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

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
(b) (6)	)	**FILE NO.** (b) (6)
RESPONDENT	)	**DATE:** August 23, 2011

MOTION: Motion to Reopen and Reconsider Proceedings

ON BEHALF OF THE RESPONDENT:	**ON BEHALF OF THE DEPARTMENT:**
(b) (6) *pro se*	Assistant Chief Counsel Department of Homeland Security (b) (6)

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION COURT

On July 21, 2011, the respondent was order removed from the United States to the Philippines and respondent waived his right to appeal the court's decision. On July 28, 2011, respondent filed a Motion to Terminate Removal Proceedings and Objections to Evidence: Proposed Order. As respondent is appearing *pro se*, the court will consider this motion to be a motion to reopen and reconsider his removal proceedings. The DHS has not filed a response in opposition to Respondent's motion although the court issued a request for same.

I. STATEMENT OF LAW

"An Immigration Judge may upon his or her own motion at any time, or upon motion of the [Department] or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals" ("BIA" or "the Board"). 8 C.F.R. § 1003.23(b)(1). Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever occurs first. 8 C.F.R. § 1003.39.

Motions to reopen and motions to reconsider and are separate and distinct motions with different requirements.

A motion to reopen must be filed within ninety (90) days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 20, 1996,

whichever is later. 8 C.F.R. § 1003.23(b)(1)(iv); INA § 240(c)(6)(C)(i). "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." 8 C.F.R. § 1003.23(b)(3). A motion to reopen must state the new facts that will be proven at a hearing to be held if the motion is granted, and it must be supported by affidavits or other evidentiary material. INA § 240(c)(6)(B). In addition, 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. 8 C.F.R. § 1002.23(b)(3). Where the respondent is seeking to reopen proceedings to act on an application for relief, he must establish *prima facie* eligibility for the relief sought, by showing that there is a reasonable likelihood of success on the merits so as to make it worthwhile to develop the issues further at an individual hearing. *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Platero-Reymundo v. INS*, 807 F.2d 865, 867 (9th Cir.1987); *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996). The decision to grant or deny a motion to reopen is within the discretion of the Immigration Judge. 8 C.F.R. § 1003.23(b)(1)(iv).

A motion to reconsider must be filed within thirty (30) days of the date of entry of a final administrative order of removal, deportation or exclusion. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). A motion to reconsider requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). A motion to reconsider must specify the errors of law or fact in the previous order and must be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). Evidence submitted in support of a motion to reconsider must establish a *prima facie* case that the respondent is eligible for the relief sought. *Matter of Heidari*, 16 I&N Dec. 203 (BIA 1977).

In circumstances when a motion is made untimely and requires the exercise of judicial discretion, the Court may grant a motion to reopen or reconsider *sua sponte*. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). The Court's *sua sponte* authority is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations. *Id.* The Court must be persuaded by sufficiently compelling reasoning that the extraordinary intervention of its *sua sponte* authority is warranted. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999).

II. ANALYSIS AND FINDINGS

Respondent's submission is an exact duplicate and resubmission of respondent's Motion to Terminate Removal Proceedings and Objections to Evidence: Proposed Order that was admitted into evidence as exhibit 10A on July 21, 2011. The court addressed each objection and the arguments contained, therein, prior to denying respondent's motion to terminate the proceedings and ordering respondent removed from the United States to the Philippines. Therefore, respondent is not submitting any new evidence or any new facts that was not presented at the previous hearing. *See* 8 C.F.R. § 1003.23(b)(3) and INA § 240(c)(6)(B). Furthermore, respondent has not presented any additional legal arguments, a

change or error of law or facts in the previous order, or an argument or aspect of the case that was overlooked. *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006), INA § 240(c)(6)(C) and 8 C.F.R. § 1003.23(b)(2).

Accordingly, the following Order shall be entered:

ORDER: **IT IS HEREBY ORDERED THAT** the respondent's motion to reopen and reconsider be **DENIED**.

James A. DeVitto
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL ( ) PERSONAL SERVICE (P)
TO: ( ) ALIEN (P) ALIEN c/o Custodial Officer ( ) ALIEN'S ATT/REP (B) DHS
DATE: 8/24/2011 BY COURT STAFF T MacLennie
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other

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IMMIGRATION COURT

In the Matter of

(b) (6)

(b) (6)

RESPONDENT

Case A(b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JULY 21, 2011.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent/applicant was ordered removed from the United States to PHILIPPINES or in the alternative to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Cancellation of removal under Section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation of removal under Section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of status under section _____ was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought. If granted, it is ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn ( ) waived/not sought.

[ ] Applicant is admitted to the United States as a _____ until _____.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

_____

Date: JULY 21, 2011

Appeal: WAIVED/RESERVED Appeal Due By:

by both

JAMES DEVITTO
IMMIGRATION JUDGE

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) - Eloy, AZ

Date: JAN 07 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Julie Rowe
Assistant Chief Counsel

APPLICATION: Termination of proceedings; remand

This case is before the Board pursuant to a (b) (6) order, which was superseded by a (b) (6) order, of the United States Court of Appeals for the (b) (6) Subsequently, the Department of Homeland Security (DHS) filed a motion to remand to which the respondent has filed no response. The motion to remand will be granted. The record will be remanded for further proceedings not inconsistent with the (b) (6) order. Accordingly, the following orders shall be entered:

ORDER: The motion to remand is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.

FOR THE BOARD

[1] The respondent was initially represented by James Todd Bennett, Esquire, who had filed a Notice of Appearance as Attorney before the Board of Immigration Appeals (Form EOIR-27). Mr. Bennett was subsequently suspended from practice before the Board and thus ceased to represent the respondent. He was reinstated to practice before the Board in May 2010 but has not filed a new Form EOIR-27. Therefore, the respondent is considered pro se.

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: (b) (6) Eloy, AZ Date: SEP 2 3 2009

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: James Todd Bennett, Esquire

ON BEHALF OF DHS: Jennifer M. Wiles
Assistant Chief Counsel

APPLICATION: Reopening; remand

The respondent is a native and citizen of the Philippines whose case was last before us on August 26, 2004, when we dismissed his appeal of an Immigration Judge's decision which found him removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a controlled substance offense. The respondent filed a petition for review of that decision with the United States Court of Appeals for the (b) (6) Although the (b) (6) remanded the case to the Board in an order dated (b) (6) that order was withdrawn when the government's petition for rehearing was granted, and oral argument before the (b) (6) is scheduled for (b) (6) On August 26, 2009, the Department of Homeland Security (DHS) filed with the Board a motion to reopen and remand, which the respondent opposes. The motion to reopen and remand will be denied.

We first address the issue of our jurisdiction as the respondent contends in his response that the Board lacks jurisdiction over the motion because a petition for review of the Board's August 26, 2004, decision is pending before the (b) (6) The Board's jurisdiction over the motion to reopen is not limited or removed by an alien's filing of a petition for review of a Board decision with a federal court. In fact, the regulations clearly contemplate that motions might be filed while judicial proceedings are pending. *See* 8 C.F.R. § 1003.2(e).

The respondent also argues that the DHS's motion should be denied as untimely. Only an alien in removal proceedings is subject to the time restrictions on motions to reopen. *See* 8 C.F.R. § 1003.2(c)(2) ("*an alien* may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened") (emphasis added). Thus, the motion is not untimely as the DHS is not subject to the time restrictions on motions to reopen removal proceedings.

(b) (6)

In its motion, the DHS seeks reopening and remand, based upon a change in law, in order for the Immigration Judge to consider additional evidence (which we note was not submitted with the motion) regarding the respondent's conviction. The DHS noted that the Immigration Judge relied upon the minute order and corresponding felony complaint to find that the respondent had been convicted in 2002 of possession of a controlled substance and was thus removable under section 237(a)(2)(B)(i) of the Act. The DHS observed, on the first page of its motion, that subsequent to the issuance of the Board's decision, the (b) (6) held that a minute order and a felony complaint were insufficient to establish a charge of removability. *See United States v.* (b) (6)

Following the (b) (6) decision in (b) (6) the DHS obtained a copy of the plea colloquy transcript for the respondent's conviction and, on December 31, 2007, the government filed a motion to remand with the (b) (6) with a copy of the new evidence, so that this evidence could be considered by the Board. The (b) (6) denied that motion on (b) (6) (b) (6) In its current motion to the Board, the DHS asserts that having obtained the additional evidence required by (b) (6) remand to the Immigration Judge for consideration of such evidence is warranted, notwithstanding the subsequent issuance by the (b) (6) of its decision in *United States v.* (b) (6) (en banc) (b) (6) which held that a minute order with felony complaint can be sufficient to establish a controlled substance conviction.

We find that reopening is not warranted in this case. The basis for the present motion to reopen and remand appears to be essentially the same as the basis for the motion to remand filed in the (b) (6) and denied by that court. As the case is still pending in the (b) (6) we decline to grant the motion to reopen and remand under these circumstances and at this juncture. Accordingly, the following order shall be entered:

ORDER: The DHS's motion to reopen and remand is denied.

Molly Dwyer Clark

FOR THE BOARD