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PRACTICE ADVISORY[1]
December 16, 2011

IMPLICATIONS OF *JUDULANG V. HOLDER* FOR LPRs SEEKING § 212(c) RELIEF AND FOR OTHER INDIVIDUALS CHALLENGING ARBITRARY AGENCY POLICIES

INTRODUCTION

Before December 12, 2011, immigration judges and the Board of Immigration Appeals (BIA or Board) permitted lawful permanent residents (LPRs) to apply for § 212(c) relief only if the Department of Homeland Security (DHS) charged them with a ground of deportability that had a comparable ground of inadmissibility. This rule, referred to as the "comparable grounds test," was announced in the 2005 decisions *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005), and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Only one circuit court, the Second Circuit, had rejected the comparable grounds test.

On December 12, 2011, the Supreme Court unanimously rejected the Board's rulings in *Matter of Blake* and *Matter of Brieva*. *See Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).[2] The Court found the BIA's comparable grounds test to be arbitrary and capricious. The decision has immediate implications for lawful permanent residents currently in removal proceedings with certain aggravated felony and other convictions preceding the enactment of AEDPA and IIRIRA in 1996, and provides grounds for seeking reopening of past removal orders involving such individuals. But beyond that context, the decision provides important new analytic tools for challenging arbitrary agency action in immigration cases more generally.

This advisory describes (1) the Court's holding in *Judulang* and who is potentially affected; (2) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings involving such individuals; and (3) some other potential uses of the *Judulang* decision's reasoning to challenge agency policy in removal cases.

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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[2] The citations to *Judulang* used throughout this practice advisory (Op. at __) refer to the slip opinion.

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I. THE SUPREME COURT'S HOLDING IN *JUDULANG*

A. Rejection of *Blake* and *Brieva*

In *Matter of Blake* and *Matter of Brieva*, the BIA found that LPRs charged with deportability do not have a right to seek relief from deportation under former INA section 212(c) unless the charged ground of deportation is "substantially equivalent" to a ground of inadmissibility (formerly, exclusion). In both cases, the LPR had been charged under the "sexual abuse of a minor" (*Blake*) and "crime of violence" (*Brieva*) aggravated felony grounds. The BIA concluded that neither of these aggravated felony deportation categories had a comparable ground of inadmissibility so as to permit the LPR to apply for § 212(c) relief under the statutory counterpart rule set forth in 8 CFR § 1212.3(f)(5).

The Supreme Court in *Judulang* held that the BIA's approach is "arbitrary and capricious" in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). This provision of the APA provides that a court reviewing an agency action shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .." The Court explained:

> Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. When reviewing an agency action, we must assess, among other matters, "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.

Op. at 9-10 (citations omitted). The Court went on to find with respect to the BIA's decisions in *Blake* and *Brieva*:

> The BIA has flunked that test here. By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Op. at 10.

The Court explained that, if the government is going to limit § 212(c)'s scope, it must do so in some rational way. The Court found that the *Blake/Brieva* comparable grounds rule does not impose such a reasonable limitation, stating:

> The comparable-grounds approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls.

> The resulting Venn diagrams have no connection to the goals of the deportation process or the rational operation of the immigration laws.

Op. at 15. The Court elaborated:

> Recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes the alien's prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Op. at 12.

In the end, the Court found that the BIA's approach "cannot pass muster under ordinary principles of administrative law" and remanded the case for further proceedings consistent with its opinion. Op. at 21. The Court's decision effectively overruled not only the BIA's decision, but also federal court decisions affirming the BIA's approach in virtually all circuits except the Second Circuit. *See, e.g.*, *De La Rosa v. U.S. Atty. Gen.*, 579 F.3d 1327 (11th Cir. 2009) (affirming BIA and discussing circuit court decisions on this issue). *But see Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007) (sole circuit overruling BIA on this issue).

B. Issues for the Agency on Remand

The *Judulang* decision remands the case to the Ninth Circuit for "further proceedings consistent with this opinion." Op. at 21. That remand should lead to a straightforward reversal of the BIA and a remand to the agency in Mr. Judulang's case. At some point thereafter, whether in Mr. Judulang's case or in another case, the BIA should announce a new non-arbitrary and rational policy for determining when an LPR charged with deportability based on a pre-1996 conviction may apply for § 212(c) relief.

While the Supreme Court in *Judulang* did not set forth what the new policy for determining § 212(c) eligibility should be, the Court referenced the approach proposed by Mr. Judulang in his briefing. Under that approach any LPR whose conviction also falls within a ground of inadmissibility – such as the crime involving moral turpitude inadmissibility ground – would be eligible for § 212(c) relief. Under this approach, it does not matter whether the deportation ground at issue has a comparable ground of inadmissibility. This essentially is the approach adopted by the Second Circuit. *See Blake v. Carbone*, 489 F.3d. at 104 ("[E]ach petitioner, a deportable lawful permanent resident with an aggravated felony conviction, is eligible for a § 212(c) waiver if his or her particular aggravated felony offense could form the basis of exclusion under § 212(a) as a crime of moral turpitude."). While the Court did not explicitly endorse this approach in *Judulang*, it did comment: "Judulang's proposed approach asks immigration officials only to do what they have done for years in exclusion cases; that

means, for one thing, that officials can make use of substantial existing precedent governing whether a crime falls within a ground of exclusion." Op. at 21.

Although *Judulang* suggests that the Court has not foreclosed all limits on § 212(c) relief, it is hard to envision an approach that the BIA could adopt that would exclude Mr. Judulang, or others like him from pursuing relief and yet pass muster under *Judulang*'s "arbitrary and capricious" standard. Moreover, the Court was clear that any limitation on § 212(c) relief must also be consistent with the Court's prior decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that IIRIRA repeal of § 212(c) could not be applied retroactively to pre-IIRIRA guilty pleas). Op. at 21. *St. Cyr* has foreclosed any limitation that was not a restriction on relief that existed prior to § 212(c)'s repeal. It seems unlikely that the BIA could now devise a rule to limit § 212(c) relief that would not run afoul of one of these two Supreme Court opinions.[3]

C. Who is Potentially Affected

This section outlines the two principal categories of people affected or potentially affected by the Supreme Court's specific holding:

1. Mr. Judulang and other individuals like him charged with deportability based on a pre-1996 guilty plea that also triggers inadmissibility.

Mr. Judulang is an LPR who was charged under a ground of deportability (aggravated felony "crime of violence") that the BIA ruled was not comparable to any ground of inadmissibility even though his offense would have qualified as a "crime involving moral turpitude" under § 212(a). Mr. Judulang argued that, because he would have been able to seek § 212(c) relief if he had traveled abroad and been charged with inadmissibility, he therefore should also be found eligible to seek § 212(c) relief when charged with deportability based on the same offense.

As discussed above, while the Court did not explicitly endorse Mr. Judulang's approach, it is hard to imagine any approach that the BIA could adopt "consistent with this [*Judulang*] opinion" and with the Court's prior decision in *St. Cyr* that would exclude from § 212(c) eligibility Mr. Judulang, or anyone else who would similarly be able to pursue § 212(c) if charged with inadmissibility.

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[3] Were the BIA to adopt a new limitation on § 212(c) relief that did not exist pre-1996, it would be subject to attack as an impermissibly retroactive rule. For arguments on why such a retroactive rule would be impermissible, see pp. 38-44 of the petitioner's brief in *Judulang*, available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-694_petitioner.authcheckdam.pdf.

2. Individuals charged with deportability based on a pre-1996 guilty plea that does not trigger inadmissibility (e.g., firearm offense).

Judulang also provides support for seeking § 212(c) relief for LPRs who are deportable but not inadmissible/excludable, such as LPRs with simple possession firearm convictions. The BIA has long held such individuals ineligible to seek § 212(c) relief. *See, e.g., Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979) (finding § 212(c) ineligibility for a firearm possession offense because the offense did not come within the grounds of excludability as a crime involving moral turpitude), *aff'd*, 624 F.2d 191 (9th Cir. 1980). But, in 1990, in *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991), the BIA itself recognized that excluding LPRs from 212(c) relief because the offense at issue did not fit within a ground of excludability would lead to incongruous results not in keeping with the spirit of the statute. *Id.* at 265 ("This limitation can result in the total unavailability of relief from deportation for longtime resident aliens who . . . may not have committed offenses nearly as serious as those of other aliens who are eligible for the section 212(c) waiver."). The BIA found that § 212(c) may waive all grounds of deportability except those that related to subversives and war criminals, which were the only categories specifically excluded by the then text of § 212(c). *Id.* at 266. The BIA explained:

> In reaching our decision today, we have been ever mindful of the fact that section 212(c) is, in essence, a forgiveness statute. It allows longtime lawful permanent residents to make a mistake, and to be forgiven for it in the immigration context, to keep his permanent resident status despite the mistake. It is a generous provision of the law and we believe that today's action is fully in keeping with its generous spirit.

Id. at 269. However, then Attorney General Thornburgh overruled the BIA's decision in *Hernandez-Casillas* and resumed the government's policy of excluding from § 212(c) relief those LPRs whose offenses did not trigger excludability. *Id.* at 280-293.

In *Judulang*, the Court was highly critical of restrictions on § 212(c) relief that are unconnected to the basic immigration policy question of who should be deported. The Court repeatedly recognized the importance of linking restrictions on discretionary relief to the statute's overall purpose. For example, it declared that "[b]y hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories – a matter irrelevant to the alien's fitness to reside in this country – the BIA has failed to exercise its discretion in a reasoned manner." Op. at 10. Although this comment was directed to the comparable grounds requirement, it could apply equally to a person who is denied relief because his or her conviction is not included in the grounds of inadmissibility. Like the BIA in *Hernandez-Casillas*, the Court noted that § 212(c), by its terms, was a very expansive form of relief – it provided for entry into the country unless the person was excludable on national security and international child abduction grounds. Op. at 16. This broadly designed form of relief provides no basis for disfavoring LPRs whose convictions do not trigger any grounds of inadmissibility over those whose convictions do.

Moreover, as the Court emphasized, "the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or to the proper operation of the immigration system. A

method of disfavoring deportable aliens that bears no relationship to these matters – that neither focuses on nor relates to an alien's fitness to remain in the country – is arbitrary and capricious." Op. at 12. It is difficult to see how the denial of relief to those who are not even inadmissible could be seen as "focusing on or relating to an alien's fitness to remain in the country." Instead, it is an artifact of the very focus on statutory grounds that the Court concluded was arbitrary and capricious.

II WHAT SHOULD BE DONE IN CASES INVOLVING LPRs NOW IN PROCEEDINGS OR WHO WERE PREVIOUSLY DENIED § 212(c) RELIEF FROM DEPORTATION BASED ON *BLAKE* AND *BRIEVA* OR OTHER SIMILARLY ARBITRARY ANALYSIS

This section offers strategies to consider for LPRs whose cases are affected by *Judulang*. Attached to the end of this practice advisory are sample motions and a Rule 28(j) letter that provide additional guidance in implementing the strategies discussed below.

A. LPRs in Pending Removal Cases

Individuals who are in removal proceedings (either before the immigration court or on appeal at the BIA) may request § 212(c) relief under *Judulang*. If the case is on appeal at the BIA, the LPR may want to file a motion to remand to the immigration court for a § 212(c) hearing. (See Sample B.) By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

B. LPRs with Final Orders

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand to the Board under *Judulang*. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, *Judulang* can be addressed in the opening brief or the reply brief. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Judulang* and its relevance to the case. (See Sample D.)

Denied Petition for Review. If the petition for review already has been denied, but the mandate has not issued, a person may file a motion to stay the mandate. (See Sample E.) If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. (See Sample E.) The motion can ask the court to reconsider its prior decision in light of *Judulang* and remand the case to the Board. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court to grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Judulang*.

Administrative Motion to Reconsider. Regardless whether a person sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the Board or the

immigration court (whichever entity last had jurisdiction over the case).[4] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may be increased where the motion is untimely filed.

If the deadline for filing a motion to reconsider or reopen has not elapsed, it is advisable to file the motion before the passage of 30 days from the order of removal, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i). (See Samples A and C.) If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Judulang*, i.e., by January 11, 2012. Filing within 30 (or 90) days of the decision bolsters the argument that the statutory deadline should be equitably tolled.[5]

If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to alternatively request *sua sponte* reopening. Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999)**.**

C. LPRs who are Outside the United States

Individuals who are outside the United States have particularly challenging cases because of the regulatory departure bar. *See* 8 C.F.R. §§ 1003.2(d) and 1003.23(b). The BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions. *See Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008).

As an initial matter, however, individuals who filed petitions for review of their removal orders may be in an easier position because there is no departure bar to judicial review. Thus, they may pursue their appeals from outside the United States and "those who prevail can be afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1761 (2009). Thus, if they are successful on a motion to stay or recall the mandate (see Sample E), they should be permitted to return to the United States for further proceedings. Unfortunately, the process for returning to the United States is not straightforward, and in many cases, the government is resistant to facilitiate a person's return. *See* American Immigration

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[4] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

[5] There are arguments that the deadline for filing was equitably tolled until the Supreme Court issued its decision in *Judulang* or until some later date. In order to show due diligence under the equitable tolling doctrine, it may be beneficial to file within 30 days after *Judulang*.

Council Practice Advisory, *Return to the United States after Prevailing in Federal Court* (May 28, 2009). (Read about efforts to uncover the government's policies on return at http://nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_Summary.pdf.)

Individuals who are filing motions with the BIA or the immigration court should consider whether their relevant court of appeals has invalidated the departure bar regulations. To date, six courts of appeals have invalidated the bar. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011) (same). The only circuit to uphold the regulation has granted rehearing *en banc*. *Contreras-Bocanegra v. Holder*, 629 F.3d 1170, 1172 (10th Cir. 2010) (rehearing *en banc* pending, argued Nov. 15, 2011). If filing a motion to reconsider or reopen in the Tenth, Fifth, Eighth, or Eleventh Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen statute or impermissibly contracts the BIA's jurisdiction. Thus, it advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening as the post departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g., Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

III. OTHER POTENTIAL CHALLENGES TO ARBITRARY OR IRRATIONAL REMOVAL POLICIES UNDER THE REASONING OF *JUDULANG*

In addition to reversing the BIA's § 212(c) comparable-grounds policy, *Judulang* has important implications for other challenges to both agency statutory interpretations and agency policies that do not stem from the statute. This section presents a brief preliminary analysis of the particular implications and uses of the Court's reasoning for such other challenges and is not meant to be a comprehensive review.

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A. Arbitrary and Capricious Review under the APA

The *Judulang* Court embraced application of the Administrative Procedure Act's review of arbitrary and capricious agency action. In particular, the Court applied 5 U.S.C. § 706(2)(A), which permits the Court to set aside agency action that is "arbitrary and capricious." As the Court explained, an agency is required to engage in "reasoned decisionmaking." Op. at 9. A court can review whether the decision was based on "a consideration of the relevant factors" and whether "there has been a clear error of judgment." Op. at 10. That review requires looking at the quality of the agency's reasoning (or lack thereof). The Court concluded that the BIA had "flunked the test" by conditioning an LPR's right to remain in the country on a "chance correspondence between statutory categories." Op. at 10.

APA review can be a powerful tool to reign in truly arbitrary policies. In some ways, APA review is similar to equal protection review. It allows the court to look at arbitrary distinctions and strike them down. But APA review is different in important ways. APA review looks at the reasons that the agency has provided, not reasons developed after the fact by the agency's attorneys. It requires the agency to engage in the issues, consider relevant factors, and provide a reasoned explanation for what it is doing. And as the Court explained in *Judulang*, the agency must focus on the statutory scheme and implementing its purpose. An agency cannot simply say, for example, that it has an interest in cutting cost. As the *Judulang* Court explained, "[c]ost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien's eligibility for a waiver.)" Op. at 21.

The Court particularly objected to the way that the *Blake-Brieva* rule allowed deportation officers' charging decisions to affect access to § 212(c) relief. It noted that the very same conviction could be charged as a crime involving moral turpitude or as an aggravated felony, and that the charging decision would dictate access to relief. The Court objected to a result where access to relief would turn on the "fortuity of an individual officials' decision." Op. at 15. This may have implications, for example, for other contexts where enormous authority has been devolved to individual officers (see subsection C, 3 below).

B. Arbitrary and Capricious Review under *Chevron*

Judulang rejected the government's argument that it should defer to the Board's comparable grounds policy under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But it nonetheless found that if it had applied *Chevron*, the agency policy would not pass step two. The Court explained that at step two the question is whether the agency policy is "'arbitrary and capricious in substance.'" Op. at 9 n.7 (citing cases). *Judulang*'s analysis of the arbitrariness of the comparable-grounds rule is therefore useful in any case challenging the reasonableness of an agency interpretation of a statute under step two of *Chevron*.

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C. Examples of Individuals Beyond *Judulang's* Specific Holding With Potential Challenges under the Court's Reasoning

1. Non-LPRs barred from any discretionary relief from removal due to DHS decision to place the individual in INA § 238(b) proceedings

Under INA § 238(b), a non-LPR who is charged as having an aggravated felony conviction can be placed in administrative removal proceedings in which many forms of relief, such as cancellation of removal and adjustment, are barred. But the very same people can be placed in removal proceedings in which these forms of relief are available. Courts have rejected equal protection challenges to this distinction. But the agency practice also can be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court offered particularly harsh words for policies that allow deportation officers' charging decisions to determine whether relief is available. It recognized that a system that turns on the "fortuity of an individual officer's decision" is fundamentally flawed. The Court cited Judge Learned Hand's admonition that deportation decisions cannot be made into a "sport of chance." Op. at 15. The agency's practices on administrative removal are precisely such a chance system, in which one long-time immigrant may have an opportunity to seek adjustment while another will not, based solely on whether the deportation officer decided to issue an NTA or follow the procedures under INA § 238(b). Because that system is arbitrary and capricious, it cannot stand.

2. LPRs deemed ineligible for § 212(c) relief because their pre-1996 convictions were trial convictions

Judulang also has implications for other outstanding issues related to 212(c) eligibility. In many circuits, § 212(c) relief is restricted to LPRs who pled guilty, and not to those who may have relied on § 212(c) relief in connection with other decisions in their criminal cases, such as a decision to reject a plea and go to trial. *See, e.g.*, *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010) (discussing circuit decisions). This distinction may be challenged as arbitrary and capricious under the reasoning of *Judulang*.

In *Judulang*, the Court rejected a rule that categorically excluded a group of deportable LPRs on grounds that bore no relationship to "the alien's fitness to remain in the country." Op. at 12. Categorical exclusion of trial conviction cases also bears no relationship to fitness to remain. Indeed, the agency has never claimed that it bore such a relationship. Instead, trial conviction cases have been excluded from relief on the ground that *St. Cyr* does not require that they be included. *See, e.g.*, *Canto v. Holder*, 593 F.3d 638 (7th Cir. 2010). That logic is almost identical to the logic that led to the *Blake* decision. The agency had been ordered by a court to provide § 212(c) to some deportable immigrants and did not extend § 212(c) to others whom it deemed not covered by *St. Cyr*. But as the Court found in *Judulang*, agency practice cannot allow for distinctions that are arbitrary just because they grew out of an accommodation of case law. Instead, access to a critical form of relief must be based on a connection to the broader purpose of the statute and fitness to remain. Moreover, just as the comparable grounds test

lacked any connection to the text of the statute, the exclusion of trial convictions finds no basis whatsoever in the wording of § 212(c).

Practitioners should be cautioned, however, that these arguments require further development, and that the courts, particularly the ones that already have ruled adversely on this issue, may not be receptive to these arguments.

3. LPRs deemed ineligible for cancellation of removal based on a finding that their pre-1996 convictions triggered the residence requirement clock-stop rule

Judulang also has potential implications for issues related to eligibility for cancellation of removal under INA § 240A(a), which was enacted in IIRIRA to replace § 212(c) relief. IIRIRA provided that the seven years of residence required to be eligible to seek cancellation "shall be deemed to end . . . when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) . . .." *See* INA § 240A(d) (1). The BIA has applied this "clock-stop" or "stop-time" rule retroactively to pre-IIRIRA offenses. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006). Some reviewing courts have applied a wooden retroactivity analysis in considering the applicability of the clock-stop rule to pre-IIRIRA offenses and have concluded that a provision based on conduct can never have a retroactive effect. On that basis, they have rejected any challenges to the BIA's policy of applying the clock stop rule to convictions that pre-date IIRIRA. *See, e.g., Zuluaga-Martinez v. I.N.S.*, 523 F.3d 365 (2d Cir. 2008).

Judulang suggests a different way to challenge such applications of the clock stop rule. Whether analyzed under the APA or under step two of *Chevron*, the agency policy cannot be "arbitrary and capricious in substance." Op. at 9 n.7. It is hard to imagine anything more arbitrary than the retroactive application of the clock-stop rule. In essence, the rule treats LPRs who entered the country on the same date, and who have the same convictions, differently based on the date the conviction took place. Thus, an LPR who committed his or her offense before 1996 when he or she may not yet have accumulated seven years of residence is barred, while another LPR who entered the country at the same time but committed his or her offense more recently after he or she accumulated seven years is not barred. Whatever logic that rule may have prospectively, when it might be said to notify a noncitizen that no relief will be available regardless of future residence, it is truly arbitrary as applied retroactively. Retroactive application means that those who had shown years of good behavior since 1996 are removed without any consideration of their "fitness to remain" while those with more recent convictions can have the "fitness" examined by an immigration judge. That rule, like the one in *Judulang*, should be found to "flunk the test" of arbitrary and capricious review.

SAMPLE MOTIONS

(Excluding Certificates of Service)

A: **If it has been 30 days or less since the immigration judge's decision in your case,** consider filing this motion to reconsider with the immigration court.

B: **If an appeal is pending at the Board of Immigration Appeals,** consider filing this motion to remand with the Board of Immigration Appeals.

C: **If it has been 30 days or less since the Board of Immigration Appeals' decision,** consider filing this motion to reconsider with the Board.

D: **If a petition for review is currently pending in the court of appeals and briefing has been completed,** consider filing this letter pursuant to Federal Rule of Appellate Procedure 28(j).

E: **If the court of appeals dismissed the petition for review**, consider filing a motion to stay or recall the mandate.

SAMPLE A

Motion to Reconsider with the Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

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

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF
JUDULANG v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby moves the Immigration Judge to reconsider this case in light of the Supreme Court's recent decision in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011). In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA or Board) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *11.[1] Specifically, the

[1] The Court rejected the BIA's entire line of pre-2005 comparable ground cases. *Judulang*, 2011 U.S. LEXIS 9018 at *11 *citing Matter of Hernandez-Casillas;* 20 I&N Dec. 262, 287 (A.G.

Court rejected the Board's "comparable ground test," which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the "comparable ground test" is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § ___. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Supreme Court's decision in *Judulang* has nullified this basis of the Immigration Judge's decision. Therefore, the Court should reconsider its decision and allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA §_____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent's application for relief from removal under former § 212(c) of the INA because, the Immigration Judge held, the charged ground of deportability is not comparable to a ground of inadmissibility. Thus, the Immigration Judge ordered Respondent removed on _____.

Pursuant to 8 C.F.R. § 1003.23(b)(i), Respondent declares that:

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

1991); *In re Jimenez–Santillano,* 21 I&N Dec. 567, 571–72 (BIA 1996); *In re Esposito,* 21 I&N Dec. 1, 6–7 (BIA 1995); *Matter of Montenegro,* 20 I&N Dec. 603, 604-05 (BIA 1992).

_____. The proceeding took place on: _____.

The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.23(b)(1).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.23(b)(1), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent

efforts, did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline "jurisdictional and mandatory"). The Supreme Court issued its decision in *Judulang* on December 12, 2011. Respondent is filing this motion as soon as practicable after the Supreme Court's ruling.

> [Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.23(b) based on a fundamental change in law. The Board has held that an "exceptional situations" standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g., Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only "incremental development" of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted *sua*

sponte reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its "policy" announced in *Matter of X-G-W-*).

IV. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board's policy of pretermitting the § 212(c) applications of lawful permanent residents charged with deportability based on the "comparable ground test" set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at *26. The Immigration Judge ordered his removal and the Board affirmed, holding that Judulang could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the "crime of violence" aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA's decisions in *Matter of Blake* and *Matter of Brieva* were "arbitrary and capricious," stating:

> By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent's application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law,

the Court should reconsider the decision in this case. *Accord Matter of G-D-*, 22. I&N Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

V. CONCLUSION

The Supreme Court's decision in *Judulang v. Holder* is a fundamental change in the law that nullifies the Immigration Judge's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests the Court reconsider its decision and schedule a § 212(c) hearing in Respondent's case.

Dated: _____ Respectfully submitted,

_____

SAMPLE B

Motion to Remand from BIA to Immigration Judge

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIGHT OF *JUDULANG v. HOLDER*

I. <u>INTRODUCTION</u>

Respondent hereby moves the Board of Immigration Appeals (BIA or Board) to remand this case in light of the Supreme Court's recent decision in in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).). In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA or Board) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S.

LEXIS 9018 at *11.[2] Specifically, the Court rejected the Board's "comparable ground test," which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the "comparable ground test" is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § ___. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Supreme Court's decision in *Judulang* has nullified this basis of the Immigration Judge's decision. Therefore, the Board should remand this case to the Immigration Judge to allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA §_____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent's application for relief from removal under former § 212(c) of the INA because, the Immigration Judge held, the charged ground of deportability is not comparable to a ground of inadmissibility. Thus, the Immigration Judge ordered Respondent removed on _____. Respondent is filing this motion as soon as practicable following the Supreme Court's ruling.

---

[2] The Court rejected the BIA's entire line of pre-2005 comparable ground cases. *Judulang,* 2011 U.S. LEXIS 9018 at *11 *citing Matter of Hernandez-Casillas;* 20 I&N Dec. 262, 287 (A.G. 1991); *In re Jimenez–Santillano,* 21 I&N Dec. 567, 571–72 (BIA 1996); *In re Esposito,* 21 I&N Dec. 1, 6–7 (BIA 1995); *Matter of Montenegro,* 20 I&N Dec. 603, 604-05 (BIA 1992).

III. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board's policy of pretermitting the § 212(c) applications of lawful permanent residents charged with deportability based on the "comparable ground test" set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at *26. The Immigration Judge ordered his removal and the Board affirmed, holding that Judulang could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the "crime of violence" aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA's decisions in *Matter of Blake* and *Matter of Brieva* were "arbitrary and capricious," stating:

> By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent's application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law, the Board should remand the decision in this case. *Accord Matter of G-D-*, 22. I. & N. Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

IV. CONCLUSION

The Supreme Court's decision in *Judulang* is a fundamental change in the law that nullifies the Immigration Judge's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests that the Board remand this case to the Immigration Judge to schedule a § 212(c) hearing in Respondent's case.

Dated: _____ Respectfully submitted,

_____

SAMPLE C

Motion to Reconsider with the BIA

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. DO NOT TREAT THIS SAMPLE MOTION AS LEGAL ADVICE.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
	)	
_____,	)	A Number:_____
	)	
Respondent.	)	
	)	
In Removal Proceedings.	)	
	)	
_____	)	

MOTION TO RECONSIDER IN LIGHT OF
JUDULANG v. HOLDER

I. <u>INTRODUCTION</u>

Pursuant to § 240(c)(6) of the Immigration and Nationality Act (INA), Respondent, _____, hereby seeks reconsideration of this case in light of the Supreme Court's recent decision in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011). In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA or Board) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA

2005). *Judulang,* 2011 U.S. LEXIS 9018 at *11.[3] Specifically, the Court rejected the Board's "comparable ground test," which permitted lawful permanent residents to apply for a § 212(c) waiver only if the Department of Homeland Security (DHS) charged them with a ground of deportability which had a comparable ground of inadmissibility. The Court found that the "comparable ground test" is arbitrary and capricious. *Judulang*, 2011 U.S. LEXIS 9018 at *40.

In the instant case, DHS charged Respondent, a lawful permanent resident with deportability under INA § ___. The Immigration Judge (IJ) found Respondent ineligible for § 212(c) relief based on the lack of a comparable ground of inadmissibility. The Board affirmed the IJ's decision on _____. The Supreme Court's decision in *Judulang* has nullified this basis of the Board's decision. Therefore, the Board should reconsider its decision and allow Respondent to proceed with an application for § 212(c) relief.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Respondent with deportability under INA §_____ for having been _____.

On _____, the Immigration Judge pretermitted Respondent's application for relief from removal under former § 212(c) of the INA because the charged ground of deportability is not comparable to a ground of inadmissibility. This Board affirmed the IJ's decision on _____**.**

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

(1) the validity of the removal order [has been or is OR has not and is not] the subject of a judicial proceeding. [If applicable] The location of the judicial proceeding is:

---

[3] The Court rejected the BIA's entire line of pre-2005 comparable ground cases. *Judulang,* 2011 U.S. LEXIS 9018 at *11 *citing Matter of Hernandez-Casillas;* 20 I&N Dec. 262, 287 (A.G. 1991); *In re Jimenez–Santillano,* 21 I&N Dec. 567, 571–72 (BIA 1996); *In re Esposito,* 21 I&N Dec. 1, 6–7 (BIA 1995); *Matter of Montenegro,* 20 I&N Dec. 603, 604-05 (BIA 1992).

_____. The proceeding took place on: _____.

The outcome is as follows _____.

(2) The validity of the removal order [has not been and is not OR has been and is] the subject of a judicial proceeding.

(3) Respondent [is OR is not] currently the subject of a criminal proceeding under the Act. The current status of this proceeding is: _____.

(4) Respondent [is OR is not] currently the subject of any pending criminal proceeding under the Act.

III. STANDARD FOR RECONSIDERATION

A motion to reconsider shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.3(b)(1). In general, a respondent may file one motion to reconsider. INA § 240(c)(6)(A), 8 C.F.R. § 1003.2(b)(2).

A motion to reconsider must be filed within 30 days of entry of a final administrative order of removal, INA § 240(c)(6)(B), 8 C.F.R. § 1003.2(b)(2), or as soon as practicable after finding out about the decision. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2011) (holding that statutory administrative appeal deadline is a procedural, not jurisdictional, rule); *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005) (explaining that petitioner must "exercise reasonable diligence in investigating and bringing the claim") (internal quotation omitted); *Toora v. Holder*, 603 F.3d 282, 284 (5th Cir. 2010) (reviewing BIA decision in which BIA concluded "no equitable tolling excused the late [filed motion to reopen] because [petitioner] failed to exercise due diligence…"); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010) (defining equitable tolling as the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent

efforts, did not discover the injury until after the limitations period had expired") (internal quotation omitted); *Pervaiz v. Gonzales*, 405 F.3d 488, 489 (7th Cir. 2005) ("…[T]he test for equitable tolling, both generally and in the immigration context, is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier") (citations omitted); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184-85 (9th Cir. 2001) (holding that "all one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim") (internal quotation omitted); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) holding that BIA must consider noncitizens due diligence in evaluating whether equitable tolling of motion to reopen deadline is warranted); *but see Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999) (finding, in case pre-dating *Henderson*, motion to reopen deadline "jurisdictional and mandatory"). The Supreme Court issued its decision in *Judulang* on December 12, 2011. Respondent is filing this motion as soon as practicable after the Supreme Court's ruling.

> [Consider adding paragraph below if the person has not been removed and the statutory motion deadline has elapsed].

In the alternative, Respondent seeks *sua sponte* reconsideration pursuant to 8 C.F.R. § 1003.2(a) based on a fundamental change in law. The Board has held that an "exceptional situations" standard applies when adjudicating a *sua sponte* motion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional circumstance. *See, e.g., Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only "incremental development" of the law); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted *sua*

sponte reopening); *Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002) (due to passage of time, BIA withdrew from its "policy" announced in *Matter of X-G-W-*).

IV. ARGUMENT

In *Judulang*, the Supreme Court rejected the Board's policy of pretermitting the § 212(c) applications of lawful permanent residents charged with deportability based on the "comparable ground test" set forth in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at 26. The Immigration Judge ordered his removal and the Board affirmed, holding that Judulang could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the "crime of violence" aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA's decisions in *Matter of Blake* and *Matter of Brieva* were "arbitrary and capricious," stating:

> By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Like the petitioner in *Judulang*, Respondent was charged with and found removable based on a ground of deportability (_____) for which there is no comparable ground of inadmissibility. Thus, the Court erroneously pretermitted Respondent's application for § 212(c) relief in violation of INA § 212(c) (1995). As *Judulang* represents a fundamental change in law,

the Court should reconsider the decision in this case. *Accord Matter of G-D-*, 22. I&N Dec. 1132, 1134 (BIA 1999) (noting that a fundamental change in law warrants reopening).

V. CONCLUSION

The Supreme Court's decision in *Judulang v. Holder* is a fundamental change in the law that nullifies the Board's decision denying Respondent the opportunity to apply for § 212(c) relief. Respondent respectfully requests the Board reconsider its decision and remand the case to the immigration court for a § 212(c) hearing in Respondent's case.

Dated: _____ Respectfully submitted,

_____

SAMPLE D

Letter pursuant to Federal Rule of Appellate Procedure 28(j)
(Pursuant to the rule, the body of the letter must not exceed 350 words)

This letter is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

Clerk of the Court
U.S. Court of Appeals for the _____Circuit
ADDRESS

Re: _____ v. _____
Case No. _____

Dear Clerk of the Court:

Pursuant to Federal Rule of Appellate Procedure 28(j), Petitioner submits *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).

In *Judulang*, the Supreme Court rejected the Board of Immigration Appeals' (BIA) rulings in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). The Court found the BIA's comparable grounds test for § 212(c) relief is "arbitrary and capricious." 2011 U.S. LEXIS 9018 at *40.

Judulang is applicable to this case because _____
_____.
Judulang supports the position in Petitioner's brief at pages _____ that the instant petition for review should be granted.

Respectfully submitted,

_____

cc:

Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

SAMPLE E

Motion to Stay or Recall the Mandate at Court of Appeals

This motion is <u>not</u> a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.

IN THE UNITED STATES COURT OF APPEALS

FOR THE _____CIRCUIT

_____	Case No. _____
Petitioner,	
v.	
Eric H. Holder, Jr., Attorney General,	
Respondent.	

MOTION TO STAY OR RECALL THE MANDATE IN LIGHT OF THE SUPREME COURT'S DECISION IN *JUDULANG v. HOLDER*

I. INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 41 [and INSERT ANY APPLICABLE LOCAL RULE], Petitioner moves this Court to stay or recall the mandate in this case in light of the Supreme Court's recent decision in *Judulang v. Holder*, No. 10-694, 565 U.S. ___, 2011 U.S. LEXIS 9018 (Dec. 12, 2011).

II. RELEVANT PROCEDURAL HISTORY

Petitioner became a lawful permanent resident on _____. The Department of Homeland Security (DHS) charged Petitioner with deportability under §_____ of the Immigration and Nationality Act, 8 U.S.C. § ____, for having been _____.

On _____, the Board affirmed the immigration judge's decision in this case, which had pretermitted Petitioner's application for relief from removal under former § 212(c) of the INA because the charged ground of deportability is not comparable to a ground of inadmissibility under 8 U.S.C. § 1182. The Board's decision relies on [*Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) AND/OR *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)].

Petitioner then filed a petition for review of the BIA's decision with this Court. On _____, this Court [dismissed OR denied] the petition for review, affirming the BIA's approach set forth in *Matter of Blake* AND/OR *Matter of*

Brieva. The Court's decision relied on [then binding circuit case law OR Board precedent]. [Insert applicable circuit case/s: *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2042 (2009); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc); *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005) AND/OR *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005)]. The mandate either is [set to issue on _____OR has issued on _____].

The Supreme Court's unanimous decision in *Judulang* was issued on December 12, 2011. Petitioner is filing this motion as soon as practicable following the Court's decision.

III. ARGUMENT

The Court should stay or recall the mandate in light of the Supreme Court's decision in *Judulang*. In *Judulang*, the Supreme Court rejected the Board's policy of pretermitting the § 212(c) applications of lawful permanent residents charged with deportability based on the "comparable ground test" set forth in *Matter of*

Blake, 23 I&N Dec. 722 (BIA 2005) and *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). *Judulang*, 2011 U.S. LEXIS 9018 at *39-40.

The petitioner in *Judulang* was a lawful permanent resident whom DHS charged with deportability for having an aggravated felony crime of violence conviction. *Judulang*, 2011 U.S. LEXIS 9018 at 26. The Immigration Judge ordered his removal and the Board affirmed, holding that Judulang could not apply for § 212(c) relief because there is no inadmissibility ground in INA § 212 comparable to the "crime of violence" aggravated felony deportability ground.

The Supreme Court reversed. *Judulang*, 2011 U.S. LEXIS 9018 at *40. The Court found that the BIA's decisions in *Matter of Blake* and *Matter of Brieva* were "arbitrary and capricious," stating:

> By hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.

Judulang, 2011 U.S. LEXIS 9018 at *21-22.

Judulang is applicable in this case because _____

_____.

The Court's decision in *Judulang* nullifies the Board's decision.

Thus, a recall of the mandate is warranted in order to prevent injustice and to allow Petitioner to exercise his right to apply for § 212(c) relief. [INSERT

DISCUSSION OF RELEVANT CIRCUIT LAW REGARDING RECALL OR STAY OF THE MANDATE].

IV. POSITION OF OPPOSING COUNSEL

Undersigned counsel contacted _____, counsel for Respondent. _____ indicated that Respondent [opposes OR does not oppose OR takes no position] on the instant motion.

V. CONCLUSION

For the foregoing reasons, this Court should [recall the mandate OR stay the mandate] and reconsider the instant petition for review. In accordance with the Supreme Court's decision in *Judulang v. Holder*, the Court should reverse the BIA's decision and remand the case for further proceedings.

Dated: _____ Respectfully submitted,

_____