# APPENDIX

**SAMPLE**

**STATUTORY 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 an 18 U.S.C. § 16(b) “crime of violence” under INA § 101(a)(43)(F) was the sole ground of removability and, as a result of *Sessions v. Dimaya*, 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 a section 16(b) “crime of violence” under INA § 101(a)(43)(F) *and* some other ground of removability, counsel should assess whether the person now is eligible for relief from removal as a result of *Sessions v. Dimaya*. 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 Removal Proceedings. )

)

**STATUTORY MOTION TO RECONSIDER AND TERMINATE IN LIGHT OF *SESSIONS v. DIMAYA***

# 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 *Sessions v. Dimaya*, No. 15-1498, -- U.S. --, 2018 U.S. LEXIS 2497 (Apr. 17, 2018). In *Dimaya*, the Supreme Court held that 18 U.S.C. § 16(b), as incorporated by INA § 101(a)(43)(F), is void for vagueness under the Due Process Clause of the Fifth Amendment. 2018 U.S. LEXIS 2497 at \*39.

The Board should reconsider its decision and terminate removal proceedings against Respondent because the Court’s decision in *Sessions v. Dimaya* controls this case.

# 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)(F) for a “crime of violence” under § 16(b).

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 .

1. Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: .
2. Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

# 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.”).

# ARGUMENT

1. **As a Matter of Law, the Board Erred in Finding the Respondent’s Conviction to be a “Crime of Violence” Aggravated Felony**

In *Sessions v. Dimaya*, the Supreme Court held that 18 U.S.C § 16(b), as incorporated in the “crime of violence” aggravated felony definition in INA § 101(a)(43)(F), is unconstitutionally void for vagueness. *Sessions v. Dimaya,* 2018 U.S. LEXIS 2497 at \*39.

Under INA § 101(a)(43)(F), an aggravated felony includes “a crime of violence (as defined in section 16 of the title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year.” Section 16 of title 18 defines a “crime of violence” as either:

(a) an offense that has as an element the use, attempted use, or threatened use of

physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial

risk that physical force against the person or property of another may be used

in the course of committing the offense.

18 U.S.C. § 16. *Sessions v. Dimaya* addresses §16(b).

Mr. Dimaya was twice convicted of first-degree burglary under Cal. Penal Code Ann. §§459, 460 (a). *Sessions v. Dimaya,* 2018 U.S. LEXIS 2497 at \*12. After his second conviction, DHS initiated removal proceedings against him and an immigration judge found that his conviction was a “crime of violence” under §16(b) and therefore an aggravated felony under INA § 101(a)(43)(F). *Id*.The Board of Immigration Appeals affirmed. *Id.* The Ninth Circuit, however, ruled in Mr. Dimaya’s favors holding that §16(b) was unconstitutionally void for vagueness. *Id.* at \*13.

The Supreme Court affirmed, finding that the Mr. Dimaya was not deportable for having been convicted of the aggravated felony of “crime of violence” under §16(b). Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the similarly worded Armed Career Criminal Act’s (ACCA’s) residual clause to be unconstitutionally void for vagueness, the Court concluded that “§16(b) produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* at \*39. Following *Johnson,* the court based it holding on the compounding uncertainties that arise from determining both “substantial risk” under § 16(b) and the “nature” of an offense, which requires an inquiry into the “ordinary case” of a crime. *Id.* \*16-22.

Like the petitioner in *Dimaya*, Respondent was charged with and found deportable for a §16(b) “crime of violence” aggravated felony under INA § 101(a)(43)(F). *See* BIA Decision at p. . In light of the Supreme Court’s decision in *Dimaya*, 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]

# 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.

# Respondent Is Diligently Pursuing [Her/His] Rights and Extraordinary Circumstances Prevented Timely Filing of this Motion.

The Supreme Court’s decision in *Dimaya* 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 *Dimaya* abrogates the Board’s erroneous finding that his/her conviction was an aggravated felony under INA § 101(a)(43)(F). This extraordinary circumstance prevented Respondent from timely filing his/her motion to reconsider.

*Dimaya* was decided on April 17, 2018. 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 *Dimaya* 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.

# 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 *Dimaya* 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.

# 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]