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 Removal Proceedings.	)	
	)	

STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND IN LIGHT OF *HARBIN v. SESSIONS*

I. 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 recent precedent decision in *Harbin v. Sessions*, No. 14-1433-AG, 2017 WL 2661590 (2d Cir. June 21, 2017). 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§ 220.31, "criminal sale of a controlled substance in the fifth degree," was categorically an "aggravated felony" under INA § 101(a)(43)(B) and § 237(a)(2)(A)(iii) and otherwise upholding his order of removal.. The Second Circuit, under whose jurisdiction Mr. X' removal proceedings arise, has now overruled the Board's conclusions and held that N.Y.P.L. § 220.31 is an indivisible, overly broad statute, and therefore categorically not an aggravated felony. The *Harbin* decision also dictates that the conviction is categorically not an offense relating to a controlled substance under INA § 237(a)(2)(B). Accordingly, the Board should reconsider its decision and terminate removal proceedings against Mr. X because the Second Circuit's decision

in *Harbin* controls this case. Alternatively, the Board should remand to the Immigration Jude for consideration of Mr. X' application for cancellation of removal under INA § 240A(a). The Board should consider this a timely filed statutory motion to reconsider.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. X was admitted to the United States as a lawful permanent resident on July 8, 1982. *See* Notice to Appear. On March 14, 2008, Mr. X pleaded guilty to N.Y. Penal Law § 220.31, "criminal sale of a controlled substance in the fifth degree." *See* Certificate of Disposition, SCI-01903-2008, Ex. I of Motion to Remand. He was sentenced to six months imprisonment. *See* Id. Subsequently, the Department of Homeland Security ("DHS") initiated removal proceedings against Mr. X, charging that his conviction was a deportable aggravated felony under INA § 101(a)(43)(B) and § 237(a)(2)(A)(iii) and a controlled substance offense under § 237(a)(2)(B)(i). *See* Notice to Appear.

On May 10, 2011, the Immigration Judge ("IJ") found the conviction under N.Y. Penal Law § 220.31 rendered Mr. X deportable for conviction for a controlled substance offense and aggravated felony.[1] *See* IJ Decision. The IJ ordered his removal. *See* Id. This Board affirmed the IJ's decision on October 25, 2011, finding his conviction under N.Y. Penal Law § 220.31 rendered him deportable and ineligible for cancellation of removal for conviction for an aggravated felony. *See* BIA Decision. The Board also denied his Motion to Remand for Ineffective Assistance of Counsel. *See* Id..

Mr. X filed a timely Petition for Review to the U.S. Court of Appeals for the Second Circuit, which the court denied on August 26, 2013. *See X v. Holder*, 534 Fed.Appx. 32 (2d Cir. 2013) (unpublished) (attached at Ex. C). In January 2014, Mr. X was deported to

[1] The IJ denied his applications for asylum, withholding of removal, and deferral of removal under the Convention Against Torture. *See* IJ Decision.

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

(1) The validity of the removal order has been the subject of a judicial proceeding. The location of the judicial proceeding was the U.S. Court of Appeals for the Second Circuit. The proceeding took place on August 2, 2013. The outcome is as follows: Petition for Review denied on August 2, 2013; Petition for Panel Rehearing denied on November 19, 2013.

(2) Respondent is not currently the subject of a criminal proceeding under the Act.

(3) Respondent 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).

The Board issued its decision in Respondent's case on October 25, 2011. 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* § IV.B.; *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* § IV.C.

IV. ARGUMENT

A. The Second Circuit Held in *Harbin* That, as a Matter of Law, the Board Erred in Finding That N.Y. Penal Law § 220.31 Categorically Qualified as an Aggravated Felony; under *Harbin*, the Conviction Is Also Not a Controlled Substance Offense.

In *Harbin v. Sessions*, the U.S. Court of Appeals for the Second Circuit addressed the question of whether N.Y. Penal Law § 220.31 is a drug-trafficking aggravated felony. Applying the categorical approach and the Supreme Court's decisions in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the court concluded that the least-acts-criminalized under § 220.31 are outside the scope of the generic definition of the drug trafficking aggravated felony ground, that § 220.31 is indivisible as between generic and non-generic conduct, and thus is not subject to the modified categorical approach, and that under the strict categorical approach § 220.31 is not an aggravated felony. The holdings are the same as to whether § 220.31 is a controlled substance offense. *See Mellouli*, 135 S. Ct. at 1987 ("The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute."); *Harbin*, 2017 WL 2661590 at *7 (relying on *Mellouli*, which applied the categorical approach to the controlled substance offense deportability ground, to call for application of the categorical approach to the drug trafficking aggravated felony ground). *See also Mathis*, 136 S. Ct. at 2251-53 nn. 2 & 3 (applying the categorical approach interchangeably across criminal sentencing provisions and various immigration deportability provisions).

Because the Second Circuit has now concluded that § 220.31 is not an aggravated felony under reasoning that also necessarily leads to the conclusion that it is also not a controlled substance offense for deportability purposes,, this Board should reconsider its decision and terminate the removal proceedings against him.

The INA requires that a drug trafficking aggravated felony involve a "controlled substance" as defined at 21 U.S.C. § 802, the federal Controlled Substances Act. *See* INA § 101(a)(43)(B). It likewise requires that a controlled substance offense involve a "controlled substance" as defined at 21 U.S.C. § 802. *See* INA § 237(a)(2)(B)(i).

The statute under which Mr. Harbin and Mr. X were convicted, N.Y. Penal Law § 220.31, 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*, 2017 WL 2661590 at *2. The Second Circuit concluded in *Harbin* that New York's "controlled substance" definition is broader than the generic federal definition. *See Harbin*, 2017 WL 2661590 at *7. The court further concluded that the identity of the substance at issue is a means of committing the offense, not an element of the offense. *See Harbin*, 2017 WL 2661590 at **4-7. The court then held that the conviction is subject to the strict categorical approach, and not categorically an aggravated felony because the least-acts-criminalized are outside the generic definition of a federally controlled substance at 21 U.S.C. § 802. Under *Harbin*, Mr. X's conviction under N.Y. Penal Law § 220.31 is not an aggravated felony.

Nor is his conviction a controlled substance offense. The Second Circuit held in *Harbin* 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*, 2017 WL 2661590 at *7. Because the categorical approach functions in precisely the same way as to both the aggravated felony and controlled substance offence deportability grounds, *Harbin* compels the conclusion that conviction under N.Y. Penal Law § 220.31 is not a controlled substance offense.

Under *Harbin*, the conviction for which Mr. X was deported is neither a deportable aggravated felony nor controlled substance offense. As such, the Board should grant

reconsideration and terminate removal proceedings against Mr. X. Alternatively, the Board should remand to the Immigration Judge for consideration of Mr. X' application for cancellation of removal under INA § 240A(a).

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, *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[2], including the Second Circuit where Mr. X's case arises, have recognized that motion

---

[2] ;*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-*

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.

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

The Second Circuit's decision in *Harbin*, which reversed the aggravated felony determination with respect to the very same offense at issue in Mr. X's own Second Circuit appeal, 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 and petition for rehearing stages. His arguments, under the law in place at the time, were rejected by the Second Circuit in *X v. Holder*, 534 Fed.Appx. 32, 34 (2d Cir. 2013) (unpublished) (relying on *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013)). *Harbin* is the first and only case where the Second Circuit has revisited the question of whether N.Y. Penal Law § 220.31 is an aggravated felony since Mr. X's own decision. The extraordinary circumstance in this case is that the Second Circuit has reversed its aggravated felony determination relating to the very same offense

---

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).

at issue in Mr. X's own case. That the court's new holding on this question did not issue until 2017 is the only reason that Mr. X did not timely move to reconsider his removal order.

Harbin was decided on June 21, 2017. Mr. X has exhibited the requisite diligence both before and after learning of the decision. He first learned of the decision on June 29, 2017 when he was contacted by his criminal appellate attorney. *See* Declaration of. (Ex. E). 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, and later via Petition for Review to the U.S. Court of Appeals for the Second Circuit. *See* Order denying Petition for Review, August 26, 2013 (Ex. C). Mr. X sought rehearing before the Second Circuit, which was also denied. *See* Order denying Petition for Panel Rehearing, November 19, 2013 (Ex. D). Additionally, Mr. X filed a petition for *coram nobis* seeking to vacate his conviction, which the N.Y. Supreme Court Appellate Division, Second Department denied. *People v. X*, 108 A.D.3d 729 (2d Dep't 2013), *aff'd by People v. X*, 23 N.Y.3d 605 (2014). In January 2014, Mr. X was deported to. Since his deportation, he has continued to work with his counsel at Appellate Advocates to prepare a request for a gubernatorial pardon of his conviction. *See* Declaration of. (Ex. E). 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.

C. 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.

D. In the Alternative, the Board Should Reconsider Respondent's Removal Order Sua Sponte.