No. _____

In the Supreme Court of the United States

RUBEN OVALLES,
Petitioner,

v.

MATTHEW G. WHITAKER
Acting United States Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 2019 *Counsel for Petitioner*

QUESTION PRESENTED

Following this Court's judgment in *Mata v. Lynch*, 135 S. Ct. 2150 (2015), the Fifth Circuit joined all of its sister circuits in holding that the statutory deadline for filing a motion to reopen a removal order is subject to equitable tolling. *Lugo-Resendez v. Lynch*, 831 F. 3d 337 (CA5 2016). In so doing, the Fifth Circuit adopted this Court's standard for equitable tolling from *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct 750 (2016).

Thereafter, the Fifth Circuit held that it lacked jurisdiction to review the merits of whether a movant (with criminal removability) pursued their rights diligently, thus further dividing a split between the courts of appeals. *Penalva v. Sessions*, 884 F. 3d 521 (CA5 2018). The question presented here is:

1. Whether the application of a legal standard to an undisputed set of facts is a question of law, or a pure question of fact that may be barred from judicial review.

Or, more specifically:

2. Whether the criminal alien bar, 8 U.S.C. §1252(a)(2)(C), tempered by §1252(a)(2)(D), prohibits a court from reviewing an agency decision finding that a movant lacked diligence for equitable tolling purposes, notwithstanding the lack of a factual dispute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruben Ovalles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth circuit in this case.

OPINIONS BELOW

The Fifth Circuit's panel opinion (App. A, *infra*, 1a-4a) is unpublished but reported at 741 Fed. Appx. 259. The underlying one-member panel decision of the Board of Immigration Appeals (BIA), on Ovalles' motion to reopen, is unreported but reproduced at App. B, *infra*, 5a-7a.

The Fifth Circuit's prior panel opinion from 2009 (App. C, *infra*, 8a-29a) is reported at 577 F. 3d 288. The underlying one-member panel decision of the BIA to that Fifth Circuit opinion, on Ovalles' first motion to reopen, is unreported but reproduced at App. D, *infra*, 30a-31a.

The BIA's original three-member panel opinion (App. E, *infra*, 32a-35a) erroneously reversing the Immigration Judge's grant of cancellation of removal is unreported but available at 2004 WL 880229.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2018. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of 8 U.S.C. § 1229a(c)(7), regarding general statutory motions to reopen, are reproduced at App. F, *infra*, 36a. As pertinent to this case, subparagraph (C)(i) establishes a 90-day deadline, from the date of a final administrative order of removal, for motions filed under subsection (c)(7).

The relevant jurisdictional provisions of 8 U.S.C. §§1252(a)(2)(C), (D) are reproduced at App. F, *infra*, 36a-37a. Subparagraph (C) creates a jurisdictional bar applicable to "any final order of removal against an alien who is removable by reason of having committed a criminal offense" triggering certain grounds of removability. But, subparagraph (D) provides a savings clause for constitutional claims and question of law.

STATEMENT OF THE CASE

This case is an attractive vehicle for the Court to clarify the standards for reviewing claims for equitable tolling of statutory deadlines. That is because the posture of this case frames the issue as the sole, dispositive question being presented to the Court.

Further, in deciding the issue the Court would in turn clarify the jurisdiction of the courts of appeals to review motions to reopen improperly entered removal orders. Reviewing this case would also serve the broader purpose of defining the outer limits of the criminal alien bar with respect to the application of a legal standard to an undisputed set of facts.

I. Legal Background

Since this Court's decision in *Mata v. Lynch*, 135 S. Ct. 2150 (2015), all the courts of appeals have recognized that the time limit for a motion to reopen filed under 8 U.S.C. §1229(c)(7) can be equitably tolled.[1] Further, the courts agree that the proper legal standard required to qualify for equitable tolling is a showing of: (1) due diligence in pursuing one's right; and (2) "that some extraordinary circumstance stood in the way and prevented a timely filing."[2]

The Immigration and Nationality Act provides for judicial review of denials of motions to reopen. 8 U.S.C. §§1252(a)(1), (b)(6). Yet, the same provision strips the courts of jurisdiction if the individual was convicted of a qualifying crime; this is known as the "criminal alien bar." 8 U.S.C. §1252(a)(2)(C). An exception within the same paragraph saves the court's jurisdiction from the "criminal alien bar," but only if the

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[1] *Neves v. Holder*, 613 F. 3d 30 (CA1 2010); *Iavorski v. INS*, 232 F. 3d 124 (CA2 2000); *Borges v. Gonzales*, 402 F. 3d 398 (CA3 2005); *Kuusk v. Holder*, 732 F. 3d 302 (CA4 2013); *Lugo-Resendez v. Lynch*, 831 F.3d 337 (CA5 2016); *Barry v. Mukasey*, 524 F. 3d 721 (CA6 2008); *Pervaiz v. Gonzales*, 405 F. 3d 488 (CA7 2005); *Hernandez-Moran* v. *Gonzales*, 408 F. 3d 496 (CA8 2005) ; *Valeriano v. Gonzales*, 474 F. 3d 669 (CA9 2007); *Riley v. INS*, 310 F. 3d 1253 (CA10 2002); *Avila-Santoyo v. U. S. Att'y Gen.*, 713 F. 3d 1357 (CA11 2013).

[2] *Supra* n.1; *accord Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016); *Holland v. Florida*, 560 U. S. 631, 649 (2010) (to be entitled to equitable tolling, a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented a timely filing.").

individual is seeking judicial review of a "constitutional claim" or is presenting a "question of law" for review. 8 U.S.C. §1252(a)(2)(D).

The courts are in conflict regarding their ability to review denied claims for equitable tolling on statutory motions to reopen when review is sought by a criminal alien.

On one side of this conflict stands the Fifth and the Fourth circuit, who bar criminal aliens from judicial review under the criminal alien bar. These courts hold that equitable tolling is a "factual determination [as to whether] the petitioner ha[s] not exercised due diligence," and is therefore outside the consideration of U.S.C. §1252(a)(2)(D). *Penalva v. Sessions*, 884 F. 3d 521, 525 (CA5 2018) (citing *Lawrence v. Lynch*, 826 F. 3d 198, 203 (CA4 2016)).

On the opposite side of this conflict is the Ninth circuit which holds that review of equitable tolling claims presents "a mixed question of law and fact, requiring that [it] apply the legal standard for equitable tolling to established facts," and thus "[j]urisdiction therefore is proper under 8 U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F. 3d 993, 999 (CA9 2007); *accord Agonafer v. Sessions*, 859 F. 3d 1198, 1202 (CA9 2017). In holding so, the Ninth circuit explained: "Congress intended the term ["question of law"] as used in 8 U.S.C. § 1252(a)(2)(D) to include mixed questions of law and fact." *Id*., at 999 (citing *Ramadan v. Gonzales*, 479 F. 3d 646, 654 (CA9 2007)). The other courts to consider the issue have provided mixed results.

II. Factual and Procedural Background

The petitioner was admitted to the United States as a lawful permanent resident at the age of six in 1985. C.A. Admin. Rec. 73. He was placed into removal proceedings in 2003 after being convicted of attempted possession of drugs under Ohio law earlier that same year. C.A. Admin. Rec. 543-45. Based upon this conviction, the Department of Homeland Security (DHS) charged Ovalles as removable for having been convicted of a controlled substance violation under 8 U.S.C. §1227(a)(2)(B)(i), also alleging that the crime was an aggravated felony under 8 U.S.C. §1101(a)(43)(B). C.A. Admin. Rec. 544.

After the Immigration Judge held that Ovalles' crime was not an aggravated felony, thereby finding him to be statutorily eligible for cancellation of removal under 8 U.S.C. §1229b(a), the Immigration Judge granted him cancellation. App. E, *infra*, 32a-33a. But, the DHS appealed, and the BIA improperly held that Ovalles' crime was indeed an aggravated felony under its now-defunct precedent, *Matter of Yanez*, 23 I. & N. Dec. 390 (BIA 2002). App. E, *infra*, 33a-35a (available at 2004 WL 880229). Thus, the BIA vacated the Immigration Judge's grant of cancellation, and ordered Ovalles removed to the Dominican Republic. Ovalles has been seeking a method to return to the United States since his removal in 2004.

Less than three years after Ovalles' removal, this Court overruled the BIA's precedent on this issue—thereby establishing that the vacatur of the Immigra-

tion Judge's grant of cancellation was in error—in *Lopez v. Gonzales*, 549 U. S. 47 (2006). In response, Ovalles sought out counsel in the United States.

Ovalles' case was eventually taken up by the Post-Deportation Human Rights Project (Project) at Boston College which filed a motion to reopen for Ovalles in July 2007. C.A. Admin. Rec. 127-51. The BIA ultimately denied the motion in light of the departure bar regulation codified at 8 CFR §1003.2(d). App. D, *infra*, 30a-31a. Thereafter, Ovalles was represented by pro bono counsel from Holland & Knight LLP, and the Project before the Fifth Circuit on petition for review. His petition attacked the validity of the departure bar on multiple grounds. The court of appeals ultimately rejected his arguments in *Ovalles v. Holder*, 577 F. 3d 288 (CA5 2009). App. C, *infra*, 8a-29a.

Since then, several developments in the law have culminated into Ovalles' current petition before this Court. Various courts of appeals struck down the departure bar on different types of arguments. Additionally, the doctrine of equitable tolling began to develop amongst the courts of appeals.

As for the departure bar, some courts held that the departure bar was an unlawful abrogation of the agency's statutory jurisdiction. *Luna v. Holder*, 637 F. 3d 85, 100 (CA2 2011); *Pruidze v. Holder*, 632 F. 3d 234, 239 (CA6 2011); *Marin-Rodriguez v. Holder*, 612 F. 3d 591, 593 (CA7 2010). Other courts held that the departure bar regulation was in conflict with, and preempted by, the statute. *Jian Le Lin v. U.S. Att'y Gen.*, 681 F. 3d 1236 (CA11 2012); *Contreras-*

Bocanegra v. Holder, 678 F. 3d 811 (CA10 2012); *Prestol Espinal v. Att'y Gen.*, 653 F. 3d 213 (CA3 2011); *Coyt v. Holder*, 593 F. 3d 902 (CA9 2010); *William v. Gonzales*, 499 F. 3d 329 (CA4 2007) (initially disagreed with by the Fifth Circuit in *Ovalles v. Holder*).

Ultimately, the Fifth Circuit was the last court to join the fray with *Garcia-Carias v. Holder*, 697 F. 3d 257 (CA5 2012), when it held that the statute did indeed preempt the departure bar regulation with regard to statutory motions to reopen. But, rather than overrule its prior ruling in *Ovalles v. Holder*, the court of appeals distinguished it by characterizing Ovalles' motion to reopen in that case as untimely—a characterization later to be addressed by this Court.

Notably, the *Garcia-Carias* case stopped short of recognizing equitable tolling in the Fifth Circuit. That is because the Fifth Circuit had a doctrine of recharacterizing requests for statutory reopening with tolling of the 90-day deadline as actually being regulatory motions to reopen *sua sponte*—a doctrine that the court held tightly onto. *Mata v. Holder* (*Mata I*), 558 Fed. Appx. 366, 367 (CA5 2014); *Ramos-Bonilla v. Mukasey*, 543 F. 3d 216, 220 (CA5 2008) (*citing Jie Lin v. Mukasey*, 286 Fed. Appx. 148, 150 (CA5 2008) (per curiam) (unpublished)); *Joseph v. Holder*, 720 F. 3d 228, 231 (CA5 2013) (same).

However, this Court addressed the Fifth Circuit's recharacterization doctrine, and struck it down in *Mata v. Lynch*, 135 S. Ct. 2150 (2015). The Court then remanded the case to the court of appeals to determine whether equitable tolling was available in

light of its "practice of recharacterizing appeals like Mata's as challenges to the Board's *sua sponte* decisions and then declining to exercise jurisdiction over them [so as to] prevent[ ] [a] split from coming to light." *Id*., at 2156. The Court also made it clear that "the Fifth Circuit may not . . . wrap such a merits decision in jurisdictional garb so that [this Court] cannot address a possible division between that court and every other. *Id*.

Thereafter, the Fifth Circuit recognized equitable tolling of the 90-day deadline in *Lugo-Resendez v. Lynch*, 831 F. 3d 337 (CA5 2016). And again, the Fifth Circuit declined to overrule *Ovalles v. Holder* by distinguishing it on the basis that Ovalles' motion to reopen in that case was an untimely regulatory *sua sponte* motion—as the Fifth Circuit's now-defunct recharacterization compelled it to be. *Id*., at 341-43.

During all this time, Ovalles periodically reached out to counsel in the United States. C.A. Admin. Rec. 77-81. Following the decision in *Lugo-Resendez*—which Ovalles learned about independently during his own personal research, C.A. Admin. Rec. 83-86 (sworn declaration taken at U. S. embassy)—Ovalles reached out to his former counsel in the United States who ultimately put Ovalles in touch with the undersigned. After retaining new counsel, Ovalles filed a motion to reopen with the BIA seeking equitable tolling for the first time. C.A. Admin. Rec. 12-117.

But, the BIA denied Ovalles' first motion to reopen filed under the authority of 8 U.S.C. §1229a(c)(7) on the grounds that he lacked diligence. App. B, *in-*

fra, 5a-7a. And then, the Fifth Circuit declined to review Ovalles' petition for review on jurisdictional grounds in *Ovalles v. Sessions*, 741 Fed. Appx. 259 (CA5 2018). App. A, *infra*, 1a-4a.

REASONS FOR GRANTING THE WRIT

The issue presented in this case involves a true, genuine, and current conflict between the courts of appeals. The issue is of significant and substantial importance because it surrounds the statutory right for all non-citizens to file a motion to reopen. *See Mata*, 135 S. Ct., at 2153 ("An alien ordered to leave the country has a statutory right to file a motion to reopen his removal proceedings."). Moreover, the ability for the courts to retain their jurisdiction to review motions to reopen should not be jeopardized, for "the purpose of a motion to reopen is to ensure a proper and lawful disposition." *Dada v. Mukasey*, 554 U. S. 1, 18 (2008). This conflict is ripe for definitive resolution by this Court.

This case satisfies all the criteria for certiorari. First, the question presented has squarely divided the Fifth and Fourth Circuits from the Ninth Circuit such that the former courts currently lack the jurisdiction to review claims that are reviewable in the latter court. Second, the question presented is an important and recurring one. Several other circuits have yet to publish an opinion on the matter, but have already started to take conflicting sides through unpublished rulings. Third, this is an ideal case for deciding the question. This case arises from simple and undisputed facts, where the only question that

needed to be answered by the Fifth Circuit was whether the petitioner has been diligently seeking to assert his right to reopening.

I. There is a genuine conflict among the courts of appeals.

a. The Ninth Circuit exercises jurisdiction.

After a thorough analysis on the history of judicial review in the immigration context, the Ninth Circuit in *Ramadan v. Gonzales*, ruled that the phrase "question of law" as it is used in 8 U.S.C. §1252(a)(2)(D) includes review of mixed questions of law and fact—the application of statutes and regulations to undisputed facts. 479 F. 3d 646, 651–654 (CA9 2007). In a subsequent decision, the Ninth held that review of a denial of equitable tolling "falls within *Ramadan*'s ambit as a mixed question of law and fact, requiring merely that we apply the legal standard for equitable tolling to established facts," to conclude that "[j]urisdiction therefore is proper under 8 U.S.C. § 1252(a)(2)(D)." *Ghahremani v. Gonzales*, 498 F. 3d 993, 999 (CA9 2007).

In the Ninth circuit, a "criminal alien" may seek judicial review of the denial of his motion to reopen that sought equitable tolling.

b. The Fourth and Fifth Circuits do not exercise jurisdiction.

Taking a polar opposite stance on the issue is the Fifth circuit. The Fifth Circuit notes "that whether equitable tolling applies to a petitioner's motion to

reopen is a question of fact." *Penalva v. Sessions*, 884 F. 3d 521, 525 (CA5 2018). The Fifth circuit has made clear that it views the inquiry as being purely "fact-intensive." *Id*. Thus, the Fifth concludes that no questions of law or constitutional claims are involved, and that it is "barred from appellate review under 8 U.S.C. § 1252(a)(2)(C)." *Id*. In the Fifth Circuit, review is strictly prohibited even if the movant raises an accompanying question of law, as long as the movant's request for equitable tolling was denied by the BIA below.

The Fourth Circuit, similar to the Fifth, does not recognize equitable tolling as involving a mixed question of law and fact. The Fourth circuit explained its "jurisdiction does not extend to a simple disagreement with the Board's factual determination that [a movant] had not exercised due diligence." *Lawrence v. Lynch*, 826 F.3d 198, 203 (CA4 2016).

While movants in the Ninth Circuit can seek judicial review of their statutory right to a motion to reopen, similar movants cannot avail themselves of such protections in the Fifth and Fourth Circuits.

c. The other circuits have reached mixed results.

While it is clear that the above-mentioned courts are in genuine conflict with each another, several other courts of appeals are in need of this Court's guidance in order to avoid a deeper rift.

For example, the First circuit has held that "[a] determination that equitable tolling is appropriate

involves a mixed question of law and fact." *Niehoff v. Maynard*, 299 F. 3d 41, 47 (CA1 2002). As explained by the First Circuit, "[t]he term mixed question is something of a misnomer; once the raw facts are determined (and such determinations are normally reviewed only for clear error), deciding which legal label to apply to those facts is a normative issue—strictly speaking, *a legal issue*." *Id*. (emphasis added). Relying on these holdings, one would assume the First and the Ninth circuit would be on the same page. But, in 2006, the First Circuit issued its opinion *Boakai v. Gonzales*, holding that the answer as to whether "*Boakai*'s challenge to the BIA's decision not to grant such tolling presents a 'question of law' within the meaning of the REAL ID Act . . . is plainly no." 447 F. 3d 1, 4 (1st Cir. 2006). In fact, both the Fifth and Fourth Circuits cite to *Boakai* in support of their decision not to exercise jurisdiction. *Penalva*, 884 F. 3d, at 525; *Lawrence*, 826 F. 3d, at 203.

Notably, and subsequent to *Boakai*, in *Neves v. Holder*, 613 F. 3d 30 (CA1 2010), the First circuit appeared to back away from its holding in *Boakai*. Importantly, *Neves* was published after a remand from Court in *Neves v. Holder*, 560 U. S. 901 (2010) (mem.). On remand the First circuit recognized:

> [o]ur earlier opinion held that no legal or constitutional issues were raised by the BIA's determination that Neves's time- and number-barred motion to reopen was not subject to equitable tolling because of Neves's failure to show due diligence. On that basis, we held we were barred from exercising jurisdiction to review the BIA's decision. That holding, as *Kucana* makes clear, was erroneous.

Neves v. Holder, 613 F. 3d, at 35. The First circuit would go on to further state that "[s]everal of this circuit's earlier cases also relied on this erroneous premise." *Id*., at 35, n.3. The *Neves* holding seems to coincide with the Ninth's opinion that the courts have jurisdiction over equitable tolling claims made by criminal aliens.

The Second, Third, and Seventh Circuits have yet to publish a precedent opinion squarely on this issue. Nonetheless, these courts are assuming jurisdiction of denials of equitable tolling claims made by criminal aliens, and deciding the cases on the merits. *See Ramos-Braga v. Session*, 900 F. 3d 871 (CA7 2018); *Johnson v. Gonzales*, 478 F. 3d 795 (CA7 2007); *McCarty v. Sessions*, 730 Fed. Appx. 75 (CA2 2018); *Mercedes-Pichardo v. Mukasey*, 297 Fed. Appx. 49 (CA2 2008); *Green v. Att'y Gen. of U. S.*, 429 Fed. Appx. 147 (CA3 2011).

The only circuit that seems to agree with the Fourth, and the Fifth is the Tenth. In a recent unpublished decision, *Vue v. Whitaker*, 743 Fed. Appx. 910 (CA10 2018) (mem.), the petitioner argued for equitable tolling of the time limit to file a motion to reopen. The court dismissed the petition and stated, "to the extent [petitioner] is challenging the BIA's discretionary decision not to permit him to file a late motion to reopen, we also lack jurisdiction to review the decision." *Id*., at 911 (citation omitted).

In sum, it appears the First, Second, Third, Seventh, and the Ninth are in accordance that they have jurisdiction to review equitable tolling claims under 8

U.S.C. §1252(a)(2)(D), while the Fourth, Fifth, and Tenth believe they do not have that jurisdiction.

II. This case is an ideal vehicle for deciding the question presented.

Whether the review of a denial for equitable tolling involves a legal question can be readily answered in the affirmative.[3] This case illustrates the point.

In raising a claim for equitable tolling with the agency, Ovalles argued that he was precluded from filing his statutory motion to reopen due to prohibitive Fifth Circuit precedent. Before Petitioner was able to file his motion, he had to overcome two issues: (1) the departure bar; and (2) that the Fifth circuit was yet to accept equitable tolling. Both obstacles have been struck down by every circuit to consider them. The only remaining issue is the jurisdictional one—whether a court of appeals can review the application of a legal standard to an undisputed set of facts in light of the criminal alien bar. There are no other issues in this case that would obfuscate the Court's review of the issue.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

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[3] "Mixed questions are generally held to fall within the jurisdiction of the reviewing court even when the court's jurisdiction to review the facts themselves has been limited or eliminated." *Jean-Pierre v. U. S. Att'y Gen.*, 500 F. 3d 1315, 1321, n.4 (CA11 2007) (*citing Townsend v. Sain*, 372 U. S. 293, 309 n. 6 (1963)).

Respectfully submitted,

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January 2019

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60438
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2018
Lyle W. Cayce

RUBEN OVALLES,

Petitioner

v.

JEFFERSON B. SESSIONS, III, U.S. ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A040 070 535

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Ruben Ovalles, a native and citizen of the Dominican Republic, seeks review of the decision of the Board and Immigration Appeals (BIA) dismissing his second motion to reopen the proceedings based on equitable tolling of the 90-day deadline established by 8 U.S.C. § 1227(c)(7). Ovalles was ordered removed from the United States in 2004 pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), based on his Ohio conviction for attempted possession of drugs. The BIA found that Ovalles's drug conviction was also an aggravated felony for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii), which rendered Ovalles ineligible for cancellation of removal.

In 2007, Ovalles moved to reopen his immigration proceedings based on *Lopez v. Gonzales*, 549 U.S. 47, 55-58 (2006), under which his conviction for attempted possession of drugs was not an aggravated felony. The BIA noted that the motion to reopen was untimely, but it dismissed the appeal based on the departure bar set forth in 8 C.F.R. § 1003.2(d). We affirmed. *Ovalles v. Holder*, 577 F.3d 288, 296-99 (5th Cir. 2009).

Ovalles filed a second motion to reopen in March 2017, arguing that under *Garcia-Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012), and *Lugo-Resendez v. Lynch*, 831 F.3d 337, 339 (5th Cir. 2016), the departure bar did not apply to a statutory motion to reopen and that he was entitled to equitable tolling. The BIA denied the motion as untimely and as number-barred, finding that under *Lugo-Resendez*, Ovalles had not shown the requisite due diligence to warrant equitable tolling, given that he waited approximately

eight months after *Lugo-Resendez* was decided to seek relief. Nor had he demonstrated an exceptional situation that warranted sua sponte reopening.

Ovalles argues that the BIA abused its discretion in failing to apply equitable tolling because circuit precedent prevented him from bringing a statutory motion to reopen the proceedings seeking equitable tolling any sooner. He contends that the BIA erred in harshly determining that he had not exercised due diligence in obtaining relief and in failing to consider his individual facts and circumstances.

We have jurisdiction to review the denial of a motion to reopen seeking equitable tolling of the 90-day deadline to file the motion. *Mata v. Lynch*, 135 S. Ct. 2150, 2154-55 (2015); *Penalva v. Sessions*, 884 F.3d 521, 523 (5th Cir. 2018). The Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(C), however, strips us of jurisdiction to review the denial of such a motion if the alien is removable because he committed, among other offenses, an offense covered in 8 U.S.C. §§ 1227(a)(2)(A)(iii) or (B). *Penalva*, 884 F.3d at 523. Section 1252(a)((2)(C)'s jurisdictional stripping provision, however, "does not extend to constitutional claims or questions of law raised upon a petition for review." *Penalva*, 884 F.3d at 523-24 (quoting 8 U.S.C. § 1252(a)(2)(D)). We review de novo whether we have jurisdiction. *Id*. At 523.

Regardless of *Lopez*'s holding, because Ovalles was determined to be removable under § 1227(a)(2)(B)(i), we lack jurisdiction to review his claims other than for questions of law or constitu-

tional claims. *See Penalva*, 884 F.3d at 523; § 1252(a)(2)(C). Whether an alien acted diligently in attempting to reopen removal proceedings for purposes of equitable tolling is a factual question. *Penalva*, 884 F.3d at 526.

Ovalles contends that he has argued both that the BIA applied the wrong legal standard for tolling and that it incorrectly decided the reasonable diligence question. According to Ovalles, the diligence issue he argues is a mixed question of law and fact reviewable as a legal question. Given that the basis of the BIA's denial of Ovalles's request for equitable tolling was his failure to show diligence, Ovalles has raised an unreviewable fact question, and his arguments amount to no more than his disagreement with the application of the equitable tolling standard. *See Penalva*, 884 F.3d at 524-26; *cf. Diaz v. Sessions*, 894 F.3d 222, 226-27 (5th Cir. 2018). Ovalles correctly acknowledges that *Lugo-Resendez* set forth the legal standard to evaluate whether an alien is entitled to equitable tolling of the statutory deadline to file a motion to reopen proceedings. *See Diaz*, 894 F.3d at 226. Nothing in the record indicates that the BIA applied an incorrect standard. *See Lugo-Resendez*, 831 F.3d at 344-45.

In light of the foregoing, Ovalles's petition is DISMISSED for lack of jurisdiction.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A040 070 535 – Oakdale, LA

Date: Jun. 2, 2017

In re: RUBEN OVALLES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mark A. Prada, Esquire

APPLICATION: Reopening

The respondent has filed his second motion to reopen proceedings in which the Board entered the final administrative decision on March 8, 2004. The Department of Homeland Security has not responded to the motion, which will be denied as untimely and number-barred, as the respondent has not demonstrated that an exception to the time and number limits applies. *See* Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2).

The respondent has not shown that the time and number limitations on motions should be equitably tolled under *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016). In particular, the United States Court of Appeals for the Fifth Circuit explicitly dis-

tinguished the respondent's case in holding that equitable tolling was potentially available to Lugo-Resendez. As the Fifth Circuit discussed, unlike in *Lugo-Resendez v. Lynch*, *supra*, the respondent-through counsel—conceded—the untimeliness of his motion to reopen. We decline to revisit that concession in his current motion filed approximately a decade later. *See Matter of R-A-M-*, 25 I&N Dec. 657,658 n.2 (BIA 2012) (observing that the failure to meaningfully appeal an issue in an Immigration Judge's decision constitutes waiver before the Board); *Zhang v. Gonzales*, 432 F.3d 339, 346 (5th Cir. 2005) (noting that an alien waives a due process claim by not raising it before the Immigration Judge); *Mutsvene v. Lynch*, 647 Fed.Appx. 369 n.6 (5th Cir. Apr. 28, 2016) (absent egregious circumstances an alien is bound by his attorney's admission).

We separately note that the respondent has not demonstrated the requisite due diligence to warrant equitable tolling, where he waited approximately 8 months after the Fifth Circuit issued *Lugo-Resendez v. Lynch*, *supra*, to file his current motion. *Id*. at 348 (observing that equitable tolling of the time limit is predicated on an alien pursuing the claim with reasonable diligence).

Finally, the respondent has not demonstrated an exceptional situation warranting sua sponte reopening. 8 C.F.R. § 1003.2(c)(3); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). Accordingly, the motion will be denied.

ORDER: The motion is denied.

/s/ John Guendelsberger

FOR THE BOARD

APPENDIX C

REVISED AUGUST 12, 2009
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60836

United States Court of Appeals
Fifth Circuit
FILED
July 27, 2009
Charles R. Fulbruge

Ruben OVALLES,

Petitioner

v.

Eric H. HOLDER, Jr., U.S. Attorney General

Respondent

Appeal from the United States
Board of Immigration Appeals

Before GARWOOD, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

Ruben Ovalles (Ovalles), who filed an untimely motion to reconsider his removal order or to reopen his removal proceedings following his departure from the United States, petitions for review of an order of the Board of Immigration Appeals (BIA or Board) denying jurisdiction over his motion pursuant to 8 C.F.R. § 1003.2(d). Ovalles argues that the so-called

"post-departure bar" in section 1003.2(d) is contrary to statute and therefore invalid, that the BIA unreasonably concluded that the post-departure bar trumped its *sua sponte* authority to reconsider decisions or reopen proceedings, that section 1003.2(d) was applied arbitrarily and capriciously in his case, and that he was deprived of his Fifth Amendment right to due process. For the following reasons, we DENY the petition for review.

I. FACTS AND PROCEEDINGS BELOW

Ovalles, a native and citizen of the Dominican Republic, immigrated to the United States in 1985 and eventually became a permanent legal resident. In 2003, Ovalles was convicted in Ohio of attempted possession of drugs under Ohio Revised Code Ann. §§ 2923.02, 2925.11 and sentenced to five years of probation. As a result, Ovalles was charged with removability pursuant to 8 U.S.C. §§ 1227(a)(2)(B)(i) (conviction of a controlled substance violation) and 1227(a)(2)(A)(iii) (conviction of an aggravated felony). The Immigration Judge (IJ) concluded that Ovalles was removable for a controlled substance violation pursuant to section 1227(a)(2)(B)(i), but, because he was never imprisoned, his conviction was not an aggravated felony under section 1227(a)(2)(A)(iii). As a result, the IJ determined that Ovalles was eligible for cancellation of removal under 8 U.S.C. § 1229b(a), which the IJ granted due to Ovalles's continuous work history and familial connections in the United States. The Department of Homeland Security appealed to the BIA. On March 8, 2004, the Board held that Ovalles's conviction was an aggravated felony,

and therefore that Ovalles was ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a)(3). Ovalles was removed to the Dominican Republic on April 14, 2004.

On December 5, 2006, the Supreme Court decided *Lopez v. Gonzales*, which held that a first-time conviction for simple possession of drugs that is neither an illicit trafficking offense nor a federal felony does not constitute an aggravated felony for immigration purposes. 127 S.Ct. 625, 631–32 (2006). Arguing that this decision undermined the legal basis for his removal, Ovalles filed a motion with the BIA on July 27, 2007 to reconsider its March 2004 decision *sua sponte*, or alternatively, to reopen his removal proceedings *sua sponte*. The BIA began by noting that Ovalles's motion, which it viewed as a motion to reopen *sua sponte*, was untimely. Ultimately, however, the BIA refused to consider the motion on the basis of 8 C.F.R. § 1003.2(d), which provides in relevant part: "A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States." Ovalles timely filed this petition for review.[1]

II. DISCUSSION

A. Standard of Review

[1] The American Immigration Law Foundation filed a brief as *amicus curiae* in support of Ovalles's position.

We review the BIA's conclusions of law and constitutional issues arising therefrom *de novo*. *See Garrido-Morato v. Gonzales*, 485 F.3d 319, 322 (5th Cir. 2006). We grant the BIA's interpretation of its own regulations "'considerable legal leeway.'" *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 675 (5th Cir. 2003) (quoting *Barnhart v. Walton*, 122 S.Ct. 1265, 1269 (2002)). "However, '[w]hile an agency interpretation of a regulation is entitled to due deference, the interpretation must rationally flow from the language of the regulation.'" *Id*. (quoting *Acadian Gas Pipeline Sys. v. FERC*, 878 F.2d 865, 868 (5th Cir. 1989)).

B. Validity of 8 C.F.R. § 1003.2(d)

Ovalles's primary contention on appeal is that the post-departure bar in 8 C.F.R. § 1003.2(d) is invalid, because it is contrary to the clear and unambiguous language of the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (1996), that "[t]he alien may file one motion to reconsider" and "[a]n alien may file one motion to reopen." *See* 8 U.S.C. § 1229a(c)(6)(A), (c)(7)(A). In support of this argument, Ovalles urges this court to follow the Fourth Circuit's decision in *William v. Gonzales*, which held that the post-departure bar in section 1003.2(d) was invalid because it conflicted with the clear and unambiguous language of section 1229a(c)(7)(A) of IIRIRA. *See* 499 F.3d 329, 331–34 (4th Cir. 2007).

Motions to reconsider and motions to reopen began as judicial creations and were later incorporated into regulations. *See Dada v. Mukasey*, 128 S.Ct.

2307, 2315 (2008). The first version of the post-departure bar on filing such motions appeared in a regulation promulgated by the Attorney General in 1952, which provided in pertinent part as follows:

> "A motion to reopen or a motion to reconsider [before the BIA] shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure of such person from the United States occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion."

17 Fed. Reg. 11,469, 11,475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2); *see In re Armendarez-Mendez*, 24 I&N Dec. 646, 648 (BIA Oct. 6, 2008). Since that time, the BIA has consistently interpreted the post-departure bar as a limitation on its jurisdiction to entertain motions to reopen or reconsider filed by aliens who have departed the country. *In re Armendarez-Mendez*, 24 I&N Dec. at 648.

In 1961, Congress imposed a similar statutory restriction on the ability of Article III courts to hear appeals from deportation or exclusion orders filed by aliens who had already departed the country:

> "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has de-

> parted from the United States after the issuance of the order."

8 U.S.C. § 1105a(c) (repealed 1996); *see In re Armendarez-Mendez*, 24 I&N Dec. at 649. The law surrounding motions to reopen or reconsider changed again in 1996, when Congress amended the Immigration and Naturalization Act (INA) with the enactment of IIRIRA. *See William*, 499 F.3d at 330. IIRIRA repealed 8 U.S.C. § 1105a(c), replacing it with a new provision governing Article III review of deportation and exclusion orders that did not contain a post-departure bar. *See* 8 U.S.C. § 1252; *see William*, 499 F.3d at 330. Additionally, IIRIRA codified procedures for filing motions to reopen and motions to reconsider, incorporating several of the existing regulatory restrictions on filing those motions but, notably, excluding the post-departure bar. *See* 8 U.S.C. § 1229a(c); *see also William*, 499 F.3d at 330.

Following the enactment of IIRIRA, the Attorney General passed a new set of regulations governing motions to reopen or reconsider that, despite the repeal of 8 U.S.C. § 1105a(c) and the lack of explicit authorization in 8 U.S.C. § 1229a(c), again imposed a post-departure bar nearly identical to those contained in previous regulations:

> "A motion to reopen or a motion to reconsider [before the BIA] shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States,

> including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such a motion."

8 C.F.R. § 3.2(d); *see* 62 Fed. Reg. 10312, 10321, 10331 (Mar. 6, 1997). This regulation, which was later redesignated 8 C.F.R. § 1003.2(d), is challenged in the instant case. *See* 68 Fed. Reg. 9,924, 9,830 (Feb. 28, 2003).

In *Pena-Muriel v. Gonzales*, the First Circuit considered whether the repeal of the statutory post-departure bar applicable to the federal courts in 8 U.S.C. § 1105a(c) abrogated or otherwise signaled Congress's intent to eliminate the post-departure bar in 8 C.F.R. § 1003.23(b)(1), which applies to the immigration courts and mirrors section 1003.2(d) (which applies to the BIA).[2] 489 F.3d 438, 441 (1st Cir. 2007). First, the court concluded that, because the regulatory post-departure bar existed prior to and independent of the statutory post-departure bar, the repeal of

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[2] 8 C.F.R. § 1003.23(b)(1) provides in relevant part as follows:

> "A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion."

section 1105a(c) did not in itself "abrogate the Attorney General's authority to continue to enforce the limitations of 8 C.F.R. § 1003.23(b)(1)." *Id*. The court then went on to consider whether, in enacting IIRIRA, Congress nevertheless intended for the Attorney General to cease enforcement of the post-departure bar. *Id*. The court determined that IIRIRA was silent or ambiguous on the issue, therefore it accorded deference to the agency's construction of the statute under *Chevron*.[3] *Id*. at 441. Ultimately, the court went on to conclude that the continued implementation of the post-departure bar was a reasonable interpretation of the Attorney General's authority under IIRIRA. *Id*. at 442–43. In the course of denying Pena-Muriel's motion for rehearing, the court observed that its initial decision did *not* address whether the post-departure bar conflicted with 8 U.S.C. § 1229a(c)(7). *Pena-Muriel v. Gonzales*, 510 F.3d 350, 350 (1st Cir. 2007).

That argument was considered in *William*, in which a divided panel of the Fourth Circuit held that "[8 U.S.C.] § 1229a(c)(7)(A) unambiguously provides an alien with the right to file one motion to reopen, regardless of whether he is within or without the country." 499 F.3d at 332. In examining the language of section 1229a(c)(7)(A), the court emphasized that the statute provides that "*[a]n alien* may file" one motion to reopen. *Id*. (emphasis in original). The court determined that because the statute did not include any geographical limitation when referring to "an al-

[3] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781–82 (1984).

ien," Congress clearly meant to provide the right to *all* aliens meeting the requirements of section 1229a(c)(7), even those who had departed the United States. *Id*.

The *William* majority bolstered its reading of section 1229a(c)(7)(A) by examining the overall structure of section 1229a(c)(7). *Id*. at 333. First of all, it presumed that Congress acted intentionally when it chose to incorporate other existing regulatory restrictions on an alien's right to file motions to reopen, including filing deadlines and numerical limitations, but not the post-departure bar. *Id*. Additionally, the majority pointed to section 1229a(c)(7)(C)(iv)(IV), which exempts alien victims of domestic violence from the usual filing deadlines for a motion to reopen if they are "physically present in the United States at the time of filing the motion." *Id*. It drew two conclusions from Congress's inclusion of this provision. *Id*. First, it reasoned that Congress's placement of a physical presence requirement in 1229a(c)(7)(C)(iv)(IV), but not in section 1229a(c)(7)(A), demonstrated Congress's intent to do so, "because where Congress 'includes particular language in one section of a statute but omits it from another section of the same Act . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id*. (quoting *Clay v. United States*, 123 S.Ct. 1072, 1077 (2003)). Second, the *William* majority observed that to adopt the Government's interpretation of section 1229a(c)(7)(A) would render section 1229a(c)(7)(C)(iv)(IV) superfluous, "for a finding that

physical presence in the United States is required before *any* motion to reopen may be filed would render the physical presence requirement expressly written into subsection (c)(7)(C)(iv)(IV) mere surplusage." *Id.* (citing *TRW, Inc. v. Andrews*, 122 S.Ct. 441, 449 (2001)). For these reasons, the *William* majority ultimately concluded that section 1003.2(d) directly conflicted with the plain language of section 1229a(c)(7)(A) and therefore was invalid. *Id.* at 334.

Chief Judge Williams wrote an extensive dissent in *William*, arguing that IIRIRA was silent on the issue of the post-departure bar and therefore the court should defer to the Attorney General's interpretation of the statute under *Chevron*. *See id.* at 334–45. He placed special emphasis on the fact that, prior to the passage of section 1229a(c)(7)(A), a similar regulation limiting aliens to only one motion to reopen worked alongside the post-departure bar to restrict the ability of aliens located within the country from filing repeated motions to reopen. *Id.* at 336 (citing 8 C.F.R. § 3.2(c)(2)). On that basis, Chief Judge Williams observed that "if Congress intended to repeal the departure bar, it would have done so by doing more than merely repeating the numerical limitation already contained in the regulations, a limitation that was designed to operate alongside the departure bar to promote finality in deportation proceedings." *Id.* at 336–37. Therefore, he concluded that the majority had "impute[d] more meaning to the codified numerical limitation than the words of the statute can bear." *Id.* at 336.

In addition, the Chief Judge rejected the majority's reliance on section 1229a(c)(7)(C)(iv)(IV), the exception to the filing deadline for alien victims of domestic violence, as a basis for concluding that Congress intended to eliminate the post-departure bar. *Id*. at 337–38. First of all, he observed that section 1229a(c)(7)(C)(iv)(IV) and the physical presence requirement contained therein were added years after the passage of IIRIRA as part of two statutes enacted in a broad legislative effort to "snuff out sex slave trade and domestic violence."[4] *Id* at 337. Therefore, Chief Judge Williams concluded that it was a mistake to rely on section 1229a(c)(7)(C)(iv)(IV) as a means of interpreting Congress's intent in passing IIRIRA, as the two were "connected neither in time nor purpose." *Id*. Second, Chief Judge Williams argued that section 1229a(c)(7)(C)(iv)(IV) could just as easily be interpreted as an exception to the second prong of the post-departure bar regulation, which would otherwise result in the automatic withdrawal of a motion to reopen filed by an alien victim of domestic violence who departed the country after filing. *Id*. Ultimately, Chief Judge Williams concluded that IIRIRA was silent as to whether aliens were permitted to file post-

[4] The exception for victims of domestic violence was created with the passage of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (2000), and originally made no mention of the alien's location at the time of filing. *See* 8 U.S.C. § 1229a(c)(6)(C)(iv) (2005); *William*, 499 F.3d at 337. The physical presence requirement was added later when Congress enacted the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–62, § 825, 119 Stat. 2960 (2006). *William*, 499 F.3d at 337.

departure motions to reopen. *Id.* at 342. Therefore, he afforded the agency deference under step two of *Chevron* and found that the post-departure bar in section 1003.2(d) was a valid exercise of the Attorney General's rulemaking authority.[5] *Id.* at 342–44.

Ovalles urges this court to adopt the analysis of the majority in *William* and to extend the majority's reasoning beyond motions to reopen to encompass motions to reconsider under section 1229a(c)(6). Without passing judgment on the merits of the Fourth Circuit's decision in *William*, we decline to do so. In asking us to invalidate section 1003.2(d), Ovalles invokes statutory provisions that offer him no relief. Section 1229a(c)(6)(B) provides that a motion to reconsider "must be filed within 30 days of the date of entry of a final administrative order of removal," and section 1229a(c)(7)(C)(i) mandates that a motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal." The BIA entered Ovalles's final order of removal on March 8, 2004, yet Ovalles did not file his motion to reconsider or to reopen until July 27, 2007. Thus, over three years had passed from the entry of the BIA's final administrative order of removal before Ovalles filed his motion. Moreover, even if we were to start the running of the allowed time period when the Supreme Court issued *Lopez* on December 6, 2006, nearly eight months would have passed before

[5] We also note that BIA itself has explicitly rejected the holding in *William* and refused to abide by that decision outside of the Fourth Circuit. *See In re Armendarez-Mendez*, 24 I&N Dec. at 653–60.

Ovalles filed his motion with the BIA. Therefore, Ovalles's motion would still have been well outside both the thirty-day deadline for filing motions to reconsider and the ninety-day deadline for filing motions to reopen.

This key fact distinguishes the present case from *William*. *See Castillo-Perales v. Mukasey*, 298 F. App'x 366, 370 n.3 (5th Cir. Nov. 3, 2008) (unpublished). In *William*, the petitioner filed a motion to reopen within ninety days after the vacatur of the state conviction for which he was deported. *See* 499 F.3d at 331. Apparently, the Fourth Circuit determined that the vacatur restarted the limitations period, and the Government did not argue that the motion was untimely. *See id*. 334 n.5. Therefore, unlike Ovalles, William filed his motion to reopen within the statutory deadline and was entitled to whatever rights the court determined were available to him under section 1229a(c)(7). *See id*. at 331.

Thus, because sections 1229a(c)(6) and 1229a(c)(7) of IIRIRA do not grant Ovalles the right to have his facially and concededly untimely motion heard by the BIA, he cannot rely on those statutory provisions as a basis for contending that the BIA was required to give *sua sponte* consideration to the merits of his July 27, 2007 motion to reconsider or reopen its March 2004 decision.

B. Interplay between 8 C.F.R. § 1003.2(a) and 1003.2(d)

Ovalles also contends that the BIA unreasonably interpreted the post-departure bar in section

1003.2(d) as trumping its *sua sponte* authority to reopen or reconsider cases under 8 C.F.R. § 1003.2(a). Section 1003.2(a) provides in relevant part as follows: "The Board may *at any time* reopen or reconsider on its own motion any case in which it has rendered a decision." (emphasis added).

Citing the Eleventh Circuit's decision in *Contreras-Rodriguez v. U.S. Atty. Gen.*, 462 F.3d 1314, 1317 (11th Cir. 2006), Ovalles asserts that the BIA's *sua sponte* authority to reconsider or reopen cases overrides the post-departure bar in section 1003.2(d). However, *Contreras-Rodriguez* is distinguishable, because that case involved an alien who was removed *in absentia* and the special provisions of sections 1229(a)(c)(7)(iii) and 1229(a)(5)(C). 462 F.3d at 1317; *see In re Mascoe*, A44 500 897, 2007 WL 3318162 (BIA Sept. 25, 2007) (unpublished). Moreover, the court limited the IJ's and the BIA's jurisdiction upon reopening the proceedings to considering only whether the alien had received sufficient notice of the removal proceedings. *Contreras-Rodriguez*, 462 F.3d at 1317.

More importantly, this argument is foreclosed by our decision in *Navarro-Miranda v. Gonzales*, which is directly on point. *See* 330 F.3d at 675–76. In *Navarro-Miranda*, as is arguably the case here, the petitioner was removed under 8 U.S.C. § 1227(a)(2)(A)(iii) for an offense (driving while intoxicated) that was later determined not to be an aggravated felony under the INA. *Id.* at 674. Navarro-Miranda moved to reopen his removal proceedings by invoking the BIA's authority to reopen *sua sponte* "at any time" under 8

C.F.R. § 3.2(a) (predecessor to section 1003.2(a)). *Id.* at 675. Despite the broad language used in section 3.2(a), the BIA determined that it lacked jurisdiction under the post-departure bar in 8 C.F.R. § 3.2(d) (predecessor to section 1003.2(d)). *Id.* We upheld that decision, concluding that "the BIA's reasoning that the prohibition on motions to reopen stated in § 3.2(d) overrides its § 3.2(a) power to reopen on its own motion is a reasonable interpretation of the language of these two regulations." *Id.* at 676.

Moreover, we note that neither section 1229(a)(c)(6) nor section 1229(a)(c)(7) speak to *sua sponte* reopening or reconsideration, and certainly not respecting "motions" to do so filed after the deadlines specified in those sections.

Therefore, because we find *Contreras-Rodriguez* distinguishable and are bound by our decision in *Navarro-Miranda*, we conclude that the BIA acted reasonably in determining that it lacked the *sua sponte* authority under section 1003.2(a) to reconsider or reopen Ovalles's case due to the post-departure bar in section 1003.2(d).

C. Application of 8 C.F.R. § 1003.2(d) to Ovalles

Ovalles contends that the BIA acted arbitrarily and capriciously in applying section 1003.2(d) to deny jurisdiction over his motion. We disagree.

First, Ovalles argues that the BIA was required to consider his appeal because his order of removal was based on a legal determination that was later found to be erroneous by the Supreme Court. In *Lopez*, the

Court held that, in order to constitute an aggravated felony for immigration purposes, a drug conviction must either be an illicit trafficking crime or punishable as a federal felony under the Controlled Substances Act. 127 S.Ct. at 631–32. Thus, because he was convicted of attempted possession, which is neither illicit trafficking nor a federal felony, Ovalles contends that his conviction was not an aggravated felony and he is eligible for relief from removal under 8 U.S.C. § 1229b(a)(3). In support, Ovalles cites to several cases from other jurisdictions where the courts rejected application of the statutory post-departure bar in section 1105a(c) "where the departure was not legally executed or otherwise did not comply with due process requirements." *E.g.*, *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977); *Juarez v. INS*, 732 F.2d 58, 59–60 (6th Cir. 1984); *Joehar v. INS*, 957 F.2d 887, 889 (D.C. Cir. 1992). However, because this court has explicitly rejected that line of cases, this argument is unavailing.[6] *See Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990).

Second, Ovalles contends that, by its own terms, section 1003.2(d) does not apply in his case. Section 1003.2(d) precludes the BIA from hearing motions filed by "a person who *is* the subject of exclusion, de-

[6] Moreover, in *Navarro-Miranda*, we found that "at the time that Navarro's final order of removal was issued, his DWI conviction was considered to be an aggravated felony. Accordingly, his removal order was legally executed. . . ." 330 F.3d at 674–75. Therefore, even if we were to adopt the reasoning espoused by the Ninth Circuit in *Mendez*, our own precedent undermines Ovalles's argument that his removal was illegally executed due to a subsequent change in the law.

portation, or removal proceedings subsequent to his or her departure from the United States." (emphasis added). Relying on the Ninth Circuit's decision in *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007)), Ovalles contends that section 1003.2(d) does not apply to him because he no longer "is" the subject of removal proceedings. In *Lin*, the Ninth Circuit considered whether the BIA erred in affirming an IJ's application of the post-departure bar in 8 C.F.R. § 1003.23(b)(1) to deny jurisdiction over a motion to reopen filed by an alien who illegally reentered the country after being removed. 473 F.3d at 981–82. The *Lin* court held:

> "The regulation is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she '*is* the subject of removal . . . proceedings.' 8 C.F.R. § 1003.23(b)(1) (emphasis added). Because petitioner's original removal proceedings were completed when he was removed to China, he did not remain the subject of removal proceedings after that time. While the regulation may have been intended to preclude aliens in petitioner's situation from filing motions to reopen their completed removal proceedings, the language of the regulation does not unambiguously support this result. Because ambiguity must be construed in favor of the petitioner, we decline to adopt the government's construction of the regulation . . . ."

Id. at 982. Ovalles analogizes his own situation to that of Lin's and urges that we apply the *Lin* court's

reasoning to the BIA's post-departure bar in section 1003.2(d), as the Ninth Circuit did in *Reynoso-Cisneros v. Gonzales*. *See* 491 F.3d 1001, 1002 (9th Cir. 2007).

The Government argues that the Ninth Circuit in *Lin* and *Reynoso-Cisneros* misconstrued the meaning of sections 1003.23(b)(1) and 1003.2(d). The Government contends that it is illogical to interpret section 1003.2(d) as only applying to aliens who are currently the subject of removal proceedings, because such individuals have no need or even ability to file motions to reconsider or reopen: if removal proceedings are still ongoing, there is nothing to *re*consider or *re*-open. This argument is consistent with the position taken by the BIA in *In re Armendarez-Mendez*, in which the Board explicitly rejected *Lin* and *Reynoso-Cisneros* and declared its intention not to follow those decisions, even within the Ninth Circuit. *See* 24 I&N Dec. at 650–53 ("[T]he filing of a motion to 'reopen' presupposes that the administrative proceedings have been 'closed' or completed . . . ."). The BIA also criticized the notion that the post-departure bar was only meant to apply to aliens who depart the country during the course of removal proceedings, because such a reading would render the post-departure withdrawal provision in sections 1003.2(d) and 1003.23(b)(1) superfluous. *Id*. at 652.

We are persuaded by the arguments put forth by the Government here and by the BIA in *In re Armendarez-Mendez*. Further, the Ninth Circuit's reading of sections 1003.2(d) and 1003.23(b)(1) is necessarily inconsistent with our decision in *Navarro-*

Miranda and that of the First Circuit in *Pena-Muriel*. *See Navarro-Miranda*, 330 F.3d at 674–76; *see also Pena-Muriel*, 489 F.3d at 440–43. Those cases upheld the application of the post-departure bar of section 1003.23(b)(1) (*Pena-Muriel*) and section 1003.2(d) (*Navarro-Miranda*) to deny jurisdiction over motions to reopen filed by aliens whose removal proceedings were already closed. *Id*.

We conclude that the post-departure bar on motions to reconsider and to reopen applies and was intended to apply to aliens who depart the country following the termination of their removal proceedings.[7] Therefore, the BIA did not act arbitrarily and capriciously in applying section 1003.2(d) to Ovalles, despite the fact that the legal basis for his removal was later determined to be erroneous and his removal proceedings were concluded at the time he filed his motion.

D. Due Process under the Fifth Amendment

Finally, Ovalles contends that the BIA violated his Fifth Amendment right to due process when it denied jurisdiction over his motion to reconsider or reopen under section 1003.2(d). *See* U.S.CONST. amend. V. Ovalles asserts that he was unconstitutionally deprived of his liberty interest in "remaining, and/or

[7] Additionally, we note that, unlike the present case, the motion to reopen at issue in *Lin* was not time-barred, because the petitioner was seeking asylum based on changed circumstances in his country of nationality and therefore fell under the exceptions to the filing deadlines for such motions laid out in 8 U.S.C. § 1229a(c)(7)(C)(ii) and 8 C.F.R. § 1003.2(c)(3)(ii). *See* 473 F.3d at 981; *Castillo-Perales*, 298 F. App'x at 370 n.3.

returning to this country, after having been wrongfully removed."

A permanent resident alien living in the United States has a right to due process in deportation proceedings. *Landon v. Plasencia*, 103 S.Ct. 321, 330 (1982). However, a permanent resident alien who has departed the country for an extended period of time, even voluntarily, may lose the special protected constitutional status afforded "an alien continuously residing and physically present in the United States." *Id.*; *see also Chew v. Colding*, 73 S.Ct. 472, 477 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States *and remains physically present there*, he is a person within the protection of the Fifth Amendment." (emphasis added)). Thus, we are not convinced that Ovalles had a due process right to have his untimely motion to reconsider or reopen heard by the BIA.

Moreover, a change in the legal status of an underlying conviction does not create a constitutional right to reopen one's removal proceedings. *See Pena-Muriel*, 489 F.3d at 443. In *Pena-Muriel*, the First Circuit considered whether the petitioner's due process rights were violated when the IJ invoked the post-departure bar in section 1003.23(b)(1) to deny jurisdiction over a motion to reopen filed after the petitioner's underlying conviction was vacated. *Id.* at 443. The court observed that "the fact that a vacatur may be an 'appropriate' basis for reopening a deportation order does not establish a due process right to such reopening after one has departed the country." *Id.* The court noted that Pena-Muriel received adequate due

process in the proceedings leading up to his removal and that his conviction was a removable offense. *Id*. As such, the court rejected his claim that the he was subsequently denied due process by the operation of the post-departure bar:

> "Now Pena-Muriel seeks to reopen proceedings that ended roughly ten years ago, on the basis of a vacatur that occurred five years after he voluntarily removed himself from the country. Due process does not require continuous opportunities to attack executed removal orders years beyond an alien's departure from the country. Indeed, there is a strong public interest in bringing finality to the deportation process."

Id.

Likewise, we conclude that, to whatever extent Ovalles may have been protected by the Fifth Amendment, his constitutional rights were not violated when the BIA refused to consider his untimely motion to reconsider or reopen pursuant to the post-departure bar in section 1003.2(d). Ovalles was afforded sufficient due process in his initial removal proceedings, and he was found removable based on an offense that, at the time, rendered him ineligible for cancellation of removal under 8 U.S.C. § 1229b(a)(3). The fact that the law changed after Ovalles was removed does not mean that he was denied due process when he was prevented from reopening his proceedings years after his departure from this country, especially when he concededly did not

request reopening with the specified allowed time even as calculated from the time the law changed. In this instance, the Government's interest in the finality of removal proceedings outweighed whatever liberty interest Ovalles may have had in returning to the United States. *See Mathews v. Eldridge*, 96 S.Ct. 893, 903 (1976).

III. CONCLUSION

We find that, because 8 U.S.C. § 1229a(c) does not grant Ovalles the right to file an untimely motion to reconsider or reopen his case, he may not rely on that statute to challenge the validity of the post-departure bar in 8 C.F.R. § 1003.2(d). Further, we conclude that the BIA reasonably interpreted the post-departure bar in section 1003.2(d) as overriding its *sua sponte* authority to reconsider or reopen Ovalles's case under 8 C.F.R. § 1003.2(a). We also hold that section 1003.2(d) was not applied arbitrarily and capriciously to Ovalles. Finally, we conclude that, to the extent that Ovalles's possessed a liberty interest in returning to the United States that was protected by the Fifth Amendment, the BIA did not violate his due process rights by refusing to consider his untimely post-departure motion to reconsider or reopen. Therefore, the petition for review is DENIED.

Judge Haynes concurs in the result.

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A40 070 535 – Oakdale, LA Date: Sep. 27, 2007

In re: RUBEN OVALLES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Rachel Rosenbloom, Esquire

ON BEHALF OF DHS: Craig A. Harlow
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM. This case was last before the Board on March 8, 2004, when we sustained an appeal by the Department of Homeland Security, and ordered the respondent's removal from the United States to the Dominican Republic. On July 31, 2007, the respondent filed this untimely motion, requesting that we reopen the proceedings *sua sponte*. It is undisputed that the respondent was removed from the United States following our previous order, and prior to the filing of the instant motion. The regulation at 8 C.F.R. § 1003.2(d) prohibits the filing of motions to reopen by removed aliens who have departed the United States. The respondent argues, however, that

the post-departure bar imposed on motions to reopen violates his Constitutional right to due process. It is well-settled, however, that the Board lacks the authority to consider challenges to regulations implemented by the Attorney General. *See Matter of Fede*, 20 I&N Dec. 35, 36 (BIA 1989) The Board is explicitly bound to apply the regulations as promulgated by the Attorney General. *See Id*. ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges."). The respondent also cites cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit to support an argument that the post-departure bar imposed on motions to reopen is not properly applicable to his case. However, since this case arises in the Fifth Circuit, we are not required to apply the case law of the Ninth Circuit.[1] *See Matter of Anselmo*, 20 I&N Dec. 25, 30-32 (BIA 1989). In sum, we are precluded under the regulations from considering this motion.

As there is nothing now pending before this Board, the record is returned to the Immigration Court without further action.

/s/ Gerald S. Hurwitz
FOR THE BOARD

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[1] We reject the respondent's argument that "the regulation is inconsistent with recent Supreme Court precedent (*Rasul v. Bush*, 542 U.S. 466 (2004)) finding jurisdiction to review claims by foreign nationals situated outside the U.S." In *Rasul v. Bush*, *supra*, the Supreme Court specifically determined that the Federal habeas statute draws no distinction between Americans and aliens held in Federal custody.

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A40 070 535 – Oakdale Date: Mar. 08, 2004

In re: RUBEN OVALLES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jihad Smaili, Esquire

ON BEHALF OF DHS: Craig A. Harlow
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)]-
Convicted of aggravated felony

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)]-
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The Department of Homeland Security ("DHS," formerly the Immigration and Naturalization Service) appeals from the November 10, 2003, order of the Immigration Judge which granted the respondent's application for cancellation of removal under

section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and terminated the removal proceedings. The record reflects that the Immigration Judge found the respondent removable as charged under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), determined that he was not convicted of an aggravated felony as charged under section 237(a)(2)(A)(iii) of the Act, and granted his request for cancellation of removal. As we find that the respondent is statutorily ineligible for cancellation of removal, the appeal will be sustained. The DHS' request for oral argument is denied. *See* 8 C.F.R. § 1003.l(e)(7) (2003).

On appeal the DHS asserts that the respondent's conviction for attempted possession of drugs constitutes an aggravated felony. The record shows that the respondent pled guilty to attempted possession of drugs in violation of the Ohio Revised Code Ann. §§ 2923.02; 2925.11 (West 2002). The conviction record reflects that the respondent pled to an amended Count Two which alleged that the respondent unlawfully attempted to possess "Heroin, a Schedule I drug, in an amount equal to or exceeding one hundred unit doses but less than five hundred unit doses." Possession of heroin in such amounts is classified as a third degree felony, for which there is a presumption for a prison term. See Ohio Rev. Code Ann. § 2925.11(C)(6)(c). The respondent did not receive a prison sentence. Rather, he was sentenced to "5 years of community control, under the supervision of the adult probation department." *See* Journal Entry.

A state drug offense constitutes a "drug traffick-

ing crime" under 18 U.S.C. § 924(c)(2) if it is (l) punishable under one of the three enumerated federal drug statutes and (2) a "felony." *See Matter of Yanez*, 23 I&N Dec. 390, 394 (BIA 2002); s*ee also Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). The Controlled Substances Act ("CSA") defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." The clear trend among the circuit courts has been toward interpreting the term "felony," as used in § 924(c)(2), by reference to the definition set forth in 21 U.S.C. § 802(13), which permits a state drug offense that is classified as a felony under the law of the convicting state to qualify as a felony under the CSA even if it could only be punished as a misdemeanor under federal law. *See Matter of Yanez*, *supra*.

In this case, the respondent's state conviction for heroin is analogous to an offense punishable under the CSA. Heroin is a controlled substance under 21 U.S.C. § 812(c), sch. I(b)(10), and possession of a controlled substance violates 21 U.S.C. § 844(a). Furthermore, the respondent's offense is classified as a felony under Ohio law. An offense classified as a felony under the law of the convicting jurisdiction is deemed to be "classified by applicable Federal or State Jaw as a felony" in accordance with 21 U.S.C. § 802(13). *See Matter of Yanez*, *supra*. The fact that the respondent did not serve a prison sentence is irrelevant to whether his conviction is a felony. Likewise, we find no distinction in the fact his crime is an "attempt" offense. *See Matter of Davis*, 20 I&N Dec. 536, 544-45 (BIA 1992). Thus, the respondent has been

convicted of a drug trafficking crime as defined under 18 U.S.C. § 924(c). Consequently, the respondent has been convicted of an aggravated felony under section 10 l (a)(43)(8) of the Act, 8 U.S.C. § 1101(a)(43)(B). Accordingly, the Immigration Judge's finding that the respondent is not convicted of an aggravated felony will be reversed. As the respondent has been convicted of an aggravated felony, he is statutorily ineligible for cancellation of removal. *See section* 240A(a)(3) of the Act; *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). The grant of such relief to the respondent will also be reversed. The following orders will be entered:

ORDER: The DHS' appeal is sustained.

FURTHER ORDER: The Immigration Judge's order is vacated and the respondent is ordered removed from the United States to the Dominican Republic.

/s/ Patricia A. Cole
FOR THE BOARD

APPENDIX F

8 U.S.C. § 1229a(c)(7) – Motions to Reopen:

(A) In general.— An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv) [asylum-based motions].

(B) Contents.— The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline.—

(i) In general.— Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

. . . .

* * * * * *

8 U.S.C. § 1252 – Judicial review of orders of removal:

(a) Applicable provisions.—

. . .

(2) Matters not subject to judicial review.—

. . .

(C) Orders against criminal aliens.—

Notwithstanding any other provision of law (statutory or non-statutory), including section

2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims.—

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.