U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: RIOS-ALATORRE, LUIS

A090-791-693

Date of this notice: 6/14/2012

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

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RIOS-ALATORRE, LUIS
A090-791-693
CCA-OTAY 446 ALTA RD
SAN DIEGO, CA 92143

DHS/ICE Office of Chief Counsel - EAZ
P.O. Box 25158
Phoenix, AZ 85002

Name: RIOS-ALATORRE, LUIS **A090-791-693**

Date of this notice: 6/14/2012

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

File: A090 791 693 - Eloy, AZ Date: JUN 14 2012

In re: LUIS RIOS-ALATORRE a.k.a. Luis Rios

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Andrew K. Nietor, Esquire

ON BEHALF OF DHS: Danielle Sigmund
Assistant Chief Counsel

APPLICATION: Reconsideration; reopening

ORDER:

Considering the totality of the circumstances presented in this matter, we reopen these removal proceedings upon our own motion and remand the record to the Immigration Judge to further assess the respondent's removability under the provisions of section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), in light of the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and any other pertinent legal authority.[1] *See Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). Upon remand, the Department of Homeland Security should be provided an opportunity, if necessary, to lodge additional factual allegations and charges of removability. *See* 8 C.F.R. § 1240.10(e). If the respondent is found to be subject to removal from the United States, he will bear the burden of demonstrating eligibility for relief. *See* 8 C.F.R. § 1240.8(d).

FOR THE BOARD

[1] The Department of Homeland Security has not argued that the respondent was removed from the United States prior to the fundamental change in law upon which the respondent seeks reconsideration of the Immigration Judge's removal order. Additionally, neither party asserts a reason upon which the Immigration Judge or this Board would lack jurisdiction to consider the merits of the respondent's motion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366

ELOY, ARIZONA

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
RIOS-ALATORRE, Luis	)	**FILE NO.** A090-791-693
	)	
RESPONDENT	)	**DATE:** April 9, 2012
	)	

MOTION: Respondent's Motion to Reopen Removal Proceedings

ON BEHALF OF THE RESPONDENT:

Andrew K. Nietor, Esq.
Law Office of Andrew K. Nietor
110 West C Street, Suite 1903
San Diego, California 90232

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
1705 East Hanna Road
Eloy, Arizona 85131

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL HISTORY

On May 8, 2000, the Immigration and Naturalization Service (INS or Service) issued the above named respondent a Notice to Appear (NTA), which commenced removal proceedings. (Exh. 1, Form I-862, 1.) The NTA states that: (1) the respondent is not a citizen or national of the United States, but is a native and citizen of Mexico, (2) the respondent was admitted to the United States at San Francisco, California on December 1, 1990 as an immigrant, (3) on May 18, 1999, the respondent was convicted in the Superior Court of California for the offense of "Driving under the Influence with Priors" in violation of California Vehicle Code (Ca.V.C.) sections 23152(B) and 23175.5, (4) for that offense the respondent was sentenced to two (2) years confinement. (*Id.*). Based on these allegations, the Department charged the respondent with being removable under Immigration and Nationality Act (INA or Act) section 237(a)(2)(A)(iii), in that he was convicted of an "aggravated felony". (*Id.*).

On June 16, 2000, at a master calendar hearing, the Court advised the respondent of his rights and of the charges against him. The respondent informed the Court that he would represent himself and that he understood his rights. The respondent then admitted allegations one (1) and two (2)—that he is not a citizen or national of the United States

but is a citizen of Mexico and that he was admitted to the United States on December 1, 1990 as an immigrant. However, the respondent denied the remainder of the allegations regarding his May 18, 1999 criminal conviction. He also denied the Service's charge that he is removable under INA § 237(a)(2)(A)(iii) for having been convicted of an "aggravated felony". Accordingly, the Court scheduled a contested removal hearing to be held on July 27, 2000. (Hr. (June 16, 2000)).

At the contested removal hearing held on July 27, 2000, the respondent once again informed the Court of his desire to represent himself. Again, the Court informed the respondent of the allegations and charges against him. The INS then filed a copy of an "abstract of judgment" from the Superior Court of California, County of Tulare dated July 19, 1999. (Exh. 2, Attach C). That document states that on July 18, 1999, the respondent pleaded guilty to violating Ca.V.C. §§ 23152(B)/ 23175.5 "Driving While Having a Blood Alcohol Content of .08% or Higher" and was sentenced to two years imprisonment. (*Id.*). The respondent agreed that this document was correct and stated that he had no objection to it being admitted. (Hr. (July 27, 2000)). Accordingly, the Court sustained the Service's allegation that the respondent was convicted in the Superior Court of California for the offense of "Driving under the Influence with Priors" in violation of California Vehicle Code (Ca.V.C.) sections 23152(B) and 23175.5 and was sentenced to two (2) years confinement. (*Id.*). The Court then found that, under the Board of Immigration Appeal's (BIA) decision in *Matter of Magallanes*, 22 I&N Dec. 1 (BIA 1998), the respondent's crime is an "aggravated felony" because it is a "crime of violence" under INA § 101(a)(43)(F). Accordingly, the Court sustained the single charge of removal. Further, the Court found that the respondent was not eligible for any form of relief. Therefore, the Court ordered the respondent removed to his home country, Mexico.

Nearly twelve years later, on April 3, 2012, the respondent filed a motion to reconsider and to terminate removal proceedings. The respondent's argument is that this Court should reconsider the decision dated July 27, 2000 ordering the respondent removed, in light of the U.S. Supreme Court's subsequent 2004 decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the U.S. Supreme Court examined an alien's conviction under a Florida statute making it a crime to drive a motor vehicle under the influence of alcohol and to cause bodily injury. The Court held that this offense was not an aggravated felony "crime of violence" under the INA because the Florida statute covers negligent conduct. Similarly, the respondent argues that the DUI statute under which he was convicted also covers negligence. Therefore, the respondent contends, under the reasoning of *Leocal*, his conviction is not a "crime of violence" and does not subject him to removal for being convicted of an aggravated felony.

The Department of Homeland Security (DHS or Department) opposes the motion on the ground that it is untimely and that *sua sponte* reopening is not warranted.

II. STATEMENT OF LAW AND ANALYSIS.

A motion to reopen and/or reconsider is subject to strict deadlines required by the Act and its implementing regulations. A motion to reconsider must be filed within thirty

(30) days of an administratively final removal order. INA § 240(c)(6)(B). A motion to reopen must be filed within ninety (90) days of an administratively final removal order. INA § 240(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(1). A removal order is administratively final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken, whichever occurs first. 8 C.F.R. § 1003.39.

Here, there is no issue that the respondent's motion is untimely. After the respondent was ordered removed on July 27, 2000, he waived appeal. (Hr. (July 27, 2000)). Accordingly, the respondent had thirty (or ninety) days from this date to file his motion. However, the respondent did not file the motion until nearly twelve years later. Therefore, the motion is clearly untimely. Nonetheless, the respondent argues that this Court should exercise its *sua sponte* authority to grant his motion.

When a motion is untimely and requires the exercise of judicial discretion, the Court may grant a motion to reopen or reconsider *sua sponte*. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997)(reopening); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (reconsideration). However, the Court's power to reopen *sua sponte* is limited to exceptional circumstances and should be employed "sparingly". *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). The Court must be persuaded by sufficiently compelling reasoning that the extraordinary intervention of its *sua sponte* authority is warranted. *Id.*

The respondent argues that the extraordinary intervention of *sua sponte* reopening is warranted because reopening/reconsideration will achieve the goals of fairness and uniformity. Specifically, the respondent argues that his removal order "contradicts relevant Supreme Court . . . case law" and therefore undermines the goal of precedential uniformity. Moreover, the respondent contends that fairness requires the Court to grant his motion; otherwise, he will barred for life from reentering the United States for having been deported because of an "aggravated felony" conviction. *See* INA § 212(a)(9)(A)(ii).

First, the Court does not understand the respondent to argue that his 2000 removal order was fundamentally unfair or based on an error of law. At the time he was ordered removed, the respondent's offense was in fact an aggravated felony "crime of violence" under controlling BIA case-law. In *Matter of Magallanes*, 22 I&N Dec. 1 (BIA 1998), the BIA examined an Arizona statute making it "unlawful for any person to drive or be in actual physical control of any vehicle . . . [w]hile under the influence of intoxicating liquor, any drug . . . if the person is impaired to the slightest degree". *Id.* at 2 The Board also examined a related statute which makes it unlawful for a "person to drive or [be in] actual physical control [of a vehicle] while under the influence of intoxicating liquor or drugs . . .while the person's driver's license or privilege to drive is suspended, canceled, revoked". *Id.* The BIA held that "DUI" is the "type of crime that involves a substantial risk of harm to persons and property", making it a "crime of violence" under INA § 101(a)(43)(F). *Id.* at 5. Accordingly, the BIA concluded that a conviction under either Arizona statute is an aggravated felony. *Id.*

Here, the respondent was convicted of violating Ca.V.C. § 23152(b) which makes it "unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle". The respondent was also convicted under former Ca.V.C. § 23175.5 which makes it unlawful to commit a subsequent DUI within ten years of a previous

DUI conviction. Under *Matter of Magallanes*, the controlling precedent at the time, both of these statutes criminalize a type of conduct that "involves a substantial risk of harm to persons and property", making it a "crime of violence" under INA § 101(a)(43)(F).

The BIA's decision in *Magallanes* was the controlling precedent in effect at the time that the respondent's case was decided. In fact, it was not until a year later that the Ninth Circuit Court of Appeals addressed the same issue decided in *Magallanes* and found that a conviction under a California DUI statute was not a "crime of violence". *See U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *See also Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002)(reversing *Matter of Magallanes*). Finally, in 2004, the Supreme Court decided *Leocal v. Ashcroft*, 543 U.S. 1 (2004), making clear that a DUI statute that requires mere negligence is not a "crime of violence". Therefore, although *Matter of Magallanes* was eventually reversed, at the time that the respondent's case was decided it was controlling law. Accordingly, the respondent was properly ordered removed on July 27, 2000 under INA § 237(a)(2)(A)(iii) for having been convicted of an "aggravated felony, crime of violence".

The heart of the respondent's argument is that a subsequent fundamental change in law warrants *sua sponte* reopening or reconsideration. A fundamental change in law may, under certain circumstances, constitute an exceptional circumstance warranting *sua sponte* reopening notwithstanding otherwise applicable time limitations on motions. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). However, the BIA has also made clear that an alien's interest in reopening proceedings to take advantage of a fundamental change in law needs to be weighed against the need to bring finality to removal proceedings. *See Matter of G-C-L-*, 23 I&N Dec. 359, 361 (BIA 2002)(finding that five years after a fundamental change in law "the interest of finality in immigration proceedings . . . takes precedence"). Therefore, this Court must weigh the respondent's interest against the interests of bringing finality to his 2000 removal order.

The Court takes seriously respondent's arguments that reopening is warranted in the interest of uniformity and fairness, however, it finds that the interest of finality is stronger in the instant matter. It is clear that after *Matter of Magallanes* was decided there was a "fundamental change" in the law on whether a "DUI" offense is an aggravated felony crime of violence. Quite simply, the Ninth Circuit, the BIA, and later the Supreme Court reached the opposite conclusion than that reached in *Magallanes*. *See Matter of G-D-*, 22 I&N Dec. at 1135 (holding that a fundamental change in the law is not a mere incremental change, but rather a departure from prior established principles). Nonetheless, the respondent did not file his motion until April 3, 2012. Thus, the motion was filed nearly eleven years after the Ninth Circuit unequivocally disagreed with *Magallanes* in *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) and ten years after the BIA reversed itself in *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002). Even considering the U.S. Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), as marking the definitive date when the law fundamentally changed, the respondent's motion was filed eight years after that decision. Therefore, given the respondent's lack of due diligence, the Court finds, in its discretion, that his interest in reopening these proceedings is outweighed by the need to bring finality to this matter.

IV. CONCLUSION

Accordingly, the following order shall be entered:

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

Richard A. Phelps
U.S. Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (M) ALIEN'S ATT/REP ( ) DHS

DATE: 4/9/2012 BY COURT STAFF: T MacKenzie
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other