UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

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In the Matter of: )

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**,**  ) A Number:

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Respondent. )

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In RemovalProceedings. )

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**STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND**

**IN LIGHT OF *OBEYA v. SESSIONS***

**I.** **INTRODUCTION**

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (“INA”), Respondent, (hereinafter “Ms. ”), hereby seeks reconsideration in light of the U.S. Court of Appeals for the Second Circuit’s recent precedent decision in *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018)[[1]](#footnote-1). This Board issued a final order of removal against Ms. , previously a lawful permanent resident, on March 3, 2017, after finding her deportable under INA § 237(a)(2)(A)(i) (conviction for a crime involving moral turpitude (“CIMT”)) and § 237(a)(2)(A)(ii) (two or more convictions for CIMTs) for her conviction under New York Penal Law (N.Y.P.L.) § 155.25, petit larceny, and otherwise upholding her order of removal. *See* BIA Decision (Ex. C). The Second Circuit, under whose jurisdiction Ms. ’s removal proceedings arise, has now overruled the Board’s conclusions and held that convictions under N.Y.P.L. § 155.25 entered prior to the BIA’s decisions in *Matter of Diaz-Lizarrag*a, 26 I&N Dec. 847 (BIA 2016), and *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016) (hereinafter “*Obeya (BIA 2016)*”), are not CIMTs. This is the case for Ms. , who was convicted under § 155.25 years before the Board’s decisions in *Diaz-Lizarraga* and *Obeya (BIA 2016)*. Under the Second Circuit’s decision in *Obeya*, Ms. has no CIMT conviction committed within the first five years of her admission to the United States as a lawful permanent resident. Nor has Ms. been convicted of multiple CIMTs. Accordingly, the Board should reconsider its decision and terminate removal proceedings against Ms. because the Second Circuit’s decision in *Obeya* controls this case. The Board should consider this a timely filed statutory motion to reconsider.

**II.** **STATEMENT OF FACTS AND STATEMENT OF THE CASE**

Ms. was admitted to the United States as a lawful permanent resident on or about April 29, 2004. *See* Notice to Appear (Ex. A). Subsequently, the Department of Homeland Security (“DHS”) initiated removal proceedings against Ms. , charging that she was deportable for one CIMT conviction committed within five years of her admission to the United States under INA § 237(a)(2)(A)(i), and for two or more CIMT convictions under INA § 237(a)(2)(A)(ii). *See* Notice to Appear (Ex. A). *See also* BIA Decision (Ex. C). In the NTA, DHS alleged conviction for two offenses: N.Y.P.L. § 155.25, petit larceny; and N.Y.P.L. § “240.50/03.” *See* Notice to Appear (Ex. A). *See also* BIA Decision (Ex. C). Additional convictions were at issue during the removal proceedings in the context of relief eligibility. *See* BIA Decision (Ex. C). The IJ sustained the deportability charges, though did not specify which convictions supported the two charges in the NTA.[[2]](#footnote-2) *See* Oral Decision of the Immigration Judge at 5 (“The bottom line is that the respondent has multiple convictions for crimes involving moral turpitude.”). On or about June 28, 2016, the IJ ordered Ms. removed, finding her removable and also statutorily ineligible for cancellation of removal for battered spouses. *See* Decision and Order of the Immigration Judge.

Ms. appealed the removal order to the Board. While the appeal was pending, the Board issued its published opinions in *Diaz-Lizarraga* and *Obeya (BIA 2016)*, holding that the generic definition of a CIMT theft offense does not require a permanent taking, and that conviction under N.Y.P.L. § 155.25 is categorically a CIMT. *See Obeya*, 884 F.3d at 444. The Board affirmed the removal order on March 3, 2017. *See* BIA Decision (Ex. C).

Ms. filed a timely Petition for Review to the U.S. Court of Appeals for the Second Circuit, which is currently pending. *See v. Sessions*, No. 17-871 (2d Cir. *pending*). On March 8, 2018, the Second Circuit issued *Obeya v. Sessions*, holding that convictions under N.Y.P.L. § 155.25 entered prior to November 16, 2016 are not CIMTs under the categorical approach. *See Obeya*, 884 F.3d at 445 (holding the Board erred in applying its new CIMT theft offense generic definition to Mr. Obeya), 450 (holding that under the Board’s prior CIMT theft offense generic definition requiring an intent to permanently deprive, conviction under N.Y.P.L. 155.25 is categorically not a CIMT). Less than 30 days later, Ms. now files this motion to reconsider the removal order entered against her, as the correct application of the doctrine of equitable tolling mandates that this motion to reconsider be considered timely.

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

(1) The validity of the removal order is the subject of a judicial proceeding. The location of the judicial proceeding is the U.S. Court of Appeals for the Second Circuit. The proceeding is a Petition for Review that is currently pending.

(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 March 3, 2017. 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 Respondent has not departed from the United States and 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**

1. **The Second Circuit Held in *Obeya* That Convictions Under N.Y.P.L. § 155.25 Entered Prior to November 16, 2016 Are Not Crimes Involving Moral Turpitude; the Respondent’s § 155.25 Conviction Falls Squarely Within This Category.**

In *Obeya v. Sessions*, the U.S. Court of Appeals for the Second Circuit held that under the categorical approach, convictions under N.Y. Penal Law § 155.25 entered prior to November 16, 2016 are not CIMTs. Under *Obeya*, the Respondent’s conviction is not a CIMT and she is not deportable under INA §237(a)(2)(A)(i) or (ii).

In *Obeya*, the Second Circuit applied the categorical approach to identify that for decades, the Board’s generic definition of a CIMT theft offense required an intent to permanently deprive the owner of property. *See Obeya*, 884 F.3d at 445 (“from the Board’s earliest days it has held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property”) (internal modifications omitted). The Board’s new generic definition announced in *Matter of Diaz-Lizarraga* no longer requires an intent to permanently deprive for a conviction to constitute a theft CIMT, provided the conviction requires “an intent to deprive the owner … where the owner’s property rights are substantially eroded.” *Obeya*, 884 F.3d at 444 (internal quotation omitted). The Court in *Obeya* found the Board’s new generic definition announced in *Diaz-Lizarraga* is “a new rule”, rather than a refinement of an existing rule. *Obeya*, 884 F.3d at 446. The Court then applied a five-factor retroactivity test to find that the new rule could not be retroactively applied to Mr. Obeya or to others similarly situated. *See id.* at 445-49. Ms. is in the precise same legal position as Mr. Obeya. The Court’s decision in *Obeya* therefore means her conviction is not a deportable CIMT.

Both Mr. Obeya and Ms. were admitted as lawful permanent residents and convicted under N.Y.P.L. § 155.25 prior to the Board’s decision in *Diaz-Lizarraga*. *See Obeya*, 884 F.3d at 444 (Mr. Obeya was admitted as a lawful permanent resident in 2004 and pleaded guilty under § 155.25 “five years later”); Notice to Appear (Ex. A) (charging that Ms. was admitted as a lawful permanent resident in 2004 and convicted under § 155.25 in 2009). The five-factor retroactivity test compels the same result in these two cases to avoid arbitrary and capricious results. There is no legal distinction whatsoever between the noncitizens in these two cases with respect to the impact of *Obeya* on whether a pre-*Diaz-Lizarraga* conviction under N.Y.P.L.§ 155.25 is a CIMT. With respect to the third retroactivity factor, which asks whether the party relied on the prior rule, “the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable.” *Obeya*, 884 F.3d at 448. The Court conducted no inquiry into the specific circumstances of Mr. Obeya’s case. Rather, the Court found that the Board had had a clear rule on CIMT theft deportability prior to *Diaz-Lizarraga*, and that it was “eminently reasonable” for noncitizen defendants to rely on that rule when entering their guilty pleas. *See Obeya*, 884 F.3d at 448. Ms. inarguably entered her guilty plea at a time when the Board’s prior rule was in effect. The *Obeya*  decision settles this question in her case.

As such, the Board should grant reconsideration and terminate removal proceedings against Ms. . Alternatively, the Board should remand to the Immigration Judge for application of *Obeya* to Ms. ’s case and for further proceedings.

**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[[3]](#footnote-3), including the Second Circuit where Ms. ’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.

**2. Respondent Is Diligently Pursuing Her Rights and Extraordinary**

**Circumstances Prevented Timely Filing of this Motion.**

The Second Circuit’s decision in *Obeya*, which reversed the CIMT determination with respect to the very same offense at issue in Ms. ’s own Second Circuit appeal, constitutes an extraordinary circumstance that calls for equitable tolling of the motion to reconsider deadline in this case.

Ms. has vigorously pursued defenses to removal all the way through the petition for review stage. *See v. Sessions*, No. 17-871 (2d Cir. *pending*) Her arguments challenging her deportability and in support of her eligibility for relief from removal were rejected by the Board in her case through application of *Obeya (BIA 2016)*. The Second Circuit has now reversed the Board’s decision in *Obeya (BIA 2016)*, holding that the Board has erred in finding that convictions under N.Y.P.L. § 155.25 entered prior to November 16, 2016 are CIMTs. The extraordinary circumstance in this case is that the Second Circuit has reversed the CIMT determination regarding the very same offense at issue in Ms. ’s own case. That the Second Circuit’s holding on this question did not issue until 2018 is the only reason that Ms. did not timely move to reconsider her removal order.

The Second Circuit decided *Obeya* on March 8, 2018. Ms. has exhibited the requisite diligence both before and after the issuance of the Second Circuit’s decision in *Obeya*; she is filing the instant motion to reconsider within 30 days of the Second Circuit’s decision. *See* Declaration of Anne Pilsbury (Ex. D). Ms. 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* BIA Decision (Ex. C);  *v. Sessions*, No. 17-871 (2d Cir. *pending*). Ms. is filing this motion as soon as practicable after finding out about the decision and has displayed reasonable diligence in pursuing her rights.[[4]](#footnote-4)

**D. 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 *Obeya* amounts to a fundamental change in law warranting sua sponte reconsideration or reopening. *See supra* § IV.A. Reconsideration is especially warranted in this case given Ms. ’s 14 years of lawful permanent residence in the United States; the effect her removal would have on her teenage U.S. citizen son; the domestic violence she endured for years before separating from her spouse; the danger she would face in El Salvador, a country to which she has not returned in 30 years; her employment history; and her commitment to continuing to access mental health services.

Ms. immigrated to the United States from El Salvador in 1988. *See* Declaration of. She was granted lawful permanent resident status under NACARA on April 29, 2004. *See* BIA Decision (Ex. C). In 2000, she married her husband, who soon became severely abusive. *See* Marriage Certificate of and (Ex. E). *See also* Form I-797, Notice of Action (granting and extending prima facie classification under the self-petitioning provisions of the Violence Against Women Act) (Ex. F). The abuse had a deleterious effect on Ms. ’s mental health, exacerbating depression. *See* Letter from, Clinical Social Worker (diagnosing the Respondent with Major Depressive Disorder, and relating her mental illness to mistreatment by her husband) (Ex. G). In 2004, they had a son together, , who is now 14 years old and a U.S. citizen. *See* Birth Certificate of (Ex. H).

Ms. ’s deportation proceedings have been ongoing since 2009. *See* Notice to Appear (Ex. A). She was released from DHS custody in 2012. *See* Declaration of (Ex. D). She has not been convicted of any offense since that time. *See id.* She remains separated from her abusive husband. She has custody of their U.S. citizen son. *See* Order of Custody Modification (Ex. I). She works regularly as a home health attendant. *See* Declaration of (Ex. D). She routinely receives counseling and treatment for mental illness, and since her release from detention has been able to invest in the health of herself and her family.

It would be a manifest injustice for the Board to deny sua sponte reopening in the Respondent’s case. The Board should sua sponte reconsider the removal order in this case and allow Ms. her to remain in the United States with her family.

**V. CONCLUSION**

The Board should reconsider its prior decision in this case and terminate removal proceedings against Respondent or, alternatively, remand for consideration of the impact of the Second Circuit’s decision in *Obeya v. Sessions* on her removal proceedings.

Dated: April 4, 2018 Respectfully submitted,

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Andrew Wachtenheim, Esq.

Immigrant Defense Project

40 West 39th Street, Fifth Floor

New York, NY 10018

Telephone: (646) 760-0588

E-mail: andrew@immdefense.org

*Counsel for Respondent*

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**EXHIBITS IN SUPPORT OF STATUTORY MOTION TO RECONSIDER AND TERMINATE OR REMAND PROCEEDINGS**

Exhibit A: Copy of Notice to Appear;

Exhibit B: Copy of *Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018);

Exhibit C: Copy of the Boards’ decision denying Respondent’s Appeal of Removal Order, dated March 3, 2017;

Exhibit D: Declaration of co-counsel before EOIR;

Exhibit E: Copy of Marriage Certificate of and;

Exhibit F: Copy of Form I-797, Notice of Action (granting and extending prima facie classification under the self-petitioning provisions of the Violence Against Women Act for Ms. );

Exhibit G: Copy of Letter from, Clinical Social Worker,;

Exhibit H: Copy of Birth Certificate of, Respondent’s U.S. citizen son;

Exhibit I: Order of Custody Modification conferring custody of to the Respondent.

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**CERTIFICATE OF SERVICE**

I, Andrew Wachtenheim, served a copy of the foregoing Statutory Motion to Reconsider and Terminate or Remand in light of *Obeya v. Sessions* with Exhibits A to I on the Office of Chief Counsel, U.S. Department of Homeland Security, 201 Varick Street, Room 1130, New York, NY 10014 by mail on April 4, 2018.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Andrew Wachtenheim

Immigrant Defense Project

40 West 39th Street, Fifth Floor

New York, NY 10018

1. A copy of the Second Circuit’s decision in *Obeya v. Sessions* is attached at Ex. B. [↑](#footnote-ref-1)
2. Ms. ’s conviction under N.Y.P.L. § 155.25 can no longer support a CIMT deportability charge under INA § 237(a)(2)(A)(i). Neither the IJ nor the Board made any finding that the *other* conviction charged in the NTA, conviction under N.Y.P.L. § “240.50/03”, constitutes a CIMT; that conviction does not support the deportability charge leveled pursuant to INA § 237(a)(2)(A)(i). Ms. is not deportable under this ground. Nor is she deportable under INA § 237(a)(2)(A)(ii), which creates deportability for multiple CIMT convictions. *Obeya* clarified that Ms. ’s conviction under § 155.25 is not a CIMT; it therefore cannot contribute to a deportability charge for multiple CIMTs. There is only one other conviction alleged in the NTA. The deportability charge under § 237(a)(2)(A)(ii) cannot stand. [↑](#footnote-ref-2)
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-3)
4. Beyond the impact of the Second Circuit’s decision in *Obeya* on Ms. ’s case, there have been other legal developments on issues germane to her case since the Board affirmed her removal order in 2017. In *Matthews v. Sessions*, No. 16-3145 (2d Cir. oral argument scheduled for May 9, 2018), the Second Circuit is currently reviewing the Board’s precedential decision in *Matter of Mendoza-Osorio*, 26 I&N Dec. 703 (BIA 2016), which the Board invoked to pretermit Ms. ’s application for cancellation of removal. *See* BIA Decision (Ex. C). Additionally, the Supreme Court is currently determining whether a Notice to Appear that does not contain information about the first appearance before the Immigration Court is sufficient to interrupt the requisite residency requirement for cancellation of removal eligibility. *See Pereira v. Sessions*, No. 17-459 (U.S. oral argument scheduled for Apr. 23, 2018). This is the case for Ms. ’s Notice to Appear. *See* Notice to Appear (Ex. A). [↑](#footnote-ref-4)