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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LUMPKIN, GEORGIA

In the Matter of	**A** [redacted]
[redacted],	
Respondent	
In Removal Proceedings	

Immigration Judge Jeffrey Nance **No Hearing Scheduled**

RESPONDENT'S MOTION TO REOPEN AND GRANT ASYLUM

NO FEE REQUIRED PER 8 C.F.R. § 1003.24(b)(2)
AS MOTION IS BASED ON AN APPLICATION FOR ASYLUM

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LUMPKIN, GEORGIA

In the Matter of	**A** [redacted]
[redacted],	
Respondent	
In Removal Proceedings	

RESPONDENT'S MOTION TO REOPEN AND GRANT ASYLUM

I. INTRODUCTION

Respondent [redacted] ("Mr. [redacted]"), through undersigned counsel, hereby moves the Stewart Immigration Court to reopen his removal proceedings and grant asylum based on the recent change of law.

II. FACTS AND PROCEDURAL HISTORY

Mr. [redacted] is a native and citizen of Cuba. Ex. C, Respondent's Declaration. On [redacted] 2020, he appeared for a hearing on the merits of his application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture ("CAT") before Judge Nance of the Immigration Court in Lumpkin, Georgia. At this hearing, Mr. [redacted] presented evidence and credible testimony in support of his application.

The court issued a written decision on [redacted] 2020 in which it denied Mr. [redacted]'s application for asylum, finding that Mr. [redacted] was subject to the Safe Third Country Transit Bar under 8 C.F.R. § 208.13(c)(4). The court specified that this bar was the sole

reason for denying Mr. [redacted] asylum application. However, the Immigration Judge also found that Mr. [redacted] had met the higher burden of proof required for withholding of removal under Immigration and Nationality Act ("INA") § 241(b)(3)(A) and granted this alternative application for relief.

On June 30, 2020, the District Court for the District of Columbia issued an order finding the rule entitled "Asylum Eligibility and Procedural Modifications," 84 Fed. Reg. 33,829 (July 16, 2019), unlawful and invalid due to a failure to comply with the Administrative Procedure Act's notice-and-comment requirements. *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, 2020 WL 3542481 (D.D.C. June 30, 2020). The entire rule was vacated. *Id.* The court declined the government's invitation to remand without vacatur or issue a stay of vacatur. *Id*. Accordingly, the Asylum Ban, codified at 8 C.F.R. § 208.13(c)(4), and contained within the rule entitled "Asylum Eligibility and Procedural Modifications," should no longer be considered a bar to requesting asylum.

III. VENUE AND JURISDICTION

Venue is proper where the case last rested. The last action in this case was the April 30, 2020 Order signed by Judge Nance at the Stewart Immigration Court. Ex. A. Therefore, venue is proper at the Stewart Immigration Court. This motion does not require a fee because it is a motion based solely on a claim for asylum. EOIR Immigration Court Practice Manual, § 3.4(b)(i). Respondent also files Form EOIR-33, Notice of Change of Address, with this submission.

Respondent files this motion to reopen pursuant to 8 C.F.R. § 1003.23(b)(1) and § 5.6 of the Immigration Court Practice Manual. In the alternative, Respondent requests that the Court reopen this case *sua sponte*, under the same regulation. 8 C.F.R. § 1003.23(b)(1). The Court may

sua sponte reopen this case at any time. *Menendez-Gonzalez v. Barr*, 929 F.3d 1113, 1116 (9th Cir. 2019).

IV. STANDARD FOR REOPENING

A "motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1 (2008)). In *Kucana*, the Supreme Court noted that by "[e]nacting [the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)] in 1996, Congress 'transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien.'" *Kucana v. Holder*, 558 U.S. at 249 (quoting *Dada*, 554 U.S. at 14); *see also Dada*, 554 U.S. at 15 (stating that the law "guarantees to each [noncitizen] the right to file" a motion to reopen proceedings); *Jian Le Lin v. U.S. Att'y Gen*., 681 F.3d 1236, 1241 (11th Cir. 2012) ("IIRIRA guarantees an alien the right to file one motion to reopen . . .").

An Immigration Judge should grant a motion to reopen when there is new law or intervening circumstances that might change the result in the case. *Dada*, 554 U.S. at 12 ("A motion to reopen is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.'") (internal citations omitted); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007); *accord* Immigration Court Practice Manual § 5.7.

V. ARGUMENT

a. The 90-day deadline for filing this motion to reopen should be equitably tolled.

In general, 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. *See* 8 C.F.R. § 1003.21(b)(1). However, the 90-day deadline is amendable to equitable tolling. *Avila-Santoyo v. U.S. Att'y*

Gen., 713 F.3d 1357 (11th Cir. 2013) (holding that the deadline for filing a motion to reopen is subject to equitable tolling).

A filing deadline may be equitable tolled where an extraordinary circumstance prevents the noncitizen from filing before the statutory deadline, and the noncitizen exercises reasonable diligence in pursuing his legal rights. *See Holland v. Florida*, 560 U.S. 631 (2010); *accord Lugo-Resendez v. Lynch*, 831 F.3d 337, 344 (5th Cir. 2016) ("The first element requires the litigant to establish that he pursued his rights with reasonable diligence, not maximum feasible diligence. The second element requires the litigant to establish that an extraordinary circumstance beyond his control prevented him from complying with the applicable deadline.") (internal quotations omitted).

This motion to reopen is outside of the normal 90-day filing window since the Respondent's Order granting withholding of removal was signed on April 30, 2020. However, the District Court for the District of Columbia entered an order vacating the Safe Third Country Transit Bar to asylum on June 30, 2020. This ruling and change in law makes Mr. [redacted] eligible for asylum. He is accordingly filing this motion to reopen after learning of his new eligibility within 90 days of the aforementioned order. Mr. [redacted] has exercised due diligence to bring this motion to reopen, as it was not possible or advisable to file a motion to reopen prior to entry of this order on June 30, 2020.

Upon learning that he may be eligible for asylum, Mr. [redacted] immediately requested assistance from the Southeast Immigrant Freedom Initiative (SIFI), a project of the Southern Poverty Law Center, a nonprofit that assists detained at the Stewart Detention Center. *See* Exh. C, Resp't Decl. at ¶¶ 6-7. SIFI was unable to take on Mr. [redacted]' case for representation, but the organization helped him to connect with undersigned counsel, who was

able to assist Mr. [redacted]. *Id*. Undersigned counsel then worked diligently, amongst their other deadlines and the difficulties posed by the COVID-19 outbreak, to gather the pertinent evidence, and prepare this motion for submission before the court. Respondent has acted diligently to protect his rights and the 90-day deadline should be equitably tolled on account of the evidence only coming to light on June 30, 2020 and this motion being filed within 90 days of that Order.

b. Even if the Court declines to toll the filing deadline, the Court should still reopen proceedings sua sponte.

Mr. [redacted]' circumstances warrant sua sponte reopening. An Immigration Judge may at any time reopen a proceeding in which he or she has made a decision. 8 C.F.R. § 1003.23(b)(1). Sua sponte authority is "not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, when enforcing them might result in hardship." *Matter of J-J-,* 21 I&N Dec. 976, 984 (BIA 1997). However, the Immigration Judge "has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy." *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997); *see also Matter of G-D-,* 22 I&N Dec. 1132, 1134 (BIA 1999) (stating that sua sponte authority is "an extraordinary remedy reserved for truly exceptional situations."); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (finding that sua sponte reopening is warranted "in unique situations where it would serve the interest of justice"). Here, Mr. [redacted] was denied asylum only because of a government policy that the District Court for the District of Columbia ruled unlawful. Consequently, there is good cause for sua sponte reopening, and reopening to grant Mr. [redacted] asylum would serve the interests of justice.

c. A Motion to Reopen is warranted because the District Court of the District of Columbia issued a decision on the Safe Third Country Transit Bar after Respondent's Individual Hearing and that decision makes Respondent now eligible for asylum.

A motion to reopen is proper when there is new law or intervening circumstances that might change the result in the case. Immigration Court Practice Manual § 5.7; *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007). As of June 30, 2020, the Respondent is newly eligible for asylum under the ruling of the District Court of the District of Columbia's ruling in *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, 2020 WL 3542481 (D.D.C. June 30, 2020). A brief and relevant overview of the litigation follows.

On July 16, 2019, the Department of Homeland Security (DHS) altered years of asylum law by requiring asylum seekers to seek protection elsewhere prior to entering the United States. The Government instituted a ban on asylum eligibility for all individuals who transited through a third country before reaching the United States at the southern land border (the "Safe Third Country Transit Bar to Asylum"). It states in relevant part:

> [A]n alien who enters or attempts to enter the United States across the southern border after failing to apply for protection in a third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which the alien transited en route to the United States is ineligible for asylum.

Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,843 (July 16, 2019) (codified at 8 C.F.R. § 208.13(c)(4)).

On April 30, 2020, the date of the Immigration Judge's decision in Mr. [redacted] case, the Safe Third Transit Country Bar to Asylum was in full effect. The Immigration Judge held that the bar applied to Mr. [redacted]. However, the Immigration Judge stated that:

> But for the Third Country Transit Bar, the Court would find Respondent eligible for asylum for the same reasons that the Court finds Respondent eligible for withholding of

> removal under the Act, as discussed substantially below. Additionally, the Court would find that Respondent has demonstrated that he should be granted asylum as a matter of discretion. Considering the totality of the circumstances, the record shows that Respondent would warrant a favorable exercise of discretion because he has no known criminal history and provided evidence that he has a place to stay in Houston, Texas if released. Most significantly, Respondent has demonstrated that he has a well-founded fear of future persecution, which outweighs any adverse factors. See INA§ 208(b)(l).

I.J. at 5n.1. Although Mr. [redacted] warranted a favorable exercise of discretion and granting of asylum, the Immigration Judge denied his asylum application based *solely* on the Safe Third Country Transit Bar.

d. Given the recent change in law, the Immigration Court should reopen this case and exercise its discretion to grant Mr. [redacted] asylum.

At his individual merits hearing, Mr. [redacted] presented credible testimony and evidence regarding his asylum claim. Mr. [redacted] incorporates the relevant evidence from his prior hearing into this motion by reference.

Mr. [redacted] now moves the court to reopen these proceedings to consider his eligibility for asylum. As the Immigration Court has previously found that Mr. [redacted] met the higher standard required for a grant of withholding of removal and further expressed its willingness to grant his asylum application but for the now-vacated regulation codified at 8 C.F.R. § 1208.13(c)(4)), Mr. [redacted] respectfully requests the Court reopen these proceedings and exercise its discretion to grant Mr. [redacted] asylum. *See, e.g.,* Exh. E, S-K-, AXXX XXX 113 (BIA July 2, 2020) (vacating denial of asylum in light of *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, __ F. Supp. 3d __ (D.D.C. June 30, 2020); Exh. F, *Matter of Y-S-H-,* AXXX XXX 166 (BIA July 27, 2020) (same); Exh. G, *Matter of F-C-N-,* AXX XXX 892 (BIA July 31, 2020) (same). Should the Court grant asylum, Mr. [redacted] will consent to withdraw his application for withholding for removal and for relief under the Convention Against Torture.

e. This Court may grant asylum without the need for further hearings.

Mr. [redacted] respectfully submits that this Court may grant asylum based on the filings and information already in the record without the need for any further hearings, as the Immigration Judge determined that the sole reason for denying Mr. [redacted]' asylum application was that he was subject to the now vacated Safe Third Country Transit Bar. *Cf.*, *e.g.*, Exh. D, Jose Noel Meza-Perez, A029 269 568 (BIA Feb. 28, 2011) (reopening sua sponte and terminating proceedings without the need for any further evidentiary hearings where a criminal conviction was vacated); Exh. G, *Matter of F-C-N-,* AXX XXX 892 (BIA July 31, 2020) (vacating denial of asylum in light of *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, __ F. Supp. 3d __ (D.D.C. June 30, 2020) and remanding only for the completion of background checks); Exh. E, S-K-, AXXX XXX 113 (BIA July 2, 2020) (same); Exh. F, *Matter of Y-S-H-,* AXXX XXX 166 (BIA July 27, 2020) (same). If the Court finds that it requires additional fact finding on the issues before it, Mr. [redacted] respectfully requests that the Court schedule a Master Calendar Hearing to take further testimony. Because both Mr. [redacted] and his attorney currently live out of state, and given the COVID-19 travel restrictions, both undersigned counsel and Mr. [redacted] would request to appear telephonically so that they can minimize their own exposure to COVID-19 and protect the Immigration Judge and all Immigration Court personnel by limiting their exposure.

V. CONCLUSION

For the foregoing reasons, the Court should reopen Mr. [redacted] removal proceedings and grant his application for asylum based on the newly issued order in *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, 2020 WL 3542481 (D.D.C. June 30, 2020).

Respectfully submitted this 31st day of August, 2020.

By: _____

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Pro Bono Attorneys for Mr. [redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LUMPKIN, GEORGIA

In the Matter of [redacted],	**A** [redacted]
Respondent **In Removal Proceedings**	

INDEX OF EXHIBITS

Exhibit	Description	Pages
A	Copy of Immigration Judge Decision Ordering Removal	
B	Copy of Respondent's Previously Filed I-589 Application for Asylum, Withholding of Removal, and protection under the Convention Against Torture	
C	Declaration of Respondent [redacted]	
D	Jose Noel Meza-Perez, A029 269 568 (BIA Feb. 28, 2011)	
E	S-K-, AXXX XXX 113 (BIA July 2, 2020) (vacates denial of asylum in light of *Capital Area Immigrants' Rights Coalition v. Trump*, Nos. 19-2117, 19-2530, __ F. Supp. 3d __ (D.D.C. June 30, 2020))	
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***** Mr.*** [redacted] ***also incorporates by reference all evidence previously submitted in support of his applications for relief from removal.***

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LUMPKIN, GEORGIA

In the Matter of	**A** [redacted]
[redacted],	
Respondent	
In Removal Proceedings	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Motion to Reopen, it is HEREBY ORDERED that the motion be ☐ GRANTED ☐ DENIED because:

- ☐ The Department of Homeland Security does not oppose the motion.
- ☐ A response to the motion has not been filed with the court.
- ☐ Good cause has been established for the motion.
- ☐ The court agrees with the reasons stated in the opposition to the motion.
- ☐ The motion is untimely per _____.
- ☐ Other:

_____ _____

Date Immigration Judge Jeffery Nance

This document was served by: ❒Mail ❒Personal Service

To: ❒Alien ❒Alien c/o Custodial Officer ❒Alien's Attorney/Rep ❒DHS

Date: _____ By: Court Staff _____

CERTIFICATE OF SERVICE

I, Aimee Mayer-Salins, do hereby certify that on the date specified below, I electronically served a copy of the foregoing "Respondent's Motion to Reopen and Grant Asylum" on the ICE Office of the Principal Legal Advisor (OPLA) at the following address:

Office of the Principal Legal Advisor, Atlanta (Lumpkin)
Stewart County Detention Facility
146 CCA Road
Lumpkin, GA 31815

Date: 8/31/2020 _____ Signed: