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

In the Matter of	**A XXX-XXX-XXX**
First LAST,	**IN REMOVAL PROCEEDINGS**
Respondent.	**NOT DETAINED**

No Hearing Scheduled

Immigration Judge _____

RESPONDENT'S MOTION TO REOPEN AND GRANT ASYLUM

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Respondent.	**NOT DETAINED**

RESPONDENT'S MOTION TO REOPEN AND GRANT ASYLUM

I. INTRODUCTION

Respondent [Redacted] ("Mr. [Redacted]"), through undersigned counsel, hereby moves the Tacoma 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 35-year-old native and citizen of Cameroon. Ex. A, Respondent's Declaration. On January XX, 2020, he appeared for a hearing on the merits of his application for asylum, withholding of removal, and protections under the United Nations Convention Against Torture ("CAT") before Judge Floyd of the Immigration Court in Tacoma, Washington. At this hearing, Mr. [Redacted] presented evidence and credible testimony in support of his application.

The court denied Mr. [Redacted]'s application for asylum, finding that Mr. [Redacted] was subject to the safe third country bar under 8 C.F.R. § 208.13(c)(4). The court specified that this bar was the sole reason for denying Mr. [Redacted]'s asylum application. However, the immigration judge also found that Mr. [Redacted]'s 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' Right Coalition v. Trump*, Case No. 1:19-cv-02117-TJK, Dkt. No. 71; Dkt. No. 72 at 2 (June 30, 2020). The entire rule was vacated. *Id.*, Dkt. No. 71; Dkt. No. 72 at 52. The court declined the government's invitation to remand without vacatur or issue a stay of vacatur. *Id.*, Dkt. No. 72 at 52. 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 January XX, 2020 Order signed by Judge Floyd at the Tacoma Immigration Court. Ex. E. Therefore, venue is proper at the Tacoma 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).

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. *Socop-Gonzalez v. Lynch*, 798 F.3d 917, 920 (9th Cir. 2015) (holding that the deadline for filing a motion to reopen is subject to equitable tolling).

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. *Sun v. Mukasey*, 555 F.3d 802, 806 (9th Cir. 2009) (concluding that petitioner was entitled to equitable tolling where she acted with due diligence). In *Avagyan v. Holder*, the Ninth Circuit set for the test for determining whether a petitioner has exercised due diligence:

> [T]o assess whether petitioner exercised due diligence, [the court] consider[s] three issues. First, we determine if (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen. Second, we ascertain whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner is ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief. … Third, we assess when the tolling period should end; that is when petitioner definitively learns of the harm resulting from counsel's deficiency, or ***obtains vital information*** bearing on the existence of his claim.

Avagyan v. Holder, 646 F.3d 672, 679 (9th Cir. 2011) (emphasis added).

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 January XX, 2020. However, the District Court for the District of Columbia's order vacating the safe third country bar to asylum was entered 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.

Mr. [Redacted] and the undersigned *pro bono* counsel were in contact immediately and counsel worked diligently, amongst his other deadlines and the difficulties posed by the COVID-19 outbreak, to gather the pertinent evidence, confer with opposing counsel from Mr. [Redacted]'s individual hearing, 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.

IV. AUTHORITY AND ARGUMENT

a. A Motion to Reopen is warranted because the decision out of the District Court of the District of Columbia, not previously available at trial, 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' Right Coalition v. Trump*, Case No.

1:19-cv-02117-TJK, Dkt. No. 71; Dkt. No. 72 at 2 (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 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 January XX, 2020, the date of Mr. [Redacted]'s individual merits hearing, the Safe Third Country Bar to Asylum was in full effect. Counsel for Mr. [Redacted] argued that he was still eligible for asylum under the plain meaning of the regulation, as he attempted to enter prior to July 16, 2019, however the IJ held that the bar applied to Mr. [Redacted]. Although Judge Floyd stated that Mr. [Redacted] warranted a favorable exercise of discretion and granting of asylum, he denied his asylum application "based solely on 8 CFR 1208.13(c)(4)." Ex. E.

b. 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. Judge Floyd noted in his oral decision, as well as on his written order, that Mr. [Redacted] was eligible for asylum but for the asylum bar codified at 8

C.F.R. 1208(c)(4). Ex. E. the immigration judge 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. § 208.13(c)(4)), Mr. [Redacted] respectfully requests the Court reopen these proceedings and exercise its discretion to grant Mr. [Redacted] asylum. 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.

V. CONCLUSION

For the foregoing reasons, the Court should reopen Mr. [Redacted]'s removal proceedings and grant his application for asylum based on the newly issued order in *Capital Area Immigrants' Right Coalition v. Trump*, Case No. 1:19-cv-02117-TJK, Dkt. No. 71; Dkt. No. 72 at 2 (June 30, 2020). If the Court finds that it requires additional fact finding on the issues before it, Respondent requests that the Court schedule a Master Calendar Hearing to take further testimony. Because Mr. [Redacted] currently lives out of state, and given the COVID-19 travel restrictions, he would request to appear telephonically or by video.

Respectfully submitted this _____ day of July, 2020.

By: _____

Attorney Name
Office

Pro Bono Attorney for [Redacted]

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Respondent.	**DETAINED**

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:

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

_____ _____
Date Immigration Judge Charles Floyd

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, _____, do hereby certify that I

___ Mailed
__ Hand delivered
___ Served electronically on the Chief Counsel's Office located in the NWDC at seattleoccfilings@dhs.gov
___ Placed in the ICE drop box inside the main entrance to the Northwest Detention Center

a true and correct copy of the attached Prehearing Statement to:

Chief Counsel
Immigration and Customs Enforcement
1623 East J Street, Suite 2
Tacoma, WA 98421

Date: _____ Signed: _____