to file motions to reconsider and motions to reopen.

2. The Board Cannot Summarily Reject Petitioner's Equitable Tolling Argument Without Analysis.

The Board "must actually consider the evidence and argument that a party presents." *Yan Chen v. Gonzales*, 417 F.3d 268, 272 (2d Cir. 2005) (quotation omitted); *see also Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 97 (2d Cir. 2001) ("[W]hen faced with a motion to reopen, the Board has an obligation to consider the record as a whole."); *Luna*, 637 F.3d at 102 ("[A] failure to consider facts relevant to the motion to reopen is, as a matter of law, reversible error."). Where, as here, the BIA entirely fails to consider evidence or arguments put forth by a noncitizen presenting his case, it fails this basic test. *Yan Chen*, 417 F.3d at 275 (granting petition where BIA failed to consider country condition report); *Tian-Yong Chen v. INS*, 359 F.3d 121, 128-29 (2d Cir. 2004) (remanding where BIA and IJ failed to consider a "significant aspect" of petitioner's testimony).

The BIA must consider all relevant arguments and facts to ensure that federal courts can review its decisions. *See, e.g.*, *Song Jin Wu v. INS*, 436 F.3d 157, 164 (2d Cir. 2006) ("It is not the function of a reviewing court in an immigration case to scour the record to find reasons why a BIA decision should be affirmed").[5]

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[5] Other courts agree that the BIA may not simply decline to issue reasoned opinions that address the evidence and arguments before it. *See, e.g.*, *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

Here, the Board entirely failed to consider – let alone analyze – the equitable tolling argument in Petitioner's motion, A.R. at 15-27, or the evidence of diligence attached to the motion, *id.* at 58-59. Instead, the Board summarily concluded in a paragraph discussing Petitioner's alternative request for reconsideration that he had not "shown that equitable tolling is warranted," without any discussion. A.R. at 3. While the BIA is not required "to write an exegesis on every contention" raised by a party, *Becerra-Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987) (quotation omitted), it may not simply summarily deny Petitioner's request for equitable tolling and reconsideration without analysis. *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992) (holding that "cursory, summary or conclusory statements from the Board leave us to presume nothing other than an abuse of discretion"); *see also 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. [The petitioner] is entitled to a reasoned analysis that engages the evidence he presented . . . .") (citations omitted).

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and the Board of Immigration Appeals with enough judicial officers to provide reasoned decisions."); *Dulane v. INS*, 46 F.3d 988, 994 (10th Cir. 1995) (requiring the Board to "articulate its reasons for denying relief sufficiently for us, as the reviewing court, to be able to see that the Board considered all the relevant factors") (quotation omitted).

Where, as here, the Board offers only "cursory, summary, [and] conclusory statements" in response to an equitable tolling argument, a reviewing court would have to "scour the record" and look beyond the agency decision to affirm. *Anderson*, 953 F.2d at 806; *Song Jin Wu*, 436 F.3d at 164. However, 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 Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 294 n.3 (2d Cir. 2006) ("And we cannot, on appeal, substitute an argument . . . for those that the BIA actually gave to support the conclusion [petitioner] disputes on appeal."). Thus, remand is an appropriate remedy in this case to address Petitioner's equitable tolling argument.

B. The Court Should Remand with Instructions to the BIA to Analyze the Merits of Petitioner's Equitable Tolling Argument Under a Circumstance-Specific Approach.

If this Court remands for the BIA to adjudicate the merits of Petitioner's equitable tolling argument, it should instruct the Board to apply and analyze the tolling argument under a circumstance-specific approach that accords with case

precedent from the Supreme Court and this Circuit.[6] Below, Amicus briefly addresses the merits of the Petitioner's claim to demonstrate the Board's legal error in this case and the need for reversal and remand with instruction.

1. The Board Must Apply a Circumstance-Specific Approach When Analyzing Tolling Claims.

Consistent with principles of equity and the Supreme Court's admonishment that the purpose of the motion to reopen statute "is to ensure the proper and lawful disposition" of removal proceedings, *Dada*, 554 U.S. at 18, application of equitable tolling to particular facts requires a case-by-case adjudication. Decisions of the Supreme Court, as well as those of this Court, provide a consistent, underlying standard: tolling is appropriate where extraordinary circumstances prevent the individual from timely filing and the individual pursued reopening with reasonable diligence after learning of the possibility of moving to reopen. *See Holland*, 560 U.S. at 649; *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 US 221, 227 (2012); *Iavorski*, 232 F.3d at 129, 134.

As its name suggests, the doctrine of equitable tolling is rooted in common law principles of equity, which look to a particular individual's circumstances

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[6] This Court regularly issues remand orders with instructions to the Board. *See, e.g.*, *Tian-Yong Chen*, 359 F.3d at 130-32; *Alvarado-Carillo v. INS*, 251 F.3d 44, 55-56 (2d Cir. 2001).

when determining whether to grant relief from rigid compliance with a legal rule. Determining whether a circumstance is extraordinary or whether an individual exercised due diligence, therefore, similarly requires a circumstance-specific approach that accords with subjective notions of justice and fairness.[7] The Board must take special care when assessing equitable tolling claims in immigration cases, where, as here, it is evident that the prior removal order is no longer valid, as courts have recognized:

> [T]he BIA should give due consideration to the reality that many departed [noncitizens] are poor, uneducated, unskilled in the English language, and effectively unable to follow developments in the American legal system—much less read and digest complicated legal decisions. The BIA should also take care not to apply the equitable tolling standard too harshly 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.

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[7] Notably, this Court has recognized that extraordinariness is not determined by how often a set of circumstances is likely to occur. *See Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011) ("The term 'extraordinary' refers not to the uniqueness of a party's circumstances, but rather to the severity of the obstacle impeding compliance with a limitations period."); *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008) (finding that "the proper inquiry is not how unusual the circumstance alleged to warrant tolling is"). In fact, in types of proceedings where "Congress intended to be 'unusually protective' of claimants," agency tolling of filing deadlines will be "not infrequently appropriate." *New York v. Sullivan*, 906 F.2d 910, 917 (2d Cir. 1990); *see also Torres v. Barnhart*, 417 F.3d 276, 279 (2d Cir. 2005) (same). Similarly, the circumstances of and law governing individuals in removal proceedings counsel against harsh and infrequent application of the tolling standard. *See infra* 11-12.

Lugo-Resendez v. Lynch, 831 F.3d 337, 345 (5th Cir. 2016) (quotations omitted). Where, as here, the extraordinary circumstance removes any doubt that the prior removal order was never valid, the consequent entitlement to equitable tolling is at its most obvious. More broadly, immigration cases often involve individuals without formal education, without knowledge of substantive immigration law or the procedural mechanisms for raising claims, who are often pro se, and who face a language barrier. *See, e.g.*, *Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir. 2005) (noting that noncitizens in removal proceedings may "have more than the average difficulty in negotiating the shoals of American law"). As Justice Sotomayor aptly stated:

> . . . with respect to remedial statutes designed to protect the rights of unsophisticated claimants, . . . agencies (and reviewing courts) may best honor congressional intent by presuming that statutory deadlines for administrative appeals are subject to equitable tolling, just as courts presume comparable judicial deadlines under such statutes may be tolled.

Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 163 (2013) (Sotomayor, J., concurring). The motion to reopen and reconsider statute is precisely this type of remedial statute: designed to protect noncitizens and "to ensure a proper and lawful disposition" of removal proceedings. *Dada*, 554 U.S. at 18. As such, tolling claims made by these "unsophisticated claimants" must be assessed in a circumstance-specific manner that comports with the principles of equity and the purpose of the motion to reopen statute. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 163 (Sotomayor, J.,

concurring). Such an analysis requires the BIA and reviewing courts to consider the particular circumstances individuals face in learning of eligibility for reopening and the time it takes for any immigration attorney to investigate the viability of a motion before preparing and filing it. Accordingly, courts generally must not have the same expectations for deportees seeking reopening from outside the country or those who are detained as they would for individuals seeking reopening from inside the country.

2. On Remand, the Board Should Assess Petitioner's Specific Circumstances.

a. Petitioner Pursued His Claim with Reasonable Diligence.

With respect to the due diligence prong of the equitable tolling test, an individual must pursue his claim with "reasonable diligence," but not "maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotations omitted). As this Court and other courts of appeals recognize, 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*, 405 F.3d at 490; *see also Iavorski*, 232 F.3d at 134 (providing for tolling until the relevant basis "is, or should have been, discovered by a reasonable person in the situation"); *Harper*, 648 F.3d at 138-39 (requiring individual to "show[] that he act[ed] as diligently as reasonably could have been expected under the circumstances") (quotation and emphasis omitted);

Avagyan v. Holder, 646 F.3d 672, 679, 682 n.9 (9th Cir. 2011) (requiring a "fact-intensive and case-specific" review of diligence, "assessing the reasonableness of petitioner's actions in the context of his or her particular circumstances," rather than some "magic period of time").

In assessing Petitioner's diligence in this case, the Board must consider the entirety of his efforts to challenge the agency's improper charge and classification of his conviction as an aggravated felony both in the courts and through a pardon. As an initial matter, as is clear now (*see infra* Section II.B.2.b.ii, discussing *Harbin*), the Department of Homeland Security was wrong to charge Petitioner with having sustained aggravated felony conviction, and both the immigration judge and BIA were wrong to sustain that charge. *Accord Auburn Reg'l Med. Ctr.*, 568 U.S. at 163-64 (Sotomayor, J., concurring) ("In particular, efforts by an agency to enforce tight filing deadlines in cases where there are credible allegations that filing delay was due to the agency's own misfeasance may not survive deferential review."). Thereafter, Petitioner challenged those decision before this Court by filing a petition for review and, when that was denied, a rehearing petition. *See Andrews v. Holder*, 534 Fed. Appx. 32, 34 (2d Cir. 2013) (unpublished), *reh'g denied* No. 11-5449 (2d Cir. Nov. 19, 2013).

Additionally, Petitioner filed a petition for *coram nobis* seeking to vacate his conviction, which the N.Y. Supreme Court Appellate Division, Second Department

denied. *People v. Andrews*, 108 A.D.3d 729 (2d Dep't 2013), *aff'd* 23 N.Y.3d 605 (2014). Moreover, since his deportation, Petitioner, through counsel, has worked to pursue a gubernatorial pardon of his conviction. A.R. at 58.

Harbin was decided on June 21, 2017. Petitioner promptly learned of the decision from his criminal attorney while in Guyana. *Id*. at 59. He filed his motion within 27 days of the *Harbin* decision and within 19 days of learning of it. Petitioner was more than reasonably diligent; he did everything that could be reasonably expected of a person in his situation to fight his case and pursue reopening.

b. An Extraordinary Circumstance Prevented Petitioner from Filing his Motion Earlier.

i. Agency Error and Interference Can Constitute an Extraordinary Circumstance.

In addition to establishing reasonable diligence, an individual must show that "some extraordinary circumstance stood in his way and prevented timely filing" in order to be "entitled to equitable tolling." *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In the specific circumstances of this case, the courts' ongoing misapplication of the law, including in Petitioner's removal proceedings, combined with Petitioner's lack of removability, his vigorous pursuit of all available appeals until this Court informed him he lacked colorable claims to pursue, and his resulting improper deportation

amounted to an extraordinary circumstance requiring tolling of the motion deadline. *See also infra* Section II.B.2.b.ii.

A wide range of conduct and lack of diligence by individuals or entities other than the party seeking tolling can constitute a sufficiently extraordinary circumstance to warrant tolling. *See South v. Saab Cars USA*, 28 F.3d 9, 11-12 (2d Cir. 1994) (listing bases for tolling). Most 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 Luna*, 637 F.3d at 99 ("A[noncitizen] who files a motion to reopen is entitled to equitable tolling when he exercises due diligence . . . and shows that he was prevented by . . . governmental interference from filing the motion on time."); *see also Briones v. Runyon*, 101 F.3d 287, 290 n.2 (2d Cir. 1996) (noting that "equitable tolling has been applied, inter alia, when the presiding court has led the plaintiff to believe that he has done all that is required . . . ."); *Sullivan*, 906 F.2d at 917 ("[E]quitable tolling is in order when government misconduct keeps plaintiffs from appreciating the scope of their rights."). Notably, such conduct need not be fraudulent or purposefully misleading to provide a basis for tolling. *See, e.g.*, *Valdez v. United States*, 518 F.3d 173, 182 (2d Cir. 2008) ("[F]raudulent concealment is not essential to equitable tolling."); *Veltri v. Bldg. Serv. 32b-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004) ("The relevant question is not the intention underlying defendants' conduct, but rather

whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.").[8]

Likewise, an agency's misinformation to a noncitizen about removability and/or eligibility for relief coupled with an erroneous legal interpretation or decision can constitute an extraordinary circumstance warranting tolling of the motion deadline. This is particularly true where, as here, the noncitizen challenged the agency's erroneous position and interpretation without success, and the agency's error was subsequently corrected. Decisions like *Harbin*, which triggered Petitioner's motion and equitable tolling claim, clarify that prior interpretations of the law, like those in Petitioner's initial BIA and court of appeals decisions, were incorrect at the time they were issued. *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]

[8] Similarly, other courts of appeals have recognized that the BIA can toll filing deadlines based on inadvertent agency error. *See Socop-Gonzales v. INS*, 272 F.3d 1176, 1181, 1193 (9th Cir. 2001) (en banc) (tolling based on an INS officer's "incorrect advice" and finding that a party's inability to timely file "need not be caused by the wrongful conduct of a third party"); *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008) (granting equitable tolling due to the BIA's failure to notify a noncitizen of the decision his case and subsequent erroneous advice that the case was still pending); *Torabi v. Gonzales*, 165 Fed. Appx. 326, 331 (5th Cir. 2006) (unpublished) (granting equitable tolling based on noncitizen's inability "to obtain information vital to her . . . claim" because immigration agency did not provide notice of her eligibility for relief until after the filing deadline).

had always meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress.").

In Petitioner's case, DHS erroneously charged Petitioner with having sustained convictions for deportable offenses, to wit, an aggravated felony and a controlled substance conviction, and, accordingly, took the position that he was both deportable and ineligible for relief from removal. A.R. at 796-98. The immigration judge and the BIA upheld that interpretation. A.R. 66-68, 289. And this Court originally upheld those positions, affirming the agency's classification of the statute of conviction as an aggravated felony. *See Andrews*, 534 Fed. Appx. at 34 (holding that Petitioner's conviction was "categorically a drug trafficking aggravated felony and, as such, [he] cannot raise a colorable constitutional claim or question of law"). In this circumstance, where Petitioner was never removable in the first instance and where he diligently pursued claims through a rehearing petition to this Court, the Board should recognize an extraordinary circumstance.

Furthermore, this set of circumstances prevented Petitioner from timely filing a motion and thus warrants tolling of the filing deadline. First, because a prior panel of this Court found that Petitioner lacked any "colorable claim" regarding whether he was convicted of an aggravated felony and/or able to seek cancellation of removal, a reasonable person in his position would have believed he lacked a basis for reconsideration or reopening. *Cf. United States v. Copeland*,

376 F.3d 61, 71 (2d Cir. 2004) (finding that IJ's failure to inform noncitizen of ability to seek relief from removal, which subsequent case law made clear he was eligible to apply for, could render the original proceeding fundamentally unfair). Second, the agency has maintained its erroneous statutory interpretation until the issuance of *Harbin*, leaving Petitioner no reason to believe he had a basis to seek reconsideration or reopening. *Cf. Diaz*, 515 F.3d at 155 (rejecting an interpretation of diligence that would require "pester[ing] a . . . court with frequent inquiries").

On remand, the Board should find that this type of error, in the specific circumstances of Petitioner's case, amounts to an extraordinary circumstance meriting tolling. Motions to reconsider and to reopen are especially well suited to tolling on this basis because they are *intended* to provide noncitizen 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); *Matter of O-S-G-*, 24 I&N Dec 56, 57 (BIA 2006). As discussed *supra*, 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*, 554 U.S. at 18. Thus, unsurprisingly, the Board regularly reassesses its decisions based on subsequently issued precedent that corrects improper interpretations of law via motions, including those filed well after the deadline. *See* Petitioner's Brief at 18-31; *cf. Matter of X-G-W-*, 22 I&N Dec. 71, 73

(BIA 1998) (finding that sua sponte reopening based on "marked change in the refugee law" after the filing deadline "would serve the interest of justice").[9]

Furthermore, granting tolling to individuals who never should have been found removable in the first instance is consistent with the longstanding agency practice of reopening proceedings where a court has vacated a criminal conviction and so the conviction no longer provides a valid basis for a charge of removability or bar to relief. *See, e.g., Cruz v. Att'y Gen.*, 452 F.3d 240, 245-46 (3d Cir. 2006) (discussing Board practice of reopening where respondent's conviction is subsequently invalidated); *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 n.2 (5th Cir. 2008) (listing cases). The agency and federal courts treat such motions as timely even if the vacatur occurs after the motion deadline has passed. *See Cruz*, 452 F.3d at 246 n.3 ("[W]e have not found[] a single case in which the Board has rejected a motion to reopen as untimely after concluding that a[noncitizen] is no

[9] This is not a case in which authorities' errors simply "made it more difficult" to simultaneously pursue a claim based on the same facts in a separate venue. *Watson v. United States*, 865 F.3d 123, 132 (2d Cir. 2017) (requiring petitioner to "demonstrate that the government's [error in immigration proceedings] was a sufficiently 'severe' obstacle that 'caused' him to miss his filing deadline" for a Federal Tort Claims action). Instead, Petitioner here pursued his claim and adjudicators erroneously ruled against him in the exact venue where Petitioner filed the instant motion and sought judicial review, thereby foreclosing Petitioner's ability to file a non-frivolous motion to reopen. *Compare id*. (finding that obstacle could not be sufficiently severe where claimant was able to make the relevant arguments in removal proceedings at the time of the filing deadline for his damages claim).

longer convicted for immigration purposes."); *William v. Gonzales*, 499 F.3d 329, 331 (4th Cir. 2007) (treating motion to reopen filed within 90 days of vacatur as timely filed). A similar practice is appropriate where the conviction no longer provides a valid basis of a charge of removability due to a corrected legal interpretation.

ii. This Court's Decision in *Harbin v. Sessions* Demonstrates Prior Agency Action in Petitioner's Case Was an Extraordinary Circumstance.

In *Harbin*, this Court corrected prior agency and court decisions that improperly classified Petitioner as deportable. The Court ruled that, under the Supreme Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), conviction under N.Y. Penal Law § 220.31 is subject to the strict categorical approach. *See Harbin*, 860 F.3d at 63-68. Under *Harbin*, the conviction is not an aggravated felony. *See id.* at 61. Further, neither is it a conviction for a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)(i). *Cf. Harbin*, 860 F.3d at 68 (citing *Mellouli*, 135 S. Ct. at 1986). On remand, the Board should assess application of this Court's decision in *Harbin v. Sessions* on Petitioner's removal proceedings and grant his motion to reconsider and terminate.

The petitioner in *Harbin* and Petitioner here were convicted under the same criminal statute, N.Y. Penal Law § 220.31, which prohibits the sale of any

"controlled substance" as defined at N.Y. Penal Law § 220.00(5) and N.Y. Pub. Health Law § 3306. *See Harbin*, 860 F.3d at 61. This Court concluded in *Harbin* that the "controlled substance" element of § 220.31 is broader than the "controlled substance" element of the generic federal aggravated felony or controlled substance definition at 21 U.S.C. § 802. *See id*. at 68. The court then concluded that the identity of the substance at issue is a means of violating § 220.31, not an element of the offense. *See id*. at 64-68. The court then held that conviction under § 220.31 is indivisible as to the nature of the substance involved and not categorically a generic aggravated felony because the least-acts-criminalized are outside the generic definition of a federally controlled substance at 21 U.S.C. § 802. *Harbin*, 860 F.3d at 68.

For these reasons, on remand, the Board must conclude that Petitioner's conviction under N.Y. Penal Law § 220.31 is not an aggravated felony. The Board also must conclude that it is not a controlled substance offense. The *Harbin* Court held that the "controlled substance" element of N.Y. Penal Law § 220.31 is broader than the "controlled substance" element of 21 U.S.C. § 802. *See Harbin*, 860 F.3d at 68. Because the categorical approach functions in precisely the same way as to both the aggravated felony and controlled substance offence deportability grounds, under *Harbin,* conviction under N.Y. Penal Law § 220.31 is not a controlled substance offense. *See Harbin,* 860 F.3d at 64 (citing both

Moncrieffe v. Holder, 569 U.S. 184 (2013) and *Mellouli*, 135 S. Ct. at 1986, which apply the categorical approach to the aggravated felony and controlled substance offense provisions, respectively).

On remand the Board must give due consideration to the fact that, under *Harbin*, the conviction for which Petitioner was deported now is neither a deportable aggravated felony nor controlled substance offense.

* * * * *

"[A]s has been said, the government wins when justice is done." *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997). Justice is not done when a 35-year lawful permanent resident husband, father, and grandfather, who has done everything possible to fight a *wrongful* deportation charge is summarily denied adjudication of the merits of his case without explanation or analysis. It is in the interests of all parties – Petitioner, DHS, the BIA, and this reviewing Court – that the Board analyze and address equitable tolling claims using a circumstance-specific approach.

III. CONCLUSION

The Court should grant the petition for review and remand the case to the BIA for adjudication of Petitioner's motion in accordance with the circumstance-specific approach discussed above.

Respectfully submitted,

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Dated: April 17, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rules 32.1(a)(4)(A) and 29.1(c) and Fed. R. App. P. 29(a)(5), because this brief contains 5,676 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f). Additionally, 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-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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