UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6)

IN THE MATTER OF	IN REMOVAL PROCEEDINGS
(b) (6)	FILE NO.: (b) (6)
Respondent	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or the "Act"), as amended, in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as described in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code.

Section 237(a)(2)(B)(i) of the Act, as amended, in that, any time after admission, you have been convicted of a violation of...any law or regulation...relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

MOTION: Motion to Reopen Removal Proceedings

ON BEHALF OF RESPONDENT:
Ronaldo Rauseo-Ricupero, Esq.
Nixon Peabody, LLP
(b) (6)

ON BEHALF OF DHS:
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DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

(b) (6) Respondent, is a native and citizen of Honduras. Respondent was admitted to the United States as a legal permanent resident on (b) (6) The Department of Homeland Security ("DHS") issued Respondent a Notice to Appear ("NTA") on April 21, 2005 charging him pursuant to sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act. The charges rested upon Respondent's conviction for possession of a controlled substance in (b) (6) on April 21, 2003. On May 31, 2005, pursuant to the factual allegations and charges in the NTA,

Respondent was found deportable and ordered removed. Respondent initially filed an appeal of this ruling with the Board of Immigration Appeals. However, Respondent, through counsel, subsequently withdrew the timely appeal. As a result, the Immigration Judge's order dated May 31, 2005 became final and Respondent was subject to an order of removal. Respondent complied with the order and was removed from the United States on November 17, 2005. Respondent currently, as of 2014, continues to reside in La Chieba, Honduras. *Respondent's 2014 Motion to Reopen Documents*, Tab A.

On December 27, 2010, Respondent filed a Motion to Reopen Proceedings based on the Supreme Court's holding in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). Respondent claimed that there was a fundamental change in law that would render him eligible for legal permanent resident cancellation of removal. More specifically, Respondent alleged that he was no longer an aggravated felon for his possession charge as it was cured by the Supreme Court's holding in *Lopez*. Respondent alleged that he met all statutory eligibility requirements for 42A cancellation of removal and that his motion to reopen should be considered timely based on equitable tolling or should be granted pursuant to Court's *sua sponte* power.

DHS submitted an opposition to Respondent's original Motion to Reopen. DHS argued that Respondent was essentially petitioning the Court to utilize its *sua sponte* power only, whether it be to grant the motion overall or to apply equitable tolling in his case. DHS reasoned that Fifth Circuit precedent demands that both of Respondent's requests be denied because the departure bar applies to any use of the Immigration Judge's *sua sponte* power in the context of Motions to Reopen. DHS cites to *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009) as the controlling authority for this point.

The Immigration Judge ruled on the motion to reopen and held that the departure bar pursuant to 8 C.F.R. 1003.23(b) divested the Court of jurisdiction and thus, Respondent's motion must be denied. As the Court had no jurisdiction over the matter, the Court did not reach other issues raised by Respondent including equitable tolling, *sua sponte* reopening, or the merits of his cancellation of removal claim. This holding was affirmed by the Board of Immigration Appeals on July 18, 2011.

Respondent subsequently appealed to the (b) (6) In (b) (6) *v. Holder*, the (b) (6) (b) (6) held that a motion to reopen in immigration proceedings is a statutory right to which the departure bar does not apply. (b) (6) . The (b) (6) remanded Respondent's motion back to the Board of Immigration Appeals. *Id.* at (b) (6) The (b) (6) Court noted that their ruling was narrow; in other words, it in no way reached the merits of Respondent's claim including the issue of timeliness. *Id.* at (b) (6) n.1.

On remand, the Board of Immigration Appeals determined that further fact finding was necessary and that the case must be remanded back to the Immigration Judge. In particular, the BIA stated that the Immigration Judge had to issue findings of fact and address any legal arguments aside from the regulatory departure bar. The BIA noted that the Immigration Judge should consider if the motion is timely pursuant to the statutorily prescribed deadline and whether a *sua sponte* reopening is warranted in Respondent's case. The BIA directed both parties to submit any new evidence for the Immigration Judge to consider regarding the merits of

Respondent's motion to reopen. On February 14, 2014, Respondent submitted additional updated documents in support of his motion. Subsequently, on March 6, 2014, DHS submitted a follow-up response in opposition to Respondent's motion to reopen.

Thereafter, on July 15, 2014, both parties agreed before the Court that the record could be closed and that the issues were ripe for decision. DHS acknowledged that it had nothing further to argue and that all objections were sufficiently contained within its response to the Court submitted on March 6, 2014. Respondent was permitted to provide a brief set of closing statements to the Court. Respondent's counsel argued that the conviction at issue in Respondent's case is no longer an aggravated felony under the law and that DHS does not object to this conclusion. Counsel further argued that the equitable tolling doctrine is a separate and distinct form of discretion which would allow the Court to grant Respondent's motion as timely. Respondent's counsel contended that the (b) (6) would not have remanded this case to the BIA if precedent (in particular *Ovalles v. Holder*, 577 F.3d 288, 291 (5th Cir. 2009)) barred Respondent's motion to reopen.

The issue now before the Court is whether or not Respondent's case warrants reopening on the merits. The Court will consider whether Respondent has established a reasonable likelihood he is eligible for relief, if his motion can be opened *sua sponte*, and whether or not the doctrine of equitable tolling can be applied to Respondent's case. I have reviewed the entire record of proceedings and taken jurisdiction over the same. For the following reasons, Respondent's motion must be denied.

II. SUMMARY OF THE LAW

A. Motions to Reopen Proceedings

Motions to reopen immigration proceedings are disfavored due to time constraints and the need for judicial economy; the Attorney General has broad discretion to grant or deny motions to reopen. *Lara v. Trominski*, 216 F.3d 487, 496 (5th Cir. 2000). Additionally, no motion to reopen will be granted unless the alien establishes a *prima facie* case of eligibility for the underlying relief sought. *Matter of S-V-*, 22 I&N Dec. 1306, 1307 (BIA 2000). *Prima facie* eligibility is established where "the evidence reveals a reasonable likelihood that the statutory requirements for relief have been satisfied." *Id.* at 1308. The alien need not demonstrate conclusively that he or she is eligible for relief. *Id.*

Title 8, Code of Federal Regulations, section 1003.23(b)(1) provides, in pertinent part:

> An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4)[1], a party

[1] Under section 1003.23(b)(4), the regulations provide various scenarios which would provide a respondent with an exception to filing a timely motion to reopen. Those scenarios are expressly provided only in relation to claims for asylum or withholding of removal, orders rendered *in absentia*, and joint motions. 8 C.F.R. §1003.23(b)(4).

> may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of the final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or before September 30, 1996, whichever is later. 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.

Title 8, Code of Federal Regulations, section 1003.23(b)(3) governs the necessary parameters for a motion to reopen and provides, in pertinent part:

> (3) *Motion to reopen.* A motion to reopen proceedings 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 and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. . . The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

B. *Sua Sponte* Motions to Reopen and the Departure Bar

An Immigration Judge may, upon his or her own motion at any time, or upon the motion of the Department or alien, reopen or reconsider any case over which the Court has proper jurisdiction. 8 C.F.R. §1003.23(b)(1). However, under a provision named the "departure bar," "[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." *Id.*

In the(b) (6) the departure bar provision necessarily trumps the Court's jurisdiction to reopen cases *sua sponte* under 8 C.F.R. §1003.23(b). The original holding on the issue stems from *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003). In that case, an alien was deported back to Mexico on account of his conviction for driving under the influence which was classified as an aggravated felony prior to the Fifth Circuit's decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). *Id.* at 674. While still residing in Mexico, Respondent filed a motion to reopen requesting that the BIA reopen his case pursuant to its *sua sponte* authority. *Id.* Respondent's request was denied by the BIA and the Fifth Circuit because both bodies found

that the departure bar embodied in 8 C.F.R. §3.2(d)(currently 8 C.F.R. §1003.2(d)) trumps the discretionary power granted by 8 C.F.R. 3.2(a)(currently 8 C.F.R. §1003.2(a)). *Id.* at 675. While the (b) (6) noted that the discretionary power exists and that it may be applied properly in response to a change in the law, it held that discretionary powers will not apply under those circumstances if the alien has already been removed from the United States. *Id.* at 676.

This rationale was later affirmed in *Ovalles v. Holder*, where the (b) (6) held that the departure bar applied to motions to reconsider and reopen in the context of intervening law created by the Supreme Court's holding in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006). 577 F.3d 288, 291 (5th Cir. 2009). The Circuit Court acknowledged that simple possession was no longer an aggravated felony pursuant to *Lopez*, however, it continued to find that the departure bar overruled the BIA's powers to reopen proceedings on its own motion *sua sponte*. *Id.* at 298.

These holdings applying the departure bar to a Court's *sua sponte* power were also discussed in Respondent's own case presented before the (b) (6). While the (b) (6) extended the right to file a motion to reopen generally, it declined to find that there was a right to have the BIA reopen proceedings *sua sponte*. (b) (6) Rather, the (b) (6) distinguished the two contexts and affirmed the rationale that the departure bar continues to trump the *sua sponte* discretionary power, but it will not eliminate an alien's right to file a motion to reopen. *Id.* (reasoning explicitly that precedent only resolved the issue of the departure regulation in relation to the Board's authority to reopen or reconsider cases on its own motion).

C. Equitable Tolling and Motions to Reopen

Nine Circuit Courts in the United States have held that the 90-day and/or 180-day filing deadlines outlined in the regulations for motions to reopen in immigration proceedings are subject to equitable tolling because the regulations embody pure statutes of limitations. *See Iavorski v. INS*, 232 F.3d 124 (2nd Cir 2000); *Borges v. Gonzales*, 402 F.3d 398 (3rd Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302 (4th Cir. 2013); *Mezo v. Holder*, 615 F.3d 616 (6th Cir. 2010); *Yuan Gao v. Mukasey*, 510 F.3d 376 (7th Cir. 2008); *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); *Avila-Santoyo v. Attorney General*, 713 F.3d 1357 (11th Cir. 2013).

The First and Fifth Circuits have declined to definitively decide the issue of whether or not these filing deadlines are subject to the doctrine of equitable tolling. *Ramos-Bonialla v. Mukasey*, 543 F.3d 216, 218 (5th Cir. 2008) *See generally Roberts v. Gonzales*, 422 F.3d 33 (1st Cir. 2005); *Cavazos v. Gonazales*, 181 Fed.Appx. 453, n.16 (5th Cir. 2006)("While acknowledging that this circuit has yet to decide the [equitable tolling] issue, Cavazos notes that several of our sister circuit courts have applied equitable tolling principles…").

While it may be that the (b) (6) has not adopted a position on equitable tolling in the motion to reopen context, it has indicated in persuasive unpublished opinions that equitable tolling is a valid remedy for untimely motions. In *Torabi v. Gonzales*, the Fifth Circuit considered equitable tolling in the context of the 90-day filing deadline and held not only that equitable tolling applied, but that Torabi's motion should be considered "timely" pursuant to the same. 165 Fed.Appx. 326, 331 (5th Cir. 2006). In *Torabi* and other unpublished opinions, the

(b) (6) seemingly adopts a two-part standard to determine if equitable tolling is warranted in a given case. First, equitable tolling depends on the particular facts of each case, but only should be employed in "rare and exceptional circumstances." *Cavasos*, 181 Fed.Appx. at 460 *citing United States v. English*, 400 F.3c 273, 275 (5th Cir. 2005). It must be that despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of a claim. *Pacheco v. Rice,* 966 F.2d 904, 906-07 (5th Cir. 1992). Second, the individual seeking equitable tolling must demonstrate due diligence in preserving his or her legal rights. *Id. citing Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). It is oft noted that due diligence is crucial because a "garden variety claim of excusable neglect does not support equitable tolling." *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)(citations omitted).

Despite acknowledging the possible applicability of equitable tolling in immigration proceedings, the Fifth Circuit held in *Ramos-Bonilla v. Mukasey* that the Court of Appeals lacked jurisdiction to review a BIA's denial of a motion to reopen based on equitable tolling for ineffective assistance of counsel because this is "in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based on the doctrine of equitable tolling." 543 F.3d at 220 *citing Lin v. Mukasey*, 2008 WL 2725317 at *1 (5th Cir. 2008). In other words, under the current regulations, where a Respondent's motion is blatantly untimely, the only remedy available is reopening the case under an IJ or BIA's *sua sponte* authority. *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 952 (5th Cir. 2012) *citing Ramos-Bonilla*, 543 F.3d at 219. This holding continues to be construed in this manner. It has recently been stated that, "[i]n this circuit, an alien's request for equitable tolling... is construed as an invitation for the BIA to exercise its discretion to reopen removal proceedings *sua sponte*." *Mata v. Holder*, 2014 WL 843578 (5th Cir. 2014).

While the original *Ramos-Bonilla* rationale actually deprives the Court of Appeals of its jurisdiction, the same rationale has also been considered in unpublished opinions in the context of the Immigration Court's jurisdictional limits. These opinions equate the equitable tolling remedy with the Court's discretionary power to reopen a case *sua sponte*. In *Whitley*, the BIA had determined that Respondent's motion to reopen was time-barred because he was not entitled to equitable tolling and further that because the case was time-barred, the BIA lacked jurisdiction pursuant to the departure bar to reopen the case. 544 Fed.Appx. 373 (5th Cir. 2013). The Fifth (b) (6) affirmed the BIA and plainly stated that "the case law of this circuit does not provide the relief that Whitley seeks." *Id. citing Ramos-Bonilla*, 543 F.3d at 220. Also, in *Voma v. Holder*, the petitioner blatantly challenged the rationale of *Ramos-Bonilla* and the applicability of the departure bar to his case in light of (b) (6) However, the Fifth Circuit declined to reconsider *Ramos-Bonilla* and declared that since Respondent's motion was correctly time-barred and number-barred, it need not reach the fact that relief was denied on the basis of the departure bar. *Id.*

D. Cancellation of Removal for Lawful Permanent Residents

The Attorney General may cancel removal in the case of a lawful permanent resident who is deportable from the United States. INA §240A(a). In order to be statutorily eligible for cancellation of removal under § 240A(a) of the Act, an alien must demonstrate that he: (1) has been an alien lawfully admitted for permanent residence for not less than five years; (2) has

resided in the United States continuously for 7 years after having been admitted in any status; and (3) that he has not been convicted of an aggravated felony. INA § 240A(a). The burden of proof to establish eligibility and to establish the privilege of relief by a preponderance of the evidence is on the applicant. 8 C.F.R. §§ 1240.8(d); 1240.11(e).

In addition to the statutory requirements, the applicant must show that the relief is warranted as a matter of discretion. Discretionary eligibility for cancellation of removal involves a balancing of the positive and negative factors including: family ties, duration of residency in the United States, evidence of hardship to family and the respondent should deportation occur, service in the Armed Forces, history of employment, existence of property or business ties to the United States, existence of value and service to the community, proof of criminal rehabilitation, evidence of good or bad character, nature and underlying circumstances of the grounds of removal, and the existence of a criminal record, its nature, and its recency. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998); *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984); *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

III. RESPONDENT'S POSITION

Respondent claims first that he is statutorily eligible for cancellation of removal for lawful permanent residents pursuant to section 240A(a) of the Act. Namely, Respondent argues that he meets both the seven and five year residency requirements prior to his conviction on April 21, 2003. Respondent also argues that the Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006) absolves Respondent of his status as an aggravated felon. More specifically, that Respondent's conviction for simple possession does not constitute a felony punishable under federal law and thus, Respondent is not an aggravated felon pursuant to section 101(a)(43)(B) of the Act.

Respondent further alleges that his motion to reopen proceedings should be granted because his motion ought to be rendered timely pursuant to equitable tolling or, in the alternative, the Court should exercise its *sua sponte* power to reopen proceedings based on a change in the law. Specifically, Respondent contends that equitable tolling of the 90-day filing deadline is proper in this case. Respondent claims that the statutory filing deadline is subject to equitable tolling. Respondent cites to nine other circuits' precedent decisions as well as (b) (6) persuasive opinions to substantiate his claim. Respondent further contends that the holding of *Ramos-Bonilla* is inapplicable as it is a holding which only dictates the limits of the Court of Appeals' jurisdiction, not necessarily the general principle that the *sua sponte* power and equitable tolling doctrine are one in the same. Thus, Respondent argues, the equitable tolling doctrine is applicable to his case. Respondent further states that his living situation in Honduras, limited legal knowledge, and wrongful attorney advice constitute rare and exceptional circumstances and that despite all of these points, he exercised due diligence in pursuing his legal rights. Respondent states that he filed his application within 90 days of learning about the availability of a claim and thus, he filed promptly within the re-set equitable tolling time-frame.

Alternatively, Respondent argues that his proceedings should be reopened *sua sponte* by the Court. Respondent argues that *Lopez* is a fundamental change in law warranting the use of the Court's exceptional discretionary powers. He notes that *Ovalles* is controlling on the issue but he

nonetheless reserves the argument that the departure bar regulation is invalid in the context of *sua sponte* motions to reopen.

Respondent concludes that pursuant to the doctrine of equitable tolling or *sua sponte* reopening of proceedings, Respondent's motion should be granted.

IV. DHS' POSITION

DHS argues that Respondent's motion to reopen is patently untimely pursuant to section 240(c)(7)(C)(i) of the Act as it was filed well past the 90-day deadline. DHS claims that Respondent has not alleged any exceptions to the filing deadline and thus, his motion is time-barred.

DHS further contends that equitable tolling is unavailable to Respondent. First, DHS argues that it is unavailable to Respondent because he withdrew his appeal and did not exhaust all of the administrative options available to him. Next, DHS contends that since *Lopez* was rendered in 2006 and he filed the motion in 2010, he did not file within a reasonable time after the intervening change of law.

Lastly, DHS contends that Respondent cannot receive a *sua sponte* reopening of his case due to the departure bar. In light of *Navarro-Miranda, Ovalles,* and even Respondent's case before the (b) (6) the departure bar relinquishes the Immigration Court of its discretionary power to reopen his case.

Accordingly, for all of the argued reasons, DHS avers that Respondent's motion to reopen cannot succeed on the merits and must be denied.

V. ANALYSIS AND FINDINGS

The Court first finds that, pursuant to Respondent's 42A application for cancellation of removal, he has established a likelihood of success on the merits of his claim. Respondent has established the residency requirements, that he likely no longer qualifies as an aggravated felon, and that he warrants a favorable exercise of discretion. Second, Respondent has complied with all statutory requirements for reopening, save the issue of timeliness, including the fact that he has attached an application for relief to his motion and this is his first and only motion to reopen. 8 C.F.R. §1003.23(b)(1), (b)(3).

Yet, despite eligibility for relief, the Court is forced to deny Respondent's motion to reopen as untimely. The Court cannot exercise its *sua sponte* power to cure the filing defect. Because equitable tolling in the I(b) (6) is interpreted as a *sua sponte* reopening of a case, it cannot apply the doctrine in these proceedings as a result of the departure bar. This same rationale applies to Respondent's general claim that the Court should reopen the case *sua sponte*. Because the Court's discretionary powers are trumped by the departure bar in this Circuit, Respondent's claim must be denied.

A. Cancellation of Removal – Eligibility for Relief

In order to be statutorily eligible for cancellation of removal under § 240A(a) of the Act, an alien must demonstrate that he: (1) has been an alien lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) that he has not been convicted of an aggravated felony. INA § 240A(a). Respondent has established he is likely eligible for cancellation of removal. He need not prove a conclusive eligibility, only a reasonable likelihood of success on the merits. *Matter of S-V-*, 22 I&N Dec. 1306, 1308 (BIA 2000). Respondent has done so in this case via the attached application and ancillary documentation in support of his claim. *Respondent's 2014 Motion to Reopen Documents*, Tabs A, G.

Respondent entered the United States in 1993 in status as a lawful permanent resident ("LPR"). *Respondent's 2014 Motion to Reopen Documents*, Tab G. Respondent was not convicted until August 21, 2003. NTA, Exh. 1. He remained in status as an LPR until this time. His residency and status is corroborated by statements and other documents such as tax and school records submitted to the Court. *Respondent's 2014 Motion to Reopen Documents*, Tabs, P-R. Thus, Respondent has established the requisite five years of continuous residence as an LPR and the requisite seven years of residence in status. INA § 240A(a).

Respondent has also established with a reasonable likelihood that he no longer qualifies as an aggravated felon and is thus eligible for relief pursuant to his 42A application. Respondent presents a compelling argument that his conviction is no longer an aggravated felony pursuant to *Lopez v. Gonzales*, 549 U.S. 47 (2006). Respondent clarifies that he was convicted under LA. REV. STAT. ANN. § 40:966(C) which only requires for conviction that the person knowingly or intentionally possess a controlled dangerous substance. He points out that this statute only defines a simple possession offense and thus, it cannot qualify as a felony punishable under the Controlled Substance Act. *Lopez*, 549 U.S. at 60.

Without reaching the argument as to whether or not *Lopez* can apply retroactively, it is clear that there is a reasonable probability that Respondent is no longer an aggravated felon and thus, eligible for relief.[2] It is also clear that there is new evidence to be presented which is highly relevant and probative to his claim for relief. 8 C.F.R. § 1003.23(b)(3). As Respondent's burden is only to establish a reasonable likelihood of success on the merits, he has carried his burden as it relates to his motion to reopen.

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[2] The Court notes that Respondent raises multiple persuasive arguments relating to the retroactivity of the *Lopez* holding. Thus, it makes his success on the merits even more reasonable overall. Respondent states that Supreme Court decisions rendering prior aggravated felony determinations erroneous have been applied consistently in a retroactive fashion by Circuit Courts. *See United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002)(holding that previous applications of the law in the 212(c) waiver context rendered a petitioner eligible for relief upon the Supreme Court's determination to overrule the prior BIA precedent in *St. Cyr*); *United States v. Rivera-Nevarez*, 418 F.3d 1104, 1107 (10th Cir. 2005)(holding that the Supreme Court's decision in *Leocal v. Aschcroft*, 543 U.S. 1 (2004) involves statutory construction and is thus retroactively applicable to determine that driving while intoxicated is not an aggravated felony).

Therefore, Respondent's claim on the overall application for relief is meritorious and he complies with this requirement outlined by the regulations.

B. *Sua Sponte* Reopening of Respondent's Case

The Court first finds that Respondent's motion to reopen is facially untimely. The Court then finds that it is barred from exercising its discretionary powers to reopen Respondent's case and thus, his motion must be denied as untimely.

1. Timeliness of Respondent's Motion to Reopen

Generally, motions to reopen proceedings must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. §1003.23(b)(1). An order becomes administratively final under one of three circumstances, whichever occurs first: (1) appeal is waived by the parties at which time the order becomes administratively final immediately; (2) it is administratively final when the time expires for filing an appeal; or (3) when the BIA has dismissed an appeal that was timely filed. *See generally Matter of Shih*, 20 I&N Dec. 697 (BIA 1993).

On May 31, 2005, Respondent was ordered removed from the United States. Respondent initially appealed the decision but withdrew the appeal at a later date. Thus, the order from May 31, 2005 remained a standing order of deportation. 8 C.F.R. §1003.4 (where an applicable is withdrawn a decision made previously shall be final to the same extent as if no appeal was taken). *Lopez* was decided by the Supreme Court on December 5, 2006. 549 U.S. at 47. Respondent subsequently filed his Motion to Reopen on December 27, 2010, more than four years after the Supreme Court's decision and over five years after his order of removal. Thus, it is clear that Respondent did not file within 90 days of the entry of a final administrative order from 2005. In fact, he could not have done so seeing as the legal premise upon which he bases his claim did not arise until more than a year after he was ordered removed from the United States.

It is unclear if Respondent argues that this change in law somehow qualifies in and of itself as an exception to the filing deadlines for motions to reopen. The Court concludes that the change in law does not present a reasonable ground upon which the Court can find an exception to the 90-day filing deadline. *See generally Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). The exceptions to a motion's filing deadline are clearly outlined in section 1003.23(b)(4) of title 8 of the Code of Federal Regulations as limited to cases involving claims for asylum or withholding that implicate changed country conditions, *in absentia* orders in proceedings, and jointly filed motions. None of these exceptions apply in Respondent's case.

Accordingly, because none of the statutory exceptions apply to Respondent's motion to reopen and he filed that motion well outside of the 90-day deadline, the motion must be deemed facially untimely. 8 C.F.R. §1003.23(b)(1). Such untimely motions cannot be considered by the Court, regardless of the merits underlying his claim for relief. *Id.*

2. Sua Sponte Reopening of Proceedings

Despite this Court's determination that Respondent's motion is untimely, Respondent may still petition this Court to exercise its *sua sponte* powers to reopen his proceedings. It effectively becomes that Respondent's sole avenue for relief rests on the Court's discretionary ability to reopen his proceedings *sua sponte*. 8 C.F.R. §1003.23(b); *See also Rodriguez-Manzano v. Holder*, 666 F.3d 948, 952 (5th Cir. 2012). The issue then becomes whether or not the departure bar of 8 C.F.R. 1003.23(b) divests this Court of its ability to exercise its discretionary powers to grant Respondent's motion. The Court first concludes that the departure bar applies to Respondent's case. [3] The Court further concludes that the departure bar provision blatantly trumps this Court's ability to reopen proceedings pursuant to its *sua sponte* authority. Respondent even concedes that this conclusion is proper under the current (b) (6) law which governs this issue. *Respondent's 2014 Motion to Reopen Brief*, at *23.

Particularly, the (b) (6) has habitually reasoned, including in its precedent decision in this very case, that the departure bar applies in cases where the BIA is attempting to reopen a case *sua sponte*. (b) (6) While the precedent on the issue generally only reasons that the BIA is limited in its ability to reopen cases pursuant to the departure bar, the same rationale applies to the limits set on an Immigration Judge's discretionary *sua sponte* authority. *Id.* In large part, the applications are analogous either as it pertains to the BIA's discretionary power or the Immigration Judge's discretionary power because they are both regulatory and separable from the Respondent's statutory right to file a motion to reopen. *Id.* at 265 ("Given the fundamental difference between the regulatory sua sponte power and the aforementioned statutory right, we conclude that *Navarro-Miranda* and *Ovalles* do not govern our consideration of whether the departure regulation can limit (b) (6) right to file a statutory motion to reopen"). Just as a respondent does not have a statutory right to the exercise of the BIA's *sua sponte* power, a respondent does not have a statutory right to the exercise of the IJ's *sua sponte* power. *See generally Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008)(equating the *sua sponte* powers of the IJ and BIA as the same forms of discretionary authority).

A similar analogy between the IJ and BIA's *sua sponte* powers has been drawn and adopted, in light of [redacted] (b) (6) precedent, by the BIA itself. In *Matter of Armendarez-Mendez*, applying the holding of *Navarro-Miranda*, the BIA noted that the departure bar trumps the BIA's authority to exercise its *sua sponte* power and noted that essentially identical language and principles would govern the filing of motions in Immigration Court. 24 I&N Dec. 646, 648 (BIA 2008).

Therefore, because the Court finds that it is precluded from exercising its *sua sponte* authority to grant Respondent's motion pursuant to the departure bar outlined in 8 C.F.R. §1003.23(b), it denies Respondent's motion to reopen on these grounds as manifestly untimely.

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[3] Respondent openly concedes that he complied with his order of removal and that he currently resides in Honduras as a result. Therefore, the departure bar remains relevant and applicable to his case as it states: "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." 8 C.F.R. §1003.23(b)(1.); *see also Respondent's 2014 Motion to Reopen Brief and Documents.*

C. Equitable Tolling of the Filing Deadline

Respondent first argues that the equitable tolling doctrine is available to him to cure the late filing of his motion. Respondent further contends that applying the equitable tolling doctrine in this case does not require the use of the Court's *sua sponte* power. Because the use of discretionary powers is unnecessary, the Court can apply the equitable tolling doctrine to render Respondent's motion timely. While the Court recognizes that the doctrine of equitable tolling is likely a doctrine which is generally applicable to motions in immigration proceedings, it does not agree that applying equitable tolling is not a use of this Court's discretionary powers. Since the Court would have to utilize its discretionary powers to apply equitable tolling in relation to Respondent's motion, the departure bar must also be considered in this instance. Because (b) (6) (b) (6) precedent demands that the departure bar trump this Court's *sua sponte* ability to reopen Respondent's case, his motion must be denied for it remains untimely. The Court's findings are outlined with specificity below.

1. The Equitable Tolling Doctrine in Immigration Proceedings

The Court acknowledges that there is no current (b) (6) precedent which either adopts or rejects equitable tolling in the context of motions to reopen. However, considering persuasive unpublished opinions, the Court finds that equitable tolling could be a valid request for most respondents. Looking to unpublished decisions such as *Torabi v. Gonzales*, it is reasonable for this Court to conclude that equitable tolling can be applied and even granted so long as the respondent establishes rare exceptional circumstances and due diligence in exercising his or her rights. 165 Fed.Appx. 326, 331 (5th Cir. 2006).

Respondent raises many valid points regarding his claim to equitable tolling. Respondent outlines the facts of his case in two briefs and multiple affidavits, all which point to a case that would likely qualify as rare and exceptional. Respondent resides in (b) (6) and he somehow managed to, despite incorrect and improper legal advice on two separate occasions, locate a Supreme Court decision, understand it, and reopen his case within a short time after locating the decision. *See Respondent's Second Brief in Support*, at *1-5. Moreover, there is a valid argument presented that Respondent was in fact diligent because despite being told by an attorney on two occasions that he had no right to relief, even after *Lopez* was rendered, he still proceeded to research his legal options and asserted them before the end of the ten-year period ban he was disillusioned into believing applied in his case. *Id.*

While the Court notes these compelling arguments presented by Respondent, as well as the likelihood that equitable tolling could be construed as a valid remedy to cure filing defects for motions to reopen, it finds that it is unable to equitably toll Respondent's filing requirement due to the applicability of the departure bar to his case.

2. The Equitable Tolling Doctrine Equates to a Discretionary Reopening of Respondent's Case

Respondent argues that (b) (6) precedent is limited to issues surrounding the jurisdiction of the Court of Appeals. Respondent's counsel further argued briefly during closing statements that

if the Court were deprived of jurisdiction in the form of discretion, the (b) (6) would have reached this conclusion and not remanded the case back to the BIA for further consideration. The Court recognizes both of these arguments, however, deems both to be unpersuasive and unsupported by the law governing Respondent's motion.

First, while the initial ruling in *Ramos-Bonilla* may have been rendered regarding an area of contention surrounding the Court of Appeals' jurisdiction, that same holding has been construed consistently to mean that any petition to reopen proceedings on the basis of equitable tolling, whether it be before the Immigration Court or BIA, is effectively a request for that body to utilize its *sua sponte* powers to reopen the case. *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 952 (5th Cir. 2012) *citing Ramos-Bonilla*, 543 F.3d at 219. This reasoning is based on the fact that once a motion is deemed untimely under the governing regulations and statutes, and no statutorily proscribed exception applies, the only remedy available to Respondent is the Court's or BIA's *sua sponte* power. *Id.* And thus, a request for equitable tolling relates directly to a Court's discretionary power and can only be granted *sua sponte*. Because of this consistent application of the holding in *Ramos-Bonilla*, the Court finds unpersuasive Respondent's argument that the departure bar only affects the Court of Appeals' jurisdiction. Instead, the Court reasons that it applies to this Court's jurisdiction as well as that of the BIA and Court of Appeals.

Second, Respondent's argument regarding the procedural posture and prior holdings in this case before the (b) (6) is a transparent mischaracterization of the (b) (6) findings and conclusions. Largely because the Court of Appeals expressly reasoned it was estopped from reaching the issue of timeliness and as a result, the issue of a *sua sponte* reopening of Respondent's proceedings. The (b) (6) was clear when it stated in its decision:

> (b) (6) also asks us to conclude that his motion was timely. We refuse this request. The Board did not affirm the Immigration Judge's decision on timeliness grounds. Because the timeliness of (b) (6) motion was not addressed by the Board, we will refrain from reaching this issue. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *cf. I.N.S. v. Ventura*, 537 U.S. 12, 16, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002) (holding that a court of appeals is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry).

(b) (6) n.1. Thus, Respondent's argument is wholly unpersuasive. The (b) (6) could not reach the issue of timeliness. As it could not reach the issue of timeliness, it also could not reach the issue of whether or not discretionary power was necessary or available to reopen Respondent's case. Without reaching the issues surrounding the use of discretionary power, it did not render a holding as to whether or not *Ovalles* and subsequent precedent barred relief for Respondent.

Now, despite not rendering a holding in (b) (6) on the exact issue, the (b) (6) did elaborate in dicta its own characterization of its precedent governing untimely motions to reopen and this Court's ability utilize its discretionary powers to reopen proceedings. Specifically, the

(b) (6) expressly stated that cases such as *Ovalles* and *Navarro-Miranda* did not govern the statutory right to file, but did bar a motion to reopen where the departure bar effectively rendered the determination discretionary. *Id.* at 265. Practically, the (b) (6) acknowledged that the departure bar did not divest Respondent of his right to file a motion to reopen, but did divest the Court of its jurisdiction to render a decision based upon its discretionary powers. *Id.* The (b) (6) was clear and stated that the regulatory right in a given case is patently distinguishable from the discretionary right to reopen cases insofar as the latter set of motions are still governed by the departure bar. *Id.*

Accordingly, because Respondent's request for equitable tolling, although possibly quite valid on the merits, is a request for this Court to exercise its *sua sponte* authority in the (b) (6) the motion must be denied for the Court cannot grant *sua sponte* reopening in this case pursuant to the departure bar. Because the departure bar limits this Court's power to act in a discretionary fashion, his motion to reopen must be denied as untimely.

VI. CONCLUSION

The Court finds that Respondent has established a general and reasonable likelihood of success on the merits of his claim for relief in the form of cancellation of removal. This includes a likelihood of success on his argument that he is no longer an aggravated felon pursuant to the Supreme Court's holding in *Lopez*. However, the Court also finds that it is unable to grant Respondent's motion because, although he complies with the other statutory requirements, his motion is untimely. Respondent does not have any statutory exceptions to the filing deadline that may apply in his case. The only remedy Respondent could seek to runaround the filing deadline is to receive discretionary relief in the form of the Immigration Court's *sua sponte* powers.

Respondent argues that he is eligible for equitable tolling and a *sua sponte* reopening of his case. However, the (b) (6) treats these remedies to untimely filing as one in the same, and in turn, bars them both if the departure bar is applicable in a given case. Seeing as Respondent has departed from the United States and the departure bar applies in his case, the Immigration Court is prevented from exercising its *sua sponte* powers. Thus, Respondent's request for a waiver of the filing requirements pursuant to equitable tolling and the *sua sponte* powers must be denied. Accordingly, Respondent's motion is untimely and the Court cannot grant the reopening of Respondent's proceedings.

Based on the above and aforementioned the Court enters the following order:

ORDER: **IT IS HEREBY ORDERED that Respondent's Motion to Reopen Proceedings is DENIED.**

08/19/2014
Date

John A. Duck, Jr.
U.S. Immigration Judge

Appeal due date: 09/18/2014

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Date: SEP. 27 2013

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ronaldo Rauseo-Ricupero, Esquire

ON BEHALF OF DHS: Joseph B. LaRocca
Senior Attorney

CHARGE:

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

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

APPLICATION: Reopening; cancellation of removal

The case is presently before the Board pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) (b) (6) The (b) (6) held that the decisions of the Immigration Judge and the Board applying the departure regulation at 8 C.F.R. § 1003.23(b)(1) to deny the respondent's motion to reopen were legally in error. *Id.* at (b) (6) The (b) (6) granted the respondent's petition for review and remanded the record to the Board for further proceedings consistent with the opinion. *Id.* at (b) (6) The Department of Homeland Security ("DHS") has filed a motion to remand the record to the Immigration Judge for further proceedings and issuance of a new decision. The respondent has filed an opposition to DHS's motion to remand and also a brief in support of his appeal. We will remand the record to the Immigration Judge for further proceedings and issuance of a new decision.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We will remand the record because the Immigration Judge's January 11, 2011, decision denying the respondent's motion to reopen did not make findings of fact or address any legal arguments other than application of the regulatory departure bar. *See* 8 C.F.R. § 1003.23(b)(1). As we are limited in our ability to find facts on appeal, we must remand the record for the Immigration Judge to consider the record evidence and make findings of fact relevant to the

parties' remaining legal arguments supporting and opposing the respondent's motion to reopen, including whether the motion is timely under the statutory deadline at section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i), and whether sua sponte reopening is warranted. *See* 8 C.F.R. §§ 1003.1(d)(3)(iv), 1003.23(b)(1); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (given Board's limited fact-finding authority, Immigration Judge decisions must include clear and complete findings of fact).

The respondent opposes remand on the grounds that the DHS did not contest below the respondent's recitation of the facts or any of the respondent's legal arguments other than the application of the departure regulations and the facial timeliness of the respondent's motion to reopen (Respondent's Opposition to Motion to Remand at 5-10). A remand is necessary, however, because we cannot resolve the remaining legal issues in this matter without further findings of fact, which must be made by the Immigration Judge in the first instance. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of S-H-*, *supra*, at 464-65.[1]

For these reasons, we will remand the record to the Immigration Judge for further proceedings and issuance of a new decision that adjudicates the respondent's December 2010 motion to reopen, as well as any other relevant legal issues. Both parties shall have an opportunity to present new evidence and arguments below.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FURTHER ORDER: The January 11, 2011, decision of the Immigration Judge and the July 18, 2011, decision of the Board are vacated.

FOR THE BOARD

[1] Moreover, the respondent argues, in the alternative, that if we remand the record to the Immigration Judge, he intends to supplement the record to address developments in the case since he filed his motion to reopen in December of 2010 (Respondent's Opposition to Motion to Remand at 10).