



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: ESCAJEDA-HERNANDEZ, JORG... A 041-939-114

Date of this notice: 3/25/2019

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.
Kendall Clark, Molly
Guendelsberger, John

Trans:
Userteam: Docket

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Falls Church, Virginia 22041

File: A041-939-114 – Adelanto, CA¹

Date: **MAR 25 2019**

In re: Jorge Ernesto ESCAJEDA-HERNANDEZ a.k.a. Jorge Ernesto Escajeda

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lauren D. Cusitello, Esquire

APPLICATION: Reopening

This case is before the Board pursuant to a May 11, 2018, order of the United States Court of Appeals for the Ninth Circuit, which granted the Government's unopposed motion to remand. In its motion, the Government sought a remand to allow the Board to fully consider whether a change in law is a basis for equitable tolling of an untimely motion to reopen, and if so, whether the following cases, taken together or individually, support equitable tolling in the respondent's case: *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *affirmed Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Descamps v. United States*, 570 U.S. 254 (2013); and *Rendon v. Holder*, 764 F.3d 1077, 1083 (9th Cir. 2014). The Government also sought a remand for the Board to determine whether the foregoing cases, taken together or individually, constitute an exceptional circumstance permitting reopening sua sponte. After a briefing schedule was set, the parties did not file briefs. Upon further consideration, the proceedings will be reopened, and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a native and citizen of Mexico, was admitted into the United States on April 13, 1988, as a lawful permanent resident. On March 26, 2001, the respondent was convicted in the Superior Court of California, County of Los Angeles, for the offense of first degree burglary in violation of section 459 of the California Penal Code, and was sentenced to 2 years of confinement (IJ at 1-2; Exh. 1).

In 2004, the respondent was placed into removal proceedings and found removable as having been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (IJ at 2; Exhs. 1-2). The specific definition of aggravated felony for which the respondent was convicted was a theft or burglary offense under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), for which the term of imprisonment ordered was at least 1 year. On January 19, 2016, the respondent filed an untimely motion seeking reopening based on a change in the law, which the Immigration Judge denied in a written decision,

¹ The removal proceedings in 2004 took place at the Immigration Court in Lancaster, California, which is now closed. Any matter relating to a case heard at that court is now under the jurisdiction of the Adelanto Immigration Court.

dated February 16, 2016.² The respondent subsequently filed an appeal with Board, which we dismissed in a decision issued on March 21, 2017.

Given the facts and circumstances presented in this case, including a change in the law, we find an exceptional situation warranting sua sponte reopening. See 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).³ In the controlling jurisdiction, it appears that the respondent's 2001 burglary conviction in violation of section 459 of the California Penal Code no longer qualifies as an aggravated felony theft or burglary offense under section 101(a)(43)(G) of the Act. See *Rendon v. Holder*, 764 F.3d at 1084, 1088-90 (holding that a conviction under section 459 of the California Penal Code does not qualify as an attempted theft offense under sections 101(a)(43)(G) and (U) of the Act);⁴ *Descamps v. United States*, 570 U.S. at 277-78 (holding that a burglary conviction under section 459 of the California Penal Code does not qualify as a conviction for generic burglary).⁵

Consequently, we will reopen and remand the record to the Immigration Judge for further proceedings. On remand, the parties may submit additional evidence and arguments pertinent to the respondent's removability and, if necessary, any applications for relief from removal. Accordingly, the following order is entered.

ORDER: The proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision, and for the entry of a new decision.



FOR THE BOARD

² Although dated February 16, 2016, the Immigration Judge's decision was not served on the respondent until February 17, 2016.

³ Because we are sua sponte reopening the proceedings, we need not address whether the respondent's motion to reopen qualifies for equitable tolling.

⁴ Although not directly applicable to the case at bar, the United States Court of Appeals for the Ninth Circuit has also determined that a petty theft conviction in violation of section 484 of the California Penal Code does not categorically qualify as a generic theft offense under section 101(a)(43)(G) of the Act. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867, 871 (9th Cir. 2015).

⁵ As set forth in our prior decision, *Dimaya* does not affect the respondent's removability in this case because *Dimaya* addressed a separate ground of removability, i.e., an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act. See *Sessions v. Dimaya*, 138 S. Ct. at 1211-12. Consequently, our decision to reopen these proceedings does not rely on the decision in *Dimaya*.