UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

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IN THE MATTER OF
TADIC, MIROSLAV PETAR

FILE A 035-946-280

DATE: Dec 3, 2014

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

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FF

CC: DHS

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

File No.: A035-946-280 December 3, 2014

In the Matter of:)
)
TADIC, Miroslav Petar) **In Removal Proceedings**
)
Respondent)

Charges: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(M) of the Act, a law relating to an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in The Internal Revenue Code of 1986, Section 7201 (relating to tax evasion) in which revenue loss to the Government exceeds $10,000.

Section 237(a)(2)(A)(iii) of the INA, as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in section 101(a)(43) of the Act.

Application: Motion to Reopen Sua Sponte, Motion to Terminate.

ON BEHALF OF THE RESPONDENT
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ON BEHALF OF THE GOVERNMENT
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent, Miroslav Petar Tadic, is a sixty-year-old male, native of Yugoslavia and citizen of Serbia. Exhibit ("Ex.") 1. He entered the United States in 1976 as a lawful permanent resident ("LPR"). Id. On December 29, 2011, respondent pled guilty and was convicted in the Berrien County Circuit Court, in St. Joseph, Michigan, of the offense of False Pretenses with

Intent to Defraud, in the amount of $20,000 or more but less than $50,000, in violation of MICH. COMP. LAWS §750.218(5)(a) (2014). Id.; Ex. 2. He was subsequently served with a Notice to Appear ("NTA") by the Department of Homeland Security ("DHS" or "Government") on February 17, 2012, alleging removability under section 237(a)(2)(A)(iii) based on that conviction. Ex. 1 at 3. The Government initiated removal proceedings by filing respondent's NTA with the Detroit Immigration Court on March 5, 2012. Ex. 1.

Respondent appeared before the Court, with counsel, for a master calendar hearing on March 19, 2012. He admitted all factual allegations in the NTA and conceded both charges of removability at that hearing.[1] Respondent next appeared before the Court on March 29, 2012, where he was issued a final order of removal. Order of the IJ (March 29, 2012). Respondent waived his right to appeal at that time. Id. On June 27, 2012, respondent filed his first motion to reopen. Respondent's Motion to Reopen (June 27, 2012). In that motion, respondent claimed to have "first-tier appellate remedies" in the Michigan courts, and asked that the Court continue proceedings until those remedies were exhausted. Id. at 1-2. The Government opposed that motion, arguing that respondent's conviction was "final for immigration purposes," and that respondent was attempting to collaterally attack his criminal conviction because he had waived his right to direct appeal under Michigan law. DHS Answer to Motion to Reopen (July 13, 2012). The IJ agreed with the Government, denying respondent's motion in part because his "collateral attack on the conviction [did] not preclude the entry of the order of removal." Order of the IJ at 4 (July 17, 2012).

[1] This case was initially heard by Immigration Judge ("IJ") Elizabeth A. Hacker. IJ Hacker retired on January 2, 2013. IJ Robert D. Newberry assumed responsibility for the matter at that time, but retired on May 31, 2014. This Court assumed responsibility for the matter from that date. Pursuant to 8 C.F.R. § 1240.1(b), the IJ has reviewed and become familiar with the entire record.

Respondent proceeded with his appeal and on June 26, 2013, his plea was vacated by the Berrien County Circuit Court "due to [respondent] receiving ineffective assistance of counsel, in contravention of [his] Sixth Amendment rights, based on a violation of the standard articulated in Padilla v. Kentucky, and for the reasons otherwise stated on the record."[2] Respondent's Motion to Reopen Proceedings, Overturn Removal Order, and Terminate Removal Proceedings, Tab B (Aug. 16, 2013) [hereinafter "Second MTR"]. He filed a second motion to reopen with the Court based on that decision. Id. However, respondent was removed to Serbia on March 29, 2012. Order of the IJ (Aug. 29, 2013). The Government opposed this second motion to reopen on three grounds: (1) that it was number-barred, (2) that it was time-barred, and (3) that it was subject to the departure bar. DHS's Answer to Motion to Reopen at 1 (Aug. 27, 2013). The IJ agreed with the Government, and denied respondent's motion on those same grounds. Order of the IJ at 2 (Aug. 29, 2013).

On September 26, 2013, respondent filed an appeal of the IJ's denial of his second motion to reopen with the Board of Immigration Appeals ("BIA" or "Board"). In that appeal, respondent argued that "the IJ erred in finding that respondent's motion to reopen was barred by statute and regulation." Respondent's Appeal Brief at 6 (Nov. 13, 2013). Respondent claimed that he demonstrated an exceptional situation warranting relief pursuant to the sua sponte authority of the Board or the Court. Id. Respondent drew the Board's attention to Lisboa v. Holder, where, pursuant to its sua sponte authority, the Immigration Court reopened proceedings after the alien had departed from the United States because "the vacatur of Lisboa's convictions constituted exceptional circumstances." 436 Fed. App'x 545, 548 (6th Cir. 2011). The Government opposed respondent's appeal on the same three grounds it had opposed his second motion to reopen. DHS Motion for Affirmance Without Opinion (Nov. 29, 2013).

[2] The Court has never been presented with the record and is unfamiliar with "the reasons otherwise stated."

On November 6, 2014, the Board issued its decision, remanding the case to this Court for further proceedings. Decision of the BIA (Nov. 6, 2014). According to the Board, "the proffered evidence raises the question as to whether or not the respondent's conviction which served as the basis for his removal remains a conviction within the meaning of the immigration laws under current Sixth Circuit and Board Precedent." Id. The Board instructed the Court to conduct additional fact-finding to determine the effect of respondent's vacated conviction on the proceedings. Id. The Board further stated that "If the conviction underlying the order of removal has been vacated, the [Court] should consider exercising [its] sua sponte authority to reopen and terminate these proceedings." Id. The Court has conducted the necessary fact-finding as instructed, and will exercise it sua sponte authority to reopen and terminate these proceedings.

II. LEGAL STANDARDS

A. MOTION TO REOPEN

A party may file a motion to reopen removal proceedings "for the purpose of acting on an application for relief" so long as the motion is accompanied by the appropriate application for relief and all supporting documents. 8 C.F.R. §1003.23(b)(3). Only one motion to reopen may be filed, unless an exception applies. 8 C.F.R. §1003.23(b)(1). The motion to reopen must be filed within ninety (90) days of the date of entry of a final administrative order of removal, deportation, or exclusion. Id. However, even if a motion to reopen is otherwise barred, the IJ may upon her own motion at any time, or upon motion of either party, reopen any case in which she has made a decision, unless jurisdiction in the case is vested in the Board.[3] Id. Such sua sponte reopening is

[3] "[W]hen the Board remands a case to an immigration judge for further proceedings, it divests itself of jurisdiction in that case unless jurisdiction is expressly retained." Matter of Patel, 16 I&N Dec. 600, 601 (BIA 1978).

"reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1134 (BIA 1999); Matter of J-J-, 21 I&N Dec. 976, 984-85 (BIA 1997).

When filing an untimely sua sponte motion, the respondent has the burden of establishing that an exceptional situation exists. Matter of Beckford, 22 I&N Dec. 1216, 1219 (BIA 2000); G-D-, 22 I&N Dec. at 1134; J-J-, 21 I&N Dec. at 984-85. Moreover, the IJ has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief. 8 C.F.R. §1003.23(b)(3). While the regulations state that any motion to reopen filed by an alien who subsequently departs the United States, including one who does so involuntarily, shall be considered to have been withdrawn, the Sixth Circuit has held that this "departure bar" does not divest the immigration court of jurisdiction to consider such a motion. See Lisboa 436 Fed. App'x at 550 (extending the holding of Pruidze v. Holder, 632 F.3d 234 (6th Cir. 2011) (rejecting the Board's assertion that the departure bar divested it of jurisdiction to hear motions to reopen by removed aliens), to prohibit departure bar jurisdictional divestment claims in the immigration courts).

B. VACATED CONVICTION

A vacated or expunged conviction is not automatically invalidated for immigration purposes. "[W]hen a court vacates an alien's conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships . . . the conviction is not eliminated for immigration purposes." Pickering v. Gonzales, 465 F.3d 263, 266 (6th Cir. 2006) (citing Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003)). However, when a conviction is vacated "because of procedural or substantive infirmities" in the underlying proceedings, it is no longer valid for immigration purposes. Id. (citations omitted). A conviction vacated for ineffective assistance of counsel, a Sixth Amendment violation, is one vacated "because of . . . [a]

substantive infirmit[y]." Id.; see also Padilla v. Kentucky, 559 U.S. 356, 374-75 (2010) (failure to inform client of whether plea carries risk of deportation results in constitutionally deficient representation); Matter of Cuellar-Gomez, 25 I&N Dec. 850, 854-55 (BIA 2012) (unconstitutional conviction rendered in violation of Padilla remains effective for immigration purposes "unless and until it is vacated by a court of competent jurisdiction." (citation omitted)).

C. MOTION TO TERMINATE

The Court has jurisdiction over removal proceedings and the applications for relief filed therein. 8 C.F.R. §§1003.14(a), 1003.31(a); see also Matter of Avetisyan, 25 I&N Dec. 688, 691 (BIA 2012). In deciding individual cases, an IJ "must exercise his or her independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for disposition of such cases." Avetisyan, 25 I&N Dec. at 691. In removal proceedings, the Government may exercise its favorable discretion and agree to a termination. Such discretion is within the sole purview of the Government. See, e.g., Matter of Quintero, 18 I&N Dec. 348, 349-50 (BIA 1982). Accordingly, where the respondent has conceded removability and the Government opposes termination, it is typically inappropriate. See Avetisyan, 25 I&N Dec. at 694-95.

However, termination of proceedings is appropriate, despite the Government's objection, where "there is no current basis to find respondent removable as charged." Matter of Rodriguez-Ruiz, 22 I&N Dec. 1378, 1380 (BIA 2011); see also Avetisyan, 25 I&N Dec. at 695, n.6 ("Termination of proceedings typically occurs when the Immigration Judge or the Board determines on the merits that the respondent is not removable as charged in the notice to appear."). The Government bears the burden of proving an admitted alien's removability by clear and convincing evidence. INA §240(c)(3)(A). Once the Government "has established its

prima facie case, the burden of going forward to produce evidence of non-deportability then shifts to the [alien]." Pickering, 465 F.3d at 269 (citation omitted). This burden is satisfied by the production of "evidence that the conviction for which the [G]overnment wishes to deport [the alien] has been vacated by a court of competent jurisdiction." Id. If the alien produces such evidence, the alien is removable only if the Government can show, by clear and convincing evidence, that the "conviction was vacated solely for immigration purposes." Id. (citations omitted).

III. DISCUSSION AND ANALYSIS

The Court finds that respondent presents an exceptional situation warranting use of its sua sponte authority, and his motion to reopen will be granted. Further, the Court finds that his underlying conviction is no longer valid for immigration purposes. Consequently, respondent's motion to terminate will also be granted.

A. MOTION TO REOPEN

Respondent presents a truly exceptional situation. Respondent's first and timely motion to reopen was denied because the Court viewed the basis of respondent's request as a collateral attack on the conviction and such did not impact the finality of the conviction. After his conviction was vacated, he again sought to reopen these proceedings so that he might be reunited with his family. Again his request was denied, not only as time and number barred, but also as subject to the departure bar. Order of the IJ (Aug. 29, 2013). Although the Court was correct in stating that his motion was time and number barred, reliance on the departure bar was inappropriate. See Lisboa 436 Fed. App'x at 55 (prohibiting departure bar jurisdictional divestment claims in the immigration courts).

Respondent has been separated from his family for over two-years, diligently pursuing relief so that he might return from Serbia. Respondent attempted to prevent such a situation from ever arising by filing his first motion to reopen. Though that motion failed, he again came before this Court seeking relief after his conviction was vacated. Again his motion was denied, in part because he had already filed such a motion, and also because he had already been removed.[4] After further reviewing the record, it is clear that respondent's conviction is no longer valid for immigration purposes.[5] The Court rely on the passage of time, or respondent's current location, to prevent it from adjudicating his motion. In light of respondent's exceptional situation, the Court will use its sua sponte authority to reopen these removal proceedings as vacation of the conviction no longer renders respondent removal and thus constitutes an exceptional situation. Matter of G-D-, supra.

B. VACATED CONVICTION

Respondent's conviction is no longer valid for immigration purposes. On June 26, 2013, the Berrien County Circuit Court vacated respondent's conviction "due to [respondent] receiving ineffective assistance of counsel, in contravention of [his] Sixth Amendment rights, based on a violation of the standard articulated in Padilla . . . ." Respondent's Second MTR, Tab B at 7 (citation omitted).[6] A Sixth Amendment violation constitutes a substantive infirmity in the underlying proceeding. See Padilla, 559 U.S. at 374-75; Cuellar-Gomez, 25 I&N Dec. at 854-55. Respondent's conviction cannot therefore be said to have been overturned "for reasons

[4] Respondent's motion was also denied as time-barred.
[5] See infra, Part III.B.
[6] Respondent has failed to include the record of his conviction vacatur with his motion, and the Court is thus unable to review the "reasons otherwise stated on the record." Id. at 7-8. Any such reasons are immaterial to this decision, as respondent need only show that his conviction was overturned at least in part for a substantive infirmity. See Pickering, 465 F.3d at 270 ("A vacated conviction remains valid for immigration purposes only if it was vacated solely for rehabilitative reasons." (emphasis in original)).

solely related to rehabilitation or to avoid adverse immigration hardships." Pickering, 465 F.3d at 266 (citation omitted). It is thus invalid for immigration purposes. See id.

C. MOTION TO TERMINATE

Respondent's motion to terminate will be granted. Though termination absent the Government's consent is generally disfavored after the respondent has conceded removability, see Avetisyan, 25 I&N Dec. at 694-95, the Court must at all times exercise independent judgment and discretion. Id. at 691. In this case, respondent has produced evidence "that the conviction for which the [G]overnment wishes to deport him has been vacated by a court of competent jurisdiction." Pickering, 465 F.3d at 269; Respondent's Second MTR, Tab B. It is therefore the Government's burden to show, by clear and convincing evidence, that the "conviction was vacated solely for immigration purposes." Id. (citations omitted). The Government did not even attempt to meet that burden.

Rather than address the substance of respondent's motion, the Government has exclusively argued that the Court should not consider it. See DHS Answer to Motion to Reopen; see also DHS Motion for Affirmance Without Opinion. For the reasons stated above, the Court is considering respondent's motion. In light of the evidence submitted by respondent, and in the absence of any substantive response, the Government has failed to meet its burden. Respondent's conviction is no longer valid for immigration purposes. See supra Part III.B. Accordingly, there is "no current basis to find respondent removable as charged." Rodriguez-Ruiz, 22 I&N Dec. at 1380; see also Avetisyan, 25 I&N Dec. at 695, n.6. Respondent's removal proceedings are hence terminated.

IV. ORDERS

IT IS HEREBY ORDERED that respondent's motion to reopen be **GRANTED**.

IT IS FURTHER ORDERED that respondent's motion to terminate be **GRANTED**.

Hon. Marsha K. Nettles
U.S. Immigration Judge

December 3, 2015
Date

APPEAL DUE DATE: January 02, 2015