**U.S. Department of Justice**

Executive Office for Immigration Review

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**Name: PERSAD, SAIRA**

**A 043-832-396**

**Date of this notice: 5/14/2020**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

Userteam: Docket

File: A043-832-396 – Miami, FL

Date: MAY 14 2020

In re: Saira PERSAD

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Alex Solomiany, Esquire

APPLICATION: Reopening

On October 15, 2019, the respondent, a native and citizen of Canada, submitted a motion to reopen proceedings in which her appeal was dismissed by the Board on June 26, 2007. The Department of Homeland Security has not responded to the respondent's motion. The record will be remanded

The respondent's motion is statutorily number and time-barred as it is her second such motion, and as it was filed more than 12 years after the Board's final administrative decision. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The respondent has not identified any exception to these statutory bars within which her motion falls. Rather, she asks that proceedings be reopened sua sponte as she contends that her conviction for grand theft under Florida Statutes section 812.014 is not a crime involving moral turpitude in light of the holding in *Descamps v. United States*, 133 S. Ct. 2276 (2013). 8 C.F.R. § 1003.2(a). She contends that, therefore, she is no longer removable as charged under either section 212(a)(2)(A)(i)(I) or 212(a)(6)(C)(i) of the Act (Exh. 1; MTR). The respondent alternatively avers that proceedings should be reopened so that she may pursue a waiver of inadmissibility under section 237(a)(1)(H) of the Act as her conviction is no longer considered a crime involving moral turpitude.

The Board's authority to sua sponte reopen cases is limited to "exceptional situations" and "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship." *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); *see also Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (stating that "as a general matter, we invoke our sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations").

We recognize that a fundamental change in law may be considered an exceptional situation warranting sua sponte reopening. *See Matter of G-D-*, 22 I&N Dec. at 1134-36. The respondent's instant motion to reopen was untimely by many years, as noted. However, the Eleventh Circuit has held that the 90-day time limitation under 8 C.F.R. § 1003.2(c)(2) for motions to reopen a removal order is not jurisdictional, but is a claim-processing rule that is subject to equitable tolling. *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1361-62 (11th Cir. 2013). The court further held that equitable tolling requires a showing that the party has been pursuing her rights diligently and that some extraordinary circumstance "stood in [her] way." *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d at 1363 n.5.

Subsequent to *Descamps v. United States*, the Board issued *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), in which we held that a theft crime is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his or her property either permanently or under circumstances where the owner's property rights are substantially eroded. *Id.* at 854-55; *see also Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016). Therein, we noted that Florida is only one of two states that explicitly permits a conviction for theft on a showing of an intent to temporarily deprive an owner of property. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852 n.8. Therefore, the respondent is no longer removable under section 212(a)(2)(A)(i)(I) of the Act (Exh. 1). We find that this constitutes an exceptional circumstance supporting sua sponte reopening, and remand of the proceedings.

The respondent asserts that she is no longer removable under section 212(a)(6)(C)(i) of the Act as her failure to disclose her conviction for grand theft in connection with her application for a visa was not material as it would not have affected the decision to grant her an immigrant visa (Motion, paras. 11-12). We disagree. Information is "material" when it has a "natural tendency to affect[] the official decision" of the adjudicator. *Kungys v. United States*, 485 U.S. 759, 771 (1988) (addressing the "materiality" of an alien's misrepresentation in a naturalization proceeding). The respondent's failure to disclose the fact of her noted conviction is material because "the misrepresentation tends to shut off a line of inquiry that is relevant to the [respondent's] admissibility," and thus had a natural tendency to influence the decision on the application. *Matter of D-R-*, 27 I&N Dec. 105, 114 (BIA 2017).

Nonetheless, we find that reopening and remand of the proceedings is warranted in light of the fact that the respondent is no longer removable under section 212(a)(2)(A)(i)(I) of the Act. On remand the respondent may apply for a waiver of inadmissibility under section 237(a)(1)(H) of the Act (Motion, para. 13).

Accordingly, the following orders will entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with this decision.

FOR THE BOARD