NO. 16 -_____

In the Supreme Court of the United States

KAP SUN BUTKA,

Petitioner,

–v–

LORETTA LYNCH,
United States Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Given that the United States Courts of Appeals for the Second, Third, Seventh, Ninth and Tenth Circuits have conclusively and affirmatively held that those Courts have jurisdiction to review denials by the Board of Immigration Appeals of requests for *sua sponte* reopening made pursuant to 8 C.F.R. § 1003.2(a), to the extent that an appeal relates to alleged legal error central to the Board's denial of the *sua sponte* request, the question presented is:

Whether the Eleventh Circuit Court of Appeals erred in this case by holding that it had no jurisdiction to review the denial of a motion to reopen, where the review sought was limited to assessing the legal framework upon which the *sua sponte* request was made.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY AND REGULATORY PROVISIONS 2

STATEMENT OF THE CASE AND RELEVANT FACTS 4

REASONS FOR GRANTING THE PETITION 8

I. THE BAR TO JUDICIAL REVIEW OF DISCRETIONARY DECISIONS APPLIES ONLY TO AUTHORITY GIVEN BY STATUTE, NOT AUTHORITY CREATED BY THE AGENCY AND ASSIGNED TO ITSELF 9

II. THE DECISION OF THE ELEVENTH CIRCUIT VIOLATES CONGRESS' INTENTION TO PROVIDE JUDICIAL REVIEW TO LEGAL AND CONSTITUTIONAL QUESTIONS CONTAINED WITHIN DISCRETIONARY DECISIONS 10

III. THE ELEVENTH CIRCUIT HAS CREATED A SPLIT IN THE COURTS OF APPEAL, WHICH UNDERMINES THE UNIFORM APPLICATION OF FEDERAL IMMIGRATION POLICY 11

TABLE OF CONTENTS – Continued

Page

IV. THE ELEVENTH CIRCUIT IMPROPERLY PERMITS THE EXECUTIVE BRANCH, TO CREATE AN EXTRA-STATUTORY MECHANISM THAT IT DEFINES AND IMPLEMENTS, AND THEN SHIELDS THE RESULTING PROCESS FROM JUDICIAL REVIEW 15

CONCLUSION 17

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

Order of the Eleventh Circuit Dismissing Petition for Review (July 5, 2016) 1a

Decision of the Board of Immigration Appeals (April 3, 2015) 19a

Per Curiam Opinion of the Eleventh Circuit (May 26, 2011) 21a

Decision of the Board of Immigration Appeals (August 10, 2010) 28a

Decision of the Immigration Judge (April 16, 2009) 33a

Additional Charges of Inadmissibility/ Deportability (December 9, 2008) 36a

Order of the Eleventh Circuit Denying Petition for Rehearing (September 15, 2016)..... 38a

Substitute Order of the Eleventh Circuit Denying Petition for Rehearing (September 20, 2016)..... 39a

TABLE OF AUTHORITIES

Page

CASES

Al-Fatlawi v. Holder,
604 Fed. Appx. 700 (10th Cir. 2015) 14

Ali v. Gonzales,
448 F.3d 515 (2d Cir. 2006) 12

Anaya-Aguilar v. Holder,
697 F.3d 1189 (7th Cir. 2012) 13

Belay-Gebru v. INS,
327 F.3d 998 (10th Cir. 2003) 12

Bonilla v. Lynch,
828 F.3d 1052, 840 F.3d 575
(9th Cir. 2016) 13

Butka v. United States AG,
827 F.3d 1278 (11th Cir. 2016) 12, 15

Calle-Vujiles v. Ashcroft,
320 F.3d 472 (3d Cir. 2003) 12

Cevilla v. Gonzales,
446 F.3d 658 (7th Cir. 2006) 13

Descamps v. United States,
133 S.Ct. 2276 (2013) 5

Doh v. Gonzales,
193 F.App'x 245 (4th Cir. 2006) 12

Ekimian v. INS,
303 F.3d 1153 (9th Cir. 2002) 12

Enriquez-Alvarado v. Ashcroft,
371 F.3d 246 (5th Cir. 2004) 12

TABLE OF AUTHORITIES—Continued

Page

Harchenko v. INS,
379 F.3d 405 (6th Cir. 2004) 12

Kucana v. Holder,
558 U.S. 233 (2010) .....passim

Lenis v. United States A.G.,
525 F.3d 1291 (11th Cir. 2008) 12, 14, 15

Luis v. INS,
196 F.3d 36 (1st Cir. 1999)..... 12

Mahmood v. Holder,
570 F.3d 466 (2d Cir. 2009)..... 12

Mata v. Lynch,
135 S.Ct. 2150 (2015) .....passim

Matter of Castro-Rodriguez,
25 I&N Dec. 698 (BIA 2012) 7

Mendiola v. Holder,
576 Fed.Appx 828 (10th Cir. 2014)..... 14

Moncrieffe v. Holder,
133 S.Ct. 1678 (2013) 5, 6

Nken v. Holder,
556 U.S. 418 (2009) 10

Pilch v. Ashcroft,
353 F.3d 585 (7th Cir. 2003) 12

Pllumi v. Att'y Gen. of the U.S.,
642 F.3d 155 (3d Cir. 2011)..... 13

Salgado-Toribio v. Holder,
713 F.3d 1267 (10th Cir. 2013)..... 14

TABLE OF AUTHORITIES—Continued

Page

Tamenut v. Mukasey,
521 F.3d 1000 (8th Cir. 2008) 12

Vahora v. Holder,
626 F.3d 907 (7th Cir. 2010) 13

STATUTES

8 U.S.C. § 1182(a)(2)(A)(i)(II) 5

8 U.S.C. § 1182(h) 2, 5, 7

8 U.S.C. § 1229a(c)(7) 2, 5, 8

8 U.S.C. § 1252(a)(2)(B) 3, 9

8 U.S.C. § 1252(a)(2)(D) 3, 10, 11, 15

21 U.S.C. § 802 ..... 5, 6, 7

28 U.S.C. § 1254(1) 2

REGULATIONS

8 C.F.R. § 1003.2(a) ..... passim

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The published decision of the Eleventh Circuit Court of Appeals dismissing the petition for review for lack of jurisdiction is reported at *Butka v. United States AG*, 827 F.3d 1278 (11th Cir. July 5, 2016) (App.1a).

The decision of the Board of Immigration Appeals (BIA), denying Petitioner's motion to reopen, Kap Sun Butka, A079-061-829 (BIA April 3, 2015), is unreported (App.19a).

The unpublished decision of the Eleventh Circuit Court of Appeals dismissing the petition for review is reported at *Kap Sun Butka v. United States AG*, 427 F. App'x 819 (11th Cir. May 26, 2011) (App.21a).

The decision of the Board of Immigration Appeals (BIA), denying Petitioner's appeal, Kap Sun Butka, A079-061-829 (BIA August 10, 2010), is unreported (App.28a).

The decision of the Immigration Judge, Kap Sun Butka, A079-061-829 (Immigration Judge, April 16, 2009) finding Petitioner ineligible for a waiver of

inadmissibility under 8 U.S.C. § 1182(h) is unreported (App.33a).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit dismissed Petitioner's petition for review on July 5, 2016, and denied her petition for rehearing on September 20, 2016 (App. 39a). Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

RELEVANT STATUTORY AND REGULATORY PROVISIONS

- 8 U.S.C. § 1229a(c)(7)(A)

  An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

- 8 U.S.C. § 1229a(c)(7)(C)(i)

  Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

- 8 U.S.C. § 1252(a)(2)(B)

  Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

  [. . .]

  (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

- 8 U.S.C. § 1252(a)(2)(D)

  Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

- 8 C.F.R. § 1003.2(a)

  General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by

> the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves the Eleventh Circuit's aberrant holding, prohibiting review of a denied *sua sponte* motion to reopen removal proceedings brought pursuant to 8 C.F.R. § 1003.2(a). This holding diverges from the approach of the Second, Third, Seventh, Ninth and Tenth Circuits. The specific issue is whether a court of appeals may assert jurisdiction to review questions of law ("the legal framework") that are embedded in a request for *sua sponte* reopening. The Eleventh Circuit stands alone in saying no.

In 1977, Petitioner was convicted, while working in her native South Korea as a "comfort woman catering to U.S. military servicemen," regarding a 1976 and a 1977 violation of Korean laws relating to cannabis. She then married U.S. Army Staff Sergeant Walter Butka in 1979 and was given a nonimmigrant waiver to permit her to accompany him to the United States. She gave birth to two children during their eleven-year marriage. Now a grandmother of two U.S. citizens,

Petitioner remarried in 2012, to I.V. Harmon, Jr., also a veteran of the U.S. Army.

Petitioner has been ordered deported. Despite being present in the United States since 1981, she has not been able to acquire lawful permanent resident status, although her family members have applied for this benefit on her behalf. Her immigration problems stem from her two-count Korean conviction, which the Board of Immigration Appeals ("BIA") found to trigger legal inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II), as crimes relating to "controlled substances" as defined in 21 U.S.C. § 802. If she had only a single cannabis offense, she could request a waiver of inadmissibility pursuant to 8 U.S.C. § 1182(h) and acquire lawful permanent resident status.

Petitioner's applications for lawful permanent resident status resulted in the Department of Homeland Security initiating removal proceedings against her. In 2009, an immigration judge found that she was ineligible for the 8 U.S.C. § 1182(h) waiver of criminal inadmissibility and ordered her removed from the United States. The BIA affirmed this order in 2010 and the Eleventh Circuit dismissed her Petition for Review in 2011. She did not seek reopening of her case during the 90-day statutory period provided by 8 U.S.C. §§ 1229a(c)(7)(A) and 1229a(c)(7)(C)(i).

In 2013, the Supreme Court made decisions in *Descamps v. United States*, 133 S.Ct. 2276 (2013), and *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), that gave cause to reassess Petitioner's case. *Moncrieffe* was particularly impactful because the Court held

that when applying the "categorical approach" in the immigration context to determine the immigration consequence of a crime, the immigrant benefits from the presumption that their conviction rests on the least of the acts criminalized. Previously, without this presumption, Petitioner was unable to meet her burden of proof to demonstrate eligibility for a waiver of inadmissibility, even if her convictions were ambiguous regarding their immigration consequences.

In 2015, Petitioner sought reopening before the BIA, but because her motion was untimely, she relied on the BIA's *sua sponte* authority that permitted reopening at any time. The BIA found her case "sympathetic," but found she remained ineligible for any immigration relief, on account of her conviction. The BIA provided no analysis to support this legal finding.

Petitioner had argued to the BIA that her 1976 possession charge related to a former Korean legal scheme[1] in which cannabis was defined more broadly than it is under 21 U.S.C. § 802. She provided a copy of the Korean law to support this assertion. Accordingly, she could benefit under *Moncrieffe* in that her conviction should be presumed to relate to a substance (parts of the cannabis plant) barred under Korean law, but not under U.S. law. Thus, the 1976 charge could not trigger inadmissibility.

Korea revised its statute to mirror the U.S. law prior to Petitioner's 1977 offense, which related to

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[1] South Korea's Habitual Drug Control Act was effective through December 31, 1976. Its Cannabis Control Act took effect January 1, 1977.

distributing 5 grams of cannabis. As a result of the revision, this charge did necessarily relate to a "controlled substance (as defined in section 802 of Title 21)" and triggers inadmissibility as an immigrant. However, the offense could be overcome pursuant to the BIA's intervening 2012 holding in *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012), that if a distribution offense relates to social sharing, it is akin to personal use. Consequently, the offense could be waived under 8 U.S.C. § 1182(h) and Petitioner could finally receive lawful permanent resident status.

The BIA provided no explanation why it rejected these arguments. The Eleventh Circuit subsequently found it lacked jurisdiction to review the BIA decision, because it was made pursuant to the BIA's *sua sponte* authority, which the Eleventh Circuit found unreviewable.

Petitioner has no quarrel with the non-reviewability of the discretionary aspects of the BIA's authority. However, the Eleventh Circuit bars review of the legal aspects of the BIA's decision, *i.e.* "if the party moving has made out a *prima facie* case for relief." *See* 8 C.F.R. § 1003.2(a). It is with this latter contention that Petition disagrees, as do all of the other Federal Circuit Courts of Appeals that have considered the issue.

REASONS FOR GRANTING THE PETITION

On numerous occasions, the Court has addressed immigration motions practice, but resolved the prior cases without reaching the issue that is unavoidable here. The Court has specifically "not opined on the issue of whether the Circuit can review the Board's exercise its self-appointed discretionary *sua sponte* authority." *See Mata v. Lynch*, 135 S.Ct. 2150, at 2155 (2015), quoting *Kucana v. Holder*, 558 U.S. 233 (2010). Thus, this Petition represents the third time this decade that the Court is called upon to review motions practice in immigration proceedings.

The *sua sponte* authority for the BIA to reopen removal proceedings is not provided by Congress. *See* 8 U.S.C. § 1229a(c)(7) (establishing rules for statutory motions to reopen, including time and number restrictions, but not *sua sponte* motions). Instead, the *sua sponte* authority is a power created solely through agency regulation and assigned to the Board of Immigration Appeals. *See Kucana*; 8 C.F.R. § 1003.2(a).

This agency regulation twice uses the term "discretion," establishing both that "the decision to grant or deny a motion to reopen [. . .] is within the discretion of the Board" and that "the Board has discretion to deny a motion to reopen even if the party has made out a prima facie case for relief." 8 C.F.R. § 1003.2(a). Unlike every other Circuit to consider the issue, the Eleventh Circuit would treat the entire *sua sponte* request as a discretionary request, even though the regulation also refers to an objectively demonstrable "*prima facie* case" component. The

Eleventh Circuit stands alone in barring review of this objective standard, despite the Court's admonishment in *Mata* to avoid characterizing legal questions as unreviewable discretionary *sua sponte* matters.

I. THE BAR TO JUDICIAL REVIEW OF DISCRETIONARY DECISIONS APPLIES ONLY TO AUTHORITY GIVEN BY STATUTE, NOT AUTHORITY CREATED BY THE AGENCY AND ASSIGNED TO ITSELF

Congress has imposed a general limitation of judicial review of discretionary agency decisions. *See* 8 U.S.C. § 1252(a)(2)(B). However, the plain reading of the limitation applies only to *statutorily* assigned discretionary schemes. *See id.* (the jurisdictional bar relates to power "specified under this subchapter to be in the discretion of the Attorney General."). As the Circuits other than the Eleventh have noted, the bar does not apply to a regulatory scheme, such as the extra-statutory agency-devised *sua sponte* authority at issue here, 8 C.F.R. § 1003.2(a), which was created by the Attorney General and assigned to herself via regulation. *See Kucana*, at 248 ("If congress wanted the jurisdictional bar to encompass decisions specified by regulation along with those made discretionary by statute, moreover, Congress could easily have said so.").

While Congress may promulgate limits on judicial review, it did not delegate to the Executive the authority to do so here. Action on motions to reopen, made discretionary by the Attorney General only, therefore remain subject to judicial review. *Id* at 252-53. Otherwise, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a

regulation declaring those decisions "discretionary." *See id.*

Further, as the Court has observed, Congress has explicitly limited review of regulatory-based discretionary acts in other contexts, so in the absence of any limiting language it must have intended review here. *See id.* at 249 (discussing instances of prohibiting review of regulatory schema and citing *Nken v. Holder*, 556 U.S. 418, 430 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion")). Congress ensured that it, and only it, would limit the federal courts' jurisdiction. Congress declined to do so here, thus the legal aspects of the *sua sponte* denial remain subject to the jurisdiction of the Courts of Appeals. The Eleventh Circuit's error would seem apparent.

II. THE DECISION OF THE ELEVENTH CIRCUIT VIOLATES CONGRESS' INTENTION TO PROVIDE JUDICIAL REVIEW TO LEGAL AND CONSTITUTIONAL QUESTIONS CONTAINED WITHIN DISCRETIONARY DECISIONS

It is telling that, even when generally restricting judicial review in aspects of immigration cases, Congress explicitly carved out an exception in order to provide review to legal and constitutional questions, notwithstanding the bar to review of "discretionary" decisions. This exception, enumerated at 8 U.S.C. § 1252(a)(2)(D), establishes:

> Nothing in subparagraph (B) [barring review of discretionary decisions] [. . .] which limits

> or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review.

As noted in *Mata*, at 2156, a court always has jurisdiction to determine its jurisdiction. In cases where the Petitioner establishes a legal question, the courts must review that question. Even assuming that a court found that it could not review certain aspects of an appeal:

> judicial review ends after the court has evaluated the Board's ruling on the alien's motion. That courts lack jurisdiction over one matter (the *sua sponte* decision) does not affect their jurisdiction over another (the decision on the alien's request).

Mata at 2155. In other words, the courts retain jurisdiction over all aspects of the appeal of a motion's denial, save for a discretionary determination.

III. THE ELEVENTH CIRCUIT HAS CREATED A SPLIT IN THE COURTS OF APPEAL, WHICH UNDERMINES THE UNIFORM APPLICATION OF FEDERAL IMMIGRATION POLICY

The Eleventh Circuit bars judicial review by ignoring both 1) the plain language 8 U.S.C. § 1252(a)(2)(D) and 2) the Court's decision in *Kucana* holding that motions to reopen, made discretionary by the Attorney General through regulation only, remain subject to judicial review.

The regulation at issue here has two components, the identification of legal basis for reopening (*i.e.* "the

prima facie case") and the discretionary decision. The "*prima facie* case" necessarily relates to a legal question, which the courts are well-positioned to assess. The discretionary decision is an act of grace by the BIA.

Petitioner does not challenge whether the courts have jurisdiction to review discretionary aspects of BIA decisions. The BIA did not make an explicit discretionary decision in her case. At any rate, the Circuits are unified in rejecting judicial review of the discretionary aspects of the *sua sponte* motion to reopen. *See e.g.*, *Butka v. United States AG*, 827 F.3d 1278, 1285 n.6 (11th Cir. 2016).[2] It is of significance that each of the cases cited by the Eleventh Circuit, to bar review, pre-date *Kucana* and are dependent upon the Courts' categorization of the *sua sponte* authority as "discretionary."

The Eleventh Circuit ignored the reasoning of the five Circuits—the Second, Third, Seventh, Ninth and Tenth Circuits—that have now had occasion to read 8 C.F.R. § 1003.2(a) through the lens of *Kucana* and *Mata.* Each has distinguished its precedent that formerly precluded review of *sua sponte* requests and

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[2] The Eleventh Circuit cites to *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F.App'x 245, 246 (4th Cir. 2006) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Lenis v. United States A.G.*, 525 F.3d 1291 (11th Cir. 2008).

have held that there is judicial review over the legal and constitutional issues contained in *sua sponte* claims. *See Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) (although the Court lacked jurisdiction to review the Agency's discretionary decision to deny *sua sponte* reopening, it asserted jurisdiction to review for legal error "where the Agency may have declined to exercise its *sua sponte* authority because it misperceived the legal background and thought, incorrectly, that a reopening would necessarily fail" and subsequently "remand to the Agency for reconsideration in view of the correct law."); *Pllumi v. Att'y Gen. of the U.S.*, 642 F.3d 155, 160 (3d Cir. 2011) ("If the reasoning given for a decision not to reopen *sua sponte* reflects an error of law, we have the power and responsibility to point out the problem, even though ultimately it is up to the BIA to decide whether it will exercise its discretion to reopen. . . . In such cases we can remand to the BIA."); *Vahora v. Holder*, 626 F.3d 907, 915 (7th Cir. 2010) (". . . the [Supreme] Court specifically rejected the view that those decisions committed to agency discretion by regulation, rather than by statute, fall within the ambit of the jurisdictional bar."); *Cevilla v. Gonzales*, 446 F.3d 658, 660 (7th Cir. 2006) ("[N]othing . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."); *Anaya-Aguilar v. Holder*, 697 F.3d 1189, 1190 (7th Cir. 2012) (rehearing granted) (" . . . we do not mean to foreclose review of the Board's denial of a motion to reopen *sua sponte* in cases where a petitioner has a plausible constitutional or legal

claim that the Board misapplied a legal or constitutional standard."); *Bonilla v. Lynch*, 828 F.3d 1052, 1063, 840 F.3d 575 (9th Cir. 2016) (citing *Kucana* to explain that "[n]either the immigration statute nor any regulation expressly precludes judicial review of motions to reopen, whether *sua sponte* or otherwise[,]" so "absent any such proscription, there is a 'presumption favoring interpretations of statutes [to] allow judicial review of administrative action[,]'" review that is "particularly important where legal and constitutional questions are at issue."); *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1271 (10th Cir. 2013) (". . . we do have jurisdiction to review 'constitutional claims or questions of law' raised in a petition for review."); *Mendiola v. Holder*, 576 Fed.Appx 828, 837 (10th Cir. 2014) (unpublished) (". . . even in matters involving the Board's exercise of its discretionary authority to deny a motion to reopen sua sponte, we retain jurisdiction to review whether the Board applied the proper constitutional and legal framework in making its decision."); *Al-Fatlawi v. Holder*, 604 Fed. Appx. 700 (10th Cir. 2015) (unpublished) (distinguishing reviewability of constitutional claims and questions of law from non-reviewability of exercise of discretionary decision based on that change of law); *Mendiola v. Holder*, 2016 U.S. App. LEXIS 13079, at *4 (10th Cir. July 15, 2016) (unpublished) ("We lacked jurisdiction to review the Board's discretionary decision to deny *sua sponte* reopening but could review whether it applied the correct law in making its decision.").

The Eleventh Circuit clings to its pre-*Kucana* precedent, *Lenis*, which bars review of a *sua sponte* denial, labelling the entire decision discretionary. Curiously, in *Lenis*, the Circuit had "note[d], in passing,

that an appellate court may have jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power." *See Lenis*, at 1294 n.7 (11th Cir. 2008) (emphasis added); *Butka*, at 1284. In *Butka*, this dicta of *Lenis* became the law of the Circuit. *See Butka*, at 1286. However, the Eleventh Circuit points to no statutory basis for considering constitutional claims, but ignoring all other legal claims like those presented by Petitioner. *See e.g.*, 8 U.S.C. § 1252(a)(2)(D) (preserving judicial review of legal and constitutional claims even in discretionary contexts where review would be otherwise precluded). This novel reading has been accepted by no other Circuit and has disrupted national uniformity on the issue.

IV. THE ELEVENTH CIRCUIT IMPROPERLY PERMITS THE EXECUTIVE BRANCH, TO CREATE AN EXTRA-STATUTORY MECHANISM THAT IT DEFINES AND IMPLEMENTS, AND THEN SHIELDS THE RESULTING PROCESS FROM JUDICIAL REVIEW

Under the Eleventh Circuit's scheme, the regulatory, extra-statutory *sua sponte* motion is subject to less judicial review than a statutory motion to reopen. This is counter to *Kucana*. It is also counter to the only five circuits to have addressed the issues, which "creates the kind of split of authority" the Court typically resolves. *Mata*, at 2156.

Any lingering doubt about the proper interpretation should be dispelled by a familiar presumption favoring judicial review of administrative action. When a statute is "reasonably susceptible to divergent interpretation, [the Court] adopt[s] the reading that accords with traditional understandings and basic

principles: that executive determinations generally are subject to judicial review." *Kucana*, at 251.

Here, the Eleventh Circuit does the opposite, empowering the Executive branch to make its own procedural mechanism and insulate its decisions thereunder from judicial review by labeling them as non-reviewable discretionary agency actions. The BIA is thus inoculated from review, even in cases of legal error dispositive of the outcomes in those decisions. Not surprisingly, no other Circuit follows this model. This deferential approach has created a 5-1 split in the Circuits and should be reviewed and reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 16, 2016

APPENDIX TABLE OF CONTENTS

Order of the Eleventh Circuit Dismissing Petition for Review (July 5, 2016) 1a

Decision of the Board of Immigration Appeals (April 3, 2015) 19a

Per Curiam Opinion of the Eleventh Circuit (May 26, 2011) 21a

Decision of the Board of Immigration Appeals (August 10, 2010) 28a

Decision of the Immigration Judge (April 16, 2009) 33a

Additional Charges of Inadmissibility/ Deportability (December 9, 2008) 36a

Order of the Eleventh Circuit Denying Petition for Rehearing (September 15, 2016)..... 38a

Substitute Order of the Eleventh Circuit Denying Petition for Rehearing (September 20, 2016)..... 39a

ORDER OF THE ELEVENTH CIRCUIT DISMISSING PETITION FOR REVIEW (JULY 5, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KAP SUN BUTKA,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

No. 15-11954
Agency No. A079-061-829

Petition for Review of a Decision of the
Board of Immigration Appeals

Before: HULL and BLACK, Circuit Judges, and MORENO,* District Judge.

HULL, Circuit Judge:

Kap Sun Butka petitions for review of the Board of Immigration Appeals' ("BIA") order denying her motion to *sua sponte* reopen her removal proceedings. The government filed a motion to dismiss Butka's

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* Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida, sitting by designation.

petition for lack of jurisdiction and we previously ordered the government's motion to be carried with the case. We now grant the government's motion and dismiss Butka's petition for lack of jurisdiction.

I. 2009 REMOVAL ORDER

On September 6, 2007, the Department of Homeland Security ("DHS") issued Butka, a native and citizen of South Korea, a notice to appear ("NTA"). The NTA included the following factual allegations: (1) that Butka had overstayed her six-month non-immigrant visitor's visa, which was issued in 1981; and (2) that Butka had a 1977 conviction from the Seoul Criminal District Court in Seoul, South Korea, for possession of 105 grams of marijuana, in violation of the Management Law for the Hemp and the Management Law of the Habitual Narcotic Drug. The NTA charged that Butka was removable under Immigration and Nationality Act ("INA") § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien convicted of a controlled substance offense. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (providing that an alien is subject to removal from the United States if she has been convicted of violating any law or regulation of "a foreign country relating to a controlled substance (as defined in [21 U.S.C. § 802]")).

Butka responded, in January 2008, with a counseled written pleading admitting the allegations in the NTA and conceding removability. In the same pleading, she requested relief from removal in the form of adjustment of status, pursuant to INA § 245(a), 8 U.S.C. § 1255(a). Later, as part of the exhibit list she filed in November 2008, Butka also submitted a

copy of her application for a waiver of inadmissibility, under INA § 212(h), 8 U.S.C. § 1182(h), which she filed on an unspecified date. She asked for "waiver of [her] conviction[] and any other grounds of inadmissibility."

At her master calendar hearing in December 2008, however, DHS served Butka with a Form I-261, "Additional Charge[] of Inadmissibility /Deportability." The form stated that, "in lieu of [the charge] set forth in the original Notice to Appear," DHS was alleging that Butka overstayed her visa without authorization, rendering her removable under INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). *See* INA § 237 (a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (providing that any alien present in the United States in violation of the INA, or whose nonimmigrant visa was revoked, is deportable).

Butka requested more time to answer the new charge, and the immigration judge ("IJ") set a deadline for her to provide a written response and identify and brief her eligibility for any forms of relief. When Butka's counsel missed the deadline to respond, the government filed a motion for a removal order, claiming that Butka had abandoned her requests for relief and that, in any event, she was ineligible for any form of relief other than voluntary departure.

On April 16, 2009, the IJ issued an order based on the existing record and Butka's prior requests for a waiver of inadmissibility and adjustment of status. The IJ found Butka removable by clear and convincing evidence. The IJ also concluded that Butka was ineligible for adjustment of status due to her drug conviction, and that the conviction could not be waived under INA § 212(h), 8 U.S.C. § 1182(h), because it in-

volved more than simple possession of 30 grams of marijuana. *See* INA § 212(h), 8 U.S.C. § 1182(h) (providing that the Attorney General may waive an alien's ineligibility for adjustment of status when the alien's ineligibility was based on a drug conviction, and that conviction "relate[d] to a single offense of simple possession of 30 grams or less of marijuana"). The IJ ordered Butka removed to South Korea, and further noted that Butka was ineligible for voluntary departure because she had failed to file the required travel documents.

II. 2010 BIA DECISION

Butka appealed to the BIA, arguing that the IJ erred by (1) denying a waiver of inadmissibility, (2) denying adjustment of status, and (3) ordering her removed without holding a hearing or giving her an opportunity to seek voluntary departure as an alternative form of relief. Notably, Butka did not deny that she had a drug conviction or argue that her conviction involved 30 grams or less of marijuana. The government responded with a motion for summary affirmance.

On August 10, 2010, the BIA affirmed Butka's removal order for the same reasons described in the IJ's order and dismissed her appeal. The BIA explained that Butka was ineligible for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h), because she had not shown by a preponderance of the evidence that her controlled substance offense constituted a single offense of simple possession of 30 grams or less of marijuana. And without the waiver, she was ineligible for adjustment of status. The BIA also concluded that there was no due process violation in the IJ ordering

Butka removed without holding a hearing and that Butka was not unconstitutionally deprived of an opportunity to file for voluntary departure.

III. 2011 DENIAL OF PETITION FOR REVIEW

Butka filed a petition for review in this Court. In May 2011, this Court concluded that it had jurisdiction to review only Butka's constitutional arguments and issues of law. *Butka v. U.S. Att'y Gen.*, 427 F. App'x 819, 822 (11th Cir. 2011) (unpublished). It denied Butka's petition for review, holding that "the IJ did not violate Butka's right to due process by issuing a removal order without holding a merits hearing," as the "documentary evidence clearly established" that Butka was not eligible for a waiver or adjustment of status because her drug conviction "involved more than 30 grams of marijuana." *Id.* at 823. This Court stated that Butka "admitted" that she had a prior conviction for possession of 105 grams of marijuana, so holding a hearing would not have changed the outcome of her case. *Id.* Additionally, this Court held that Butka had "a sufficient opportunity to apply for voluntary departure," and that Butka had not made out an equitable estoppel claim based on the government's initial decision to admit her with a drug conviction. *Id.* at 822-23.

IV. 2015 MOTION TO REOPEN

The record is silent from May 26, 2011, when this Court denied Butka's petition for review, until March 2, 2015, when Butka filed the instant motion to reopen her removal proceedings. Butka's 2015 motion sought reopening pursuant to the BIA's *sua sponte* authority under 8 C.F.R. § 1003.2(a). She asked the

BIA to reopen her removal proceedings and remand her case to the IJ so that she could reapply for adjustment of status based on a pending Form I-130 filed by her daughter.[1] Butka argued that her case presented the exceptional circumstances necessary for *sua sponte* reopening. She did not request statutory reopening or equitable tolling.

To support her claim that she was eligible for adjustment of status and had an exceptional case, Butka argued that the original NTA erroneously charged that she had a 1977 conviction for possession of 105 grams of marijuana. While Butka had previously admitted to that specific allegation in the NTA, Butka's motion to reopen now claimed that she had two "concurrent" South Korean convictions—(a) one for a December 1976 possession of 100 grams of marijuana, in violation of the Habitual Drug Control Act, and (b) one for a January 1977 distribution of 5 grams of marijuana, in violation of the Cannabis Control Act.[2] Butka attached a translated copy of her criminal judgment to support her claim. There is only one criminal judgment, dated March 17, 1977, with one case number, "77 Go Hap 70." Butka argues, however, that a review of that judgment shows she was charged with a December 1976 possession of 100 grams and a January 1977 distribution of 5 grams and, therefore, she has two "concurrent crimes" in that one case.

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[1] A Form I-130 allows a citizen or lawful permanent resident to declare a familial relationship with an alien seeking to immigrate to the United States.

[2] Butka states that her marijuana convictions fell under two different statutes because the Cannabis Control Act replaced the Habitual Drug Control Act on January 1, 1977.

As to her crime of possession of 100 grams of marijuana, Butka argued that the Habitual Drug Control Act was overbroad, and therefore that conviction was not categorically a controlled substance offense under the INA. As such, it did not render her inadmissible.

As to her crime of conviction for distributing 5 grams of marijuana, Butka contended that, under intervening Supreme Court and BIA precedent, the crime could be waived pursuant to INA § 212(h), 8 U.S.C. § 1182(h). Butka argued that her 5-gram-distribution crime arose from "the social sharing of marijuana on a single occasion," and in that way "relate[d] to a single offense of simple possession of 30 grams or less of marijuana," as required for a waiver under the INA.

Alternatively, Butka asserted that her case should be transferred to her current place of residence, which was within the Ninth Circuit, and argued that under Ninth Circuit law her drug convictions would be considered expunged. Therefore, should her case be reopened, Butka maintained that she would be eligible for relief under one or more of these theories.

On April 3, 2015, the BIA denied Butka's motion to reopen. The BIA determined that Butka did not present an "exceptional situation to justify reopening sua sponte," and it denied the motion as time-barred. The BIA reiterated that Butka was ineligible for a waiver of inadmissibility for the reasons discussed in its prior opinion. It appeared to rely on Butka's previous admission to the original NTA that she had a 1977 conviction for possession of 105 grams of marijuana, and did not address her claims that she

had two separate crimes of conviction, although in the one 1977 criminal judgment.

Because the BIA's order was brief, we recite it in full here:

> This matter was before the Board on August 10, 2010, when we dismissed the respondent's appeal from the Immigration Judge's decision determining that she is ineligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The respondent filed the present motion to reopen proceedings on March 3, 2015. The motion is untimely and the respondent requests reopening under the Board's sua sponte authority. *See* 8 C.F.R. § 1003.2(a).
>
> For reasons discussed in the Board's prior decision, the respondent is not eligible for a waiver of inadmissibility due to her conviction of a controlled substance violation in which some 105 grams of hemp were confiscated from her. She could not show that her offense did not involve more than simple possession of 30 grams or less of marijuana, and we are not persuaded that the respondent's various arguments asserted in her motion could lead to a different result. *See Matter v. Davey*, 26 I&N Dec. 37, 39 (BIA 2012) (explaining that the exception is "exceedingly narrow and fact-specific" and refers to a "specific type of conduct (possession for one's own use) committed on a specific number of occasions (a 'single' offense) and involving a specific

> quantity (30 grams or less) of a specific substance (marijuana)").
>
> Although the respondent may present a sympathetic case, she has not established that she is eligible for any relief within the jurisdiction of the Board. There is no exceptional situation to justify reopening sua sponte. The motion to reopen is denied as time-barred.

V. 2015 PETITION FOR REVIEW AND MOTION TO DISMISS

In May 2015, Butka filed a timely petition for review in this Court. The government responded with a motion to dismiss for lack of appellate jurisdiction, citing *Lenis v. U.S. Attorney General*, 525 F.3d 1291 (11th Cir. 2008).

On October 16, 2015, after Butka replied to the motion, this Court issued an order carrying the government's motion to dismiss with the case. The parties have now filed merits briefs addressing the BIA's decision and reasserting their arguments concerning this Court's jurisdiction. The parties debate whether Butka can use a motion to reopen *sua sponte* to (1) withdraw her earlier concession from January 2008[3] that she had a 1977 conviction in South Korea for possession of 105 grams of marijuana; (2) re-litigate and obtain *de novo* review of the BIA's 2010 decision that she was ineligible for adjustment of status due to that 1977 conviction; and

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[3] Butka's reply to the original NTA was filed in January 2008, which was before the government filed the amended NTA in December 2008.

(3) submit new evidence and arguments in 2015 that were available in her original removal proceedings, her first BIA review, and her first petition for review before this Court. The government stresses that Butka's request to reopen is based on changes in the facts, not on changes in the law. We need not reach and decide all these issues because we conclude we lack jurisdiction over Butka's petition for review.[4]

VI. DISCUSSION

To understand Butka's jurisdictional arguments, we describe the differences between the BIA's statutory and *sua sponte* authority to reopen immigration proceedings. We then detail the relevant case law addressing this Court's jurisdiction to review the BIA's denial of motions for *sua sponte* reopening. In the final section, we explain why we do not have jurisdiction over Bukta's petition for review.

A. Statutory Reopening

Under the INA, an alien may file one "statutory" motion to reopen her removal proceedings, and, generally, the motion must be filed within 90 days of the date of entry of the administratively final order of removal. INA § 240(c)(7)(A), (C), 8 U.S.C. § 1229a(c)(7)(A), (C). The 90-day deadline is subject to equitable tolling. *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1362-65 (11th Cir. 2013) (en banc). This Court has jurisdiction to review the BIA's denial of a petitioner's motion for statutory reopening. *See Jiang v.*

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[4] This Court reviews its subject matter jurisdiction *de novo*. *Chao Lin v. U.S. Att'y Gen.*, 677 F.3d 1043, 1045 (11th Cir. 2012).

U.S. Att'y Gen., 568 F.3d 1252, 1256 (11th Cir. 2009) (reviewing for abuse of discretion).

Butka filed her March 2015 motion to reopen over four years after the BIA's August 2010 order of removal. While Butka's 2015 motion requested only *sua sponte* reopening, the BIA addressed statutory reopening (in addition to *sua sponte* reopening) and found Butka's 2015 motion to be time-barred. On appeal, Butka does not argue that the BIA abused its discretion in declining to exercise its statutory power to reopen her removal proceedings. She petitions for review of only the Board's discretionary decision not to exercise its *sua sponte* authority to reopen.

B. *Sua Sponte* Reopening

The BIA has the authority to reopen removal proceedings *sua sponte* at any time. 8 C.F.R. § 1003.2(a). A petitioner can file a written motion in the BIA requesting the Board to exercise its *sua sponte* authority. *Id.* The BIA has broad discretion over motions for *sua sponte* reopening, *Lenis*, 525 F.3d at 1293-94, but it has held that it will exercise its authority only in exceptional circumstances, *In re J—J—*, 21 I. & N. Dec. 976, 984 (BIA 1997).

To meet the exceptional circumstances standard, the alien must show that there is "a substantial likelihood that the result in [her] case would be changed if reopening is granted." *In re Beckford*, 22 I. & N. Dec. 1216, 1219 (BIA 2000). A fundamental change in the law may satisfy this condition. *See Matter of X-G-W-*, 22 I. & N. Dec. 71, 72-73 (BIA 1998); *see also In re G—D—*, 22 I. & N. Dec. 1132, 1135 (BIA 1999). Indeed, Butka relied primarily on alleged changes in the law in her motion for *sua sponte* reopening. The

threshold issue, however, is whether we have jurisdiction to review Butka's challenges.

C. *Lenis*—No Jurisdiction over Denials of *Sua Sponte* Reopening

We directly answered this question in *Lenis*. This Court, in *Lenis*, squarely held that it lacked jurisdiction to review a BIA decision denying a petitioner's motion for *sua sponte* reopening. *Lenis*, 525 F.3d at 1292, 1294. The petitioner, Clara Ines Lenis, requested *sua sponte* reopening based on an intervening change in the law. *See id.* at 1292. The BIA denied her motion. *See id.*

Before this Court, Lenis argued "that the BIA abused its discretion in denying [her] request to use its *sua sponte* powers to reopen the underlying proceedings essentially because the agency had issued a precedential decision changing the meaning of the term 'particular social group' under the asylum laws." *Id.* Lenis thus raised a legal claim concerning her eligibility for asylum under the Agency's new interpretation of the term "particular social group." *See id.*

In reviewing Lenis's petition for review, this Court explained that, "under the Administrative Procedure Act, judicial review is not available when 'agency action is committed to agency discretion by law.'" *Id.* at 1293 (quoting 5 U.S.C. § 701(a)(2)). This situation occurs when the statute at issue does not provide a "meaningful standard against which to judge the agency's exercise of discretion." *Id.* (quotation marks omitted). The *Lenis* Court then concluded that neither the INA nor 8 C.F.R. § 1003.2(a) provided any "standard to govern the BIA's exercise of its

discretion" to *sua sponte* reopen immigration proceedings. *Id.* Therefore, it did not have jurisdiction to review the BIA's decision. *Id.* at 1294. The Court noted that, in reaching this conclusion, it was agreeing with ten other courts of appeal that had also concluded "that they have no jurisdiction to hear an appeal of the BIA's denial of a motion to reopen based on its *sua sponte* authority." *Id.* at 1292.[5]

At the end of *Lenis*, this Court, however, expressly left open the question of whether "an appellate court may have jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power." *Id.* at 1294 n.7 (emphasis added). The Court observed that it had no occasion to answer that question because Lenis did not raise any constitutional claims in her petition for review. *Id.* That question still remains open.

Butka argues that *Lenis* does not control her case because it involved only "a pure *sua sponte* discretionary denial," whereas her case contains a question of law in addition to a prayer for discretionary relief. She also claims that *Mata v. Lynch*, 576 U.S. ___, 135 S. Ct. 2150 (2015), undermines *Lenis*. The gov-

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[5] *Lenis* cites the following decisions: (1) *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); (2) *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); (3) *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); (4) *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (unpublished); (5) *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); (6) *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); (7) *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); (8) *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc); (9) *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); (10) *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003).

ernment maintains that *Lenis* controls Butka's case, that *Mata* does not undermine *Lenis*, and that *Lenis* is binding precedent. We discuss *Mata* and then why *Lenis* controls this particular case.

D. Mata v. Lynch

Subsequent to this Court's decision in *Lenis*, the U.S. Supreme Court decided *Mata v. Lynch*, 576 U.S. ___, 135 S.Ct. 2150. Butka claims that *Mata* partially abrogated *Lenis* and mandated that federal courts of appeal assert jurisdiction over legal claims accompanying requests for *sua sponte* reopening.

In *Mata*, Petitioner Noel Reyes Mata filed an untimely motion to reopen his removal proceedings, asking the BIA to equitably toll the filing deadline based on his counsel's ineffectiveness, and grant reopening under its statutory authority. 576 U.S. at ___, 135 S. Ct. at 2153. The BIA denied equitable tolling and, therefore, denied Mata's motion as time-barred. *Id.* It also stated that Mata's case was not one that warranted *sua sponte* reopening. *Id.*

Mata filed a petition for review in the Fifth Circuit Court of Appeals, arguing that the BIA should have granted him equitable tolling. *Id.* at ___, 135 S. Ct. at 2154. The Fifth Circuit dismissed the petition for lack of jurisdiction, stating that it construed petitioners' requests to the BIA for equitable tolling based on ineffective assistance of counsel as motions for *sua sponte* reopening, and it did not have jurisdiction to review the BIA's refusal to *sua sponte* reopen cases. *Id.*

The Supreme Court reversed the Fifth Circuit, explaining that circuit courts have jurisdiction to

review the denial of statutory motions to reopen, and "that jurisdiction remains unchanged if the Board, in addition to denying the alien's statutorily authorized motion, states that it will not exercise its separate *sua sponte* authority to reopen the case." *Id.* at ___, 135 S. Ct. at 2154-55 (emphasis added). The Supreme Court assumed, arguendo, that circuit courts do not have jurisdiction to review the BIA's denial of *sua sponte* reopening and summarized its holding as follows: "That courts lack jurisdiction over one matter (the *sua sponte* decision) does not affect their jurisdiction over another (the decision on the alien's request)." *Id.* at ___, 135 S. Ct. at 2155.

The Supreme Court ordered the Fifth Circuit to assert jurisdiction over the BIA's denial of equitable tolling and statutory reopening. *Id.* at ___, 135 S. Ct. at 2156-57. In doing so, it resolved a circuit split, as every circuit court but the Fifth had already decided that it had jurisdiction to review the BIA's denial of equitable tolling in a statutory reopening case. *Id.* at ___, 135 S. Ct. at 2154; *see Avila-Santoyo*, 713 F.3d 1357 (reviewing the BIA's denial of equitable tolling in a statutory reopening case).

E. Synthesizing *Lenis* and *Mata*

Butka asserts that *Mata* supports a bifurcated approach to *sua sponte* reopening cases. Butka explains that, under this approach, courts retain jurisdiction to review the legal questions presented in a petitioner's motion to *sua sponte* reopen.[6] If the

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[6] For this proposition, Butka relies mainly on these decisions that were rendered before *Mata* was decided: *Pllumi v. Att'y Gen. of the U.S.*, 642 F.3d 155, 160 (3d Cir. 2011) ("If the reasoning given for a decision not to reopen *sua sponte* reflects

court concludes that the BIA made a legal error, it must remand the case for the BIA to reconsider whether to exercise its *sua sponte* authority in light of the correct legal framework. However, the court of appeals remains unable to reach the ultimate question of whether the BIA abused its discretion by denying reopening.

Contrary to Butka's characterization, the Supreme Court in *Mata* did not instruct federal circuit courts to assert jurisdiction over legal claims related to or underlying requests for *sua sponte* reopening. The *Mata* Court reached no holding about whether courts have jurisdiction to review the BIA's decision concerning whether to *sua sponte* reopen a case. *See Mata*, 576 U.S. at ___, 135 S. Ct. at 2155. The Supreme Court clarified only that courts must exercise jurisdiction over statutory reopening cases and requests for equitable tolling accompanying a statutory motion to reopen. *See id.* Therefore, *Mata* had no effect on our

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an error of law, we have the power and responsibility to point out the problem, even though ultimately it is up to the BIA to decide whether it will exercise its discretion to reopen . . . . In such cases we can remand to the BIA."); *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) (stating that the Court lacked jurisdiction to review the Agency's discretionary decision to deny *sua sponte* reopening, but determining that "where the Agency may have declined to exercise its sua sponte authority because it misperceived the legal background and thought, incorrectly, that a reopening would necessarily fail, remand to the Agency for reconsideration in view of the correct law is appropriate").

In contrast to these cases, our pre-*Mata* law is *Lenis*, which concluded that this Court did not have jurisdiction to review the BIA's denial of a motion to *sua sponte* reopen immigration proceedings, with the possible exception of constitutional issues. *Lenis*, 525 F.3d at 1294 & n.7.

precedent in *Lenis*, which held unambiguously that this Court does not have jurisdiction to review the BIA's denial of a motion to *sua sponte* reopen proceedings, with the possible exception of constitutional issues. *See Lenis*, 525 F.3d at 1293-94 & n.7.

Lenis, furthermore, forecloses Butka's argument that this Court could review the legal issues presented in her motion to reopen, while declining to reach the question of whether the BIA should have exercised its discretionary power to grant *sua sponte* reopening. Like Butka, Lenis sought reopening based on an alleged intervening change in the law. *Id.* at 1292. This Court, however, did not review whether the BIA correctly assessed the impact of the new law on Lenis's case. Rather, this Court held that it did not have jurisdiction over that issue or any other—save perhaps constitutional claims—related to Lenis's motion to *sua sponte* reopen. *See id.* at 1294 & n.7.

We are compelled to reach the same conclusion here. As Butka has not raised any constitutional claims, we lack jurisdiction to review the BIA's denial of her motion for *sua sponte* reopening.[7] Thus, we

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[7] Often in the immigration context, when this Court faces a jurisdictional bar, it can still review both constitutional and legal issues. This power comes from INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D), which provides that "[n]othing in subparagraph [(a)(2)(B)] or [(a)(2)(C)], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review."

This provision's statement concerning the enduring reviewability of questions of law, however, has no impact on our jurisdiction to review motions for sua sponte reopening, as it creates an exception only to jurisdiction-stripping provisions contained in the INA. See INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). This

must reject Butka's arguments and grant the government's motion to dismiss.

IV. CONCLUSION

For all the foregoing reasons, we GRANT the government's motion to dismiss Butka's petition for review for lack of jurisdiction. Butka's petition for review is hereby DISMISSED.

Court's jurisdiction over *sua sponte* reopening decisions is limited by the Administrative Procedure Act, not the INA. *See Lenis*, 525 F.3d at 1293-94.

DECISION OF THE BOARD OF IMMIGRATION APPEALS (APRIL 3, 2015)

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 20530

In re:
KAP SUN BUTKA

File: A079 061 829–Atlanta, GA

This matter was before the Board on August 10, 2010, when we dismissed the respondent's appeal from the Immigrant Judge's decision determining that she is ineligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The respondent filed the present motion to reopen proceedings on March 3, 2015. The motion is untimely and the respondent requests reopening under the Board's sua sponte authority. *See* 8 C.F.R. § 1003.2(a).

For reasons discussed in the Board's prior decision, the respondent is not eligible for a waiver of inadmissibility due to her conviction of a controlled substance violation in which some 105 grams of hemp were confiscated from her. She could not show that her offense did not involve more than simple possession of 30 grams or less of marijuana, and we are not persuaded that the respondent's various arguments

asserted in her motion could lead to a different result. *See Matter of Davey*, 26 I&N Dec. 37, 39 (BIA 2012) (explaining that the exception is "exceedingly narrow and fact-specific" and refers to "a specific type of conduct (possession for one's own use) committed on a specific number of occasions (a 'single' offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana)").

Although the respondent may present a sympathetic case, she has not established that she is eligible for any relief within the jurisdiction of the Board.[1] There is no exceptional situation to justify reopening sua sponte. The motion to reopen is denied as time-barred.

/s/ Signature not Legible
For the Board

[1] We note that the motion states that the Department of Homeland Security has granted the respondent a stay of removal at this time.

PER CURIAM OPINION OF THE ELEVENTH CIRCUIT (MAY 26, 2011)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KAP SUN BUTKA,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

No. 10-14200
Agency No. A079-061-829

Petition for Review of a Decision of the
Board of Immigration Appeals

Before: HULL, PRYOR and FAY, Circuit Judges.

Kap Sun Butka, a native and citizen of South Korea, petitions this Court for review of the Board of Immigration Appeals' ("BIA") order affirming the Immigration Judge's ("IJ") final order of removal and denying her application for adjustment of status, INA § 245(a), 8 U.S.C. § 1255(a). Butka argues that the government should be equitably estopped from seeking to remove her on the basis of a prior drug conviction because the government earlier admitted her into the United States despite that conviction.

Butka also contends that the IJ violated her right to due process by denying her application for adjustment of status without holding a hearing and without giving her an opportunity to apply for voluntary departure. For the reasons stated below, we deny the petition for review.

I.

The Department of Homeland Security issued a Notice To Appear to Butka, alleging that she was a native and citizen of South Korea who was admitted to the United States in October 1981 as a nonimmigrant visitor for pleasure, for a temporary period not to exceed six months. The notice further stated that Butka had been convicted in the Criminal District Court of Seoul, South Korea, for the offense of possession of 105 grams of marijuana. The notice charged that Butka was subject to removal under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien who had been convicted of a controlled substance offense. The judgment from Butka's 1977 drug conviction revealed that she had been convicted of possessing 105 grams of hemp.

Butka submitted a written pleading admitting the allegations in the notice to appear and conceding removability. She filed an application for adjustment of status pursuant to 8 U.S.C. § 1255(a), and requested a merits hearing. Butka also applied for a waiver of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h), seeking to waive her drug conviction.

At a master calendar hearing, the Department of Homeland Security served Butka with a Form I-261 listing an additional charge of removability. The Form I-261 alleged that Butka had remained in the

United States after expiration of her visa, and was removable under INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), as an alien present in the United States in violation of the INA or any other law of the United States. Butka requested additional time to answer the new charge, so the IJ directed Butka to submit a written pleading by February 28, 2009, responding to the new charge and identifying any forms of relief that she wished to request. The IJ asked Butka to state in her response whether a hearing would be needed.

After the February 28, 2009, deadline passed without a response from Butka, the IJ issued a written decision pretermitting Butka's request for a § 212(h) waiver and denying her application for adjustment of status. The IJ concluded that Butka was not eligible for adjustment of status because her prior drug conviction rendered her inadmissible. The IJ further noted that Butka's drug conviction could not be waived under § 212(h) because it involved more than 30 grams of marijuana. The IJ observed that Butka had not formally applied for voluntary departure, and, in any event, the IJ determined that Butka was ineligible for voluntary departure because she had not provided the government with a travel document such as a passport that would be sufficient for admission to a foreign country. Accordingly, The IJ ordered that Butka be removed to South Korea.

Butka appealed to the BIA, but the BIA dismissed her appeal. The BIA observed that Butka was ineligible for adjustment of status due to her conviction for a controlled substance violation. The BIA further noted that Butka could not seek a waiver under § 212(h) because her conviction had involved

more than 30 grams of marijuana. In addition, the BIA concluded that the IJ did not violate Butka's right to due process by issuing a removal order without holding a hearing. The BIA pointed out that Butka had failed to comply with the IJ's instructions to file a written pleading identifying any forms of relief that she was seeking. In light of Butka's failure to file a response, the BIA determined that it was reasonable for the IJ to conclude that she was not requesting voluntary departure.

II.

As an initial matter, we note that we have jurisdiction over Butka's petition. As a general matter, we may not review a final order of removal entered against an alien such as Butka who has been found to be removable based on a conviction for a criminal offense. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C). We do have jurisdiction, however, to review constitutional claims and questions of law. INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). Here, Butka only raises legal and constitutional arguments, so 8 U.S.C. § 1252(a)(2)(C) does not preclude us from exercising jurisdiction over her claims.

"Whether equitable estoppel should apply is a legal question that we review *de novo*." *Tovar-Alvarez v. U.S. Att'y Gen.*, 427 F.3d 1350, 1353 (11th Cir. 2005). Neither this Court nor the Supreme Court has definitively held that the doctrine of equitable estoppel is applicable to immigration proceedings. *See Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307, 1318-19 (11th Cir. 2006) (noting that "it is far from clear that the doctrine of equitable estoppel may be applied against a government agency," and pointing out that the

Supreme Court has, in several immigration cases, specifically declined to apply estoppel against the government). Assuming that equitable estoppel can be applied in an immigration case, a petitioner must establish three elements in order to invoke it: "'(1) words, conduct, or acquiescence that induces reliance; (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; [and] (3) detrimental reliance.'" *Id.* at 1319 (quoting *United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003)) (alteration in original). In addition, the petitioner must demonstrate that the government engaged in affirmative misconduct—a showing of negligence or mere inaction is insufficient. *Id.*

Here, even assuming without deciding that equitable estoppel may be applied against the government in the immigration context, Butka has not established the elements of an estoppel claim. First, she has not shown that the government's initial decision to admit her into the United States was due to affirmative misconduct, rather than to inaction or negligence. *See id.* In addition, Butka did not suffer any legal detriment as a result of the government's decision to admit her into the United States. *See id.* (explaining that an alien who had mistakenly been granted adjustment of status could not invoke equitable estoppel to bar his removal because he had received a benefit from the government's earlier mistake, rather than suffering a detriment). Thus, Butka's equitable estoppel claim fails.

III.

We review constitutional challenges *de novo*. *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th

Cir. 2010). Aliens in removal proceedings are entitled to due process of law, meaning that they must be given both notice and an opportunity to be heard. *Id.* "To establish a due process violation, the petitioner must show that she was deprived of liberty without due process of law and that the purported errors caused her substantial prejudice." *Id.* "To show substantial prejudice, an alien must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different." *Id.*

An alien seeking adjustment of status must show that she is eligible to receive an immigrant visa, and is admissible for permanent residence. INA § 245(a), 8 U.S.C. § 1255(a). Thus, aliens who are inadmissible based on criminal convictions may not receive adjustment of status. The Attorney General may waive certain convictions that normally would render an alien inadmissible. INA § 242(h), 8 U.S.C. § 1182(h). Among other things, the Attorney General may waive an alien's prior conviction for a controlled substance offense involving the possession of 30 grams or less of marijuana. *See* INA § 242(a)(2)(A)(i)(II) and (h), 8 U.S.C. § 1182(a)(2)(A)(i)(II) and (h).

In this case, the IJ did not violate Butka's right to due process by issuing a removal order without holding a merits hearing. First, the IJ gave Butka a sufficient opportunity to apply for voluntary departure. At the master calendar hearing, the IJ directed Butka to submit a written pleading identifying the forms of relief that she was requesting. When Butka failed to file any such pleading by the deadline set by the IJ, it was reasonable for the IJ to conclude that she did not intend to request voluntary departure.

In addition, the IJ did not have to hold a hearing on Butka's application for adjustment of status because the documentary evidence clearly established that she was not eligible for that form of relief. Butka admitted that she had a prior conviction for possession of 105 grams of marijuana. That conviction could not be waived under § 212(h) because it involved more than 30 grams of marijuana. *See* INA § 212(h), 8 U.S.C. § 1182(h). Butka's conviction rendered her inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II), making her ineligible for adjustment of status. *See* INA § 245(a), 8 U.S.C. § 1255(a) (explaining that an alien must be admissible in order to receive adjustment of status). Because the outcome of the proceedings would not have changed had the IJ held a hearing, Butka was not substantially prejudiced by the IJ's decision not to hold one. *See Lapaix*, 605 F.3d at 1143.

Accordingly, after review of the record and the parties' briefs, we deny the petition for review.

PETITION DENIED.

DECISION OF THE BOARD OF IMMIGRATION APPEALS (AUGUST 10, 2010)

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Falls Church, Virginia 22041

In re:
KAP SUN BUTKA,

File: A079 061 829–Atlanta, GA

CHARGE:

Order: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)]-Controlled substance violation

Lodged: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)]-In the United States in violation of law

APPLICATION: Adjustment of status; 212(h) waiver; voluntary departure

The respondent appeals an Immigration Judge's April 16, 2009, decision. In that decision the Immigration Judge concluded, *inter alia*, that, by reason of the respondent's South Korea conviction for possession of hemp, she was inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The Immigration Judge pretermitted the respondent's application for

adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a), concluding that she could not satisfy the requirement that, to seek adjustment, she must be shown to be admissible for permanent residence. *See* section 245(a)(2) of the Act. The Immigration Judge specifically determined that the respondent's inadmissibility cannot be waived under section 212(h) of the Act, 8 U.S.C. § 1182(h), because she was unable to demonstrate that the conduct which made her inadmissible relates to a single offense involving simple possession of 30 grams or less of marihuana. The Immigration Judge further found that she had not formally applied for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The appeal will be dismissed.

The record of conviction shows that the respondent has a 1977 conviction in Seoul, South Korea, for possession of hemp, in violation of the Management Law for the Hemp and the Management Law of Habitual Narcotic Drugs. The judgment reflects that some 105 grams of the hemp were confiscated from the respondent (Gp. Exh. 3). On the basis of this conviction, the Department of Homeland Security (the DHS) had charged the respondent with removability under section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a violation of any law relating to a controlled substance (Exh. 1). The Immigration Judge sustained the charge of removability.

The respondent argues on appeal that the Immigration Judge erred in stating that she did not qualify for relief as she is eligible to seek a waiver under section 212(h) of the Act, in conjunction with an application for adjustment of status to that of a lawful permanent resident pursuant to section 245(a)

of the Act. To be eligible for adjustment under section 245(a) of the Act, the respondent must demonstrate, *Inter alia*, that she is "eligible to receive an immigrant visa and is admissible to the United States for permanent residence." *See* section 245(a)(2) of the Act. However, the respondent, a native and citizen of South Korea, is *prima facie* inadmissible—as an alien convicted of a controlled substance violation, a determination not disputed on appeal. *See* section 212(a)(2)(A)(i)(II) of the Act. Thus, to establish that she is eligible to receive an immigrant visa in connection with her adjustment application, the respondent must first obtain a waiver of inadmissibility under section 212(h) of the Act. While section 212(h) of the Act provides that the Attorney General may waive the application of section 212(a)(2)(A)(i)(II) of the Act, the authority to grant a waiver for a controlled substance violation requires an applicant to demonstrate that her inadmissibility relates to a certain kind of marihuana possession "offense," namely, a single offense of simple possession of 30 grams or less of marihuana. The Immigration Judge found that, as the respondent's controlled substance offense involved an amount of marihuana greater than 30 grams, she was not eligible for a section 212(h) waiver. Despite the respondent's argument to the contrary, we agree with the Immigration Judge that the respondent has not shown, by a preponderance of the evidence, that her controlled substance offense constitutes a single offense of simple possession of 30 grams or less of marihuana. As an inadmissible alien, the respondent is ineligible for adjustment of status under section 245(a) of the Act.

The respondent also argues on appeal that, because the Immigration Judge never scheduled her for a final merits hearing, but instead issued a removal order, she was denied due process because the Immigration Judge deprived her of the opportunity to seek voluntary departure at the conclusion of the proceedings. The Immigration Judge did not, at a December 9, 2008, hearing, consider the respondent for eligibility for voluntary departure under section 240B(b) of the Act. Rather, it was at that hearing that the Immigration Judge advised the respondent and her attorney to submit written arguments by February 28, 2009. The respondent and her attorney were specifically advised to, in those written arguments, identify any relief for which the respondent is eligible; the Immigration Judge indicated that a determination would then be made as to whether a hearing was needed or the matter could be decided solely on the pleadings and arguments. (Tr. at 2).

In his decision, the Immigration Judge indicated that, while the respondent had been given until February 28, 2009, to provide arguments as to eligibility for relief, no response had been filed by the respondent subsequent to the December 9, 2008, hearing. The Immigration Judge found that she had not applied for voluntary departure, and had failed to produce a travel document, such as a passport, for admission to a foreign country. Although the respondent argues that she did not have the opportunity to seek post-conclusion voluntary departure under section 240B(b) of the Act, she has acknowledged on appeal that no response had been filed subsequent to the December 9, 2008, hearing (Respondent's Brief at 4). Under the circumstances, we find that, having

been given the opportunity to do so, in an absence of any indication from the respondent that she would be seeking voluntary departure under section 240B(b) of the Act, she was not denied due process. Accordingly, the appeal will be dismissed.

The following order shall be issued.

ORDER: The appeal is dismissed.

/s/
For the Board

DECISION OF THE IMMIGRATION JUDGE (APRIL 16, 2009)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

IN THE MATTER OF
KAP SUN BUTKA,

Respondent.

File No. A79-061-829
In Removal Proceedings

APPLICATION: Adjustment of Status with 212(h) waiver

1. Procedural History

Respondent is an applicant for adjustment of status based on an approved I-130 filed by her United States citizen husband. The case was set for an adjustment hearing on December 9, 2008. At that time the Department filed an I-261 charging removability pursuant to section 237(a)(1)(B) of the Act to comply with the admitted factual allegations that Respondent had been admitted to the United States. The Department further argued that Respondent was ineligible for adjustment based on her conviction for possession of 105 grams of marijuana on March

17, 1977. (Ex. 3) Respondent was given until February 28, 2009 to respond to the amended charge in the I-261 and provide argument as to eligibility for relief. The Department was ordered to file any response deemed appropriate by March 30, 2009. Both parties were notified by the Court that a written decision might be issued based on the record without further hearing.

2. Analysis and Decision

Based on the written and oral concessions and the documentary record the Court finds removability to be established by clear and convincing evidence. No response has been filed by Respondent subsequent to the December 2008 adjustment hearing. Although an I-601 was filed prior to the adjustment hearing for a 212(h) waiver, the conviction record shows a conviction for an amount in excess of 30 grams of marijuana. Having been convicted of a "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance", Respondent is inadmissible pursuant to 212(a)(2)(A)(i)(1) and not eligible to adjust her status. The waiver for which she has applied, a 212(h), would not waive her particular conviction.

Respondent has not formally applied for any other relief including voluntary departure. Even if she had, at the conclusion of proceedings it is required that she produce for the Department's inspection a travel document such as a passport sufficient for admission to a foreign country. Having failed to do so, Respondent is ineligible for such relief.

ORDERS OF THE COURT

Accordingly, after a careful review of the record as a whole, the following orders are entered:

It is ORDERED that Respondent's application for 212(h) waiver be pretermitted and DENIED.

It is ORDERED that Respondent's application for adjustment be DENIED.

It is ORDERED that Respondent shall be removed from the United States to The Republic of Korea (South Korea) on the charge contained in the I-261.

/s/ J. Dan Pelletier
U.S. Immigration Judge

ADDITIONAL CHARGES OF INADMISSIBILITY/DEPORTABILITY (DECEMBER 9, 2008)

U.S. DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT

IN THE MATTER OF:
BUTKA, KAP SUN

Alien/Respondent.

File No. A79-061-829

In: Removal proceedings under section 240 of the Immigration and Nationality Act.

Address:
227 Chesser Park Drive,
Chelsea, AL 35043

There is hereby submitted the following factual allegations issued in lieu of those set forth in the original Notice to Appear, dated September 6, 2007:

Allegations:

4) You have remained in the United States beyond that period without authorization and have not adjusted to any other lawful status.

There is hereby submitted the following charges of removability issued in lieu of those set forth in the original Notice to Appear, dated September 6, 2007:

Charges:

Section 237(a)(1)(B) of the Immigration and Nationality Act, as amended, in that you are an alien who is present in the United States in violation of this Act or any other law of the United States.

/s/
(Signature of Service Counsel)

Dated: December 9, 2008

ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 15, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KAP SUN BUTKA,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

No. 15-11954-FF

Petition for Review of a Decision of the Board of Immigration Appeals

Before: HULL and BLACK, Circuit Judges, and MORENO,* District Judge.

BY THE COURT:

The Petitioner's Petition for Panel Rehearing, construed as a motion for reconsideration of the Court's July 5, 2016, dismissal order, is denied.

* Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida, sitting by designation.

SUBSTITUTE ORDER OF THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING (SEPTEMBER 20, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KAP SUN BUTKA,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

No. 15-11954-FF

On Petition for Review of a Decision of the Board of Immigration Appeals

Before: HULL and BLACK, Circuit Judges, and MORENO,* District Judge.

PER CURIAM:

We *sua sponte* VACATE our order issued on September 15, 2016 and substitute this order in its place.

The petition for panel rehearing filed by Petitioner is DENIED.

* Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida, sitting by designation.

Entered for the Court:

/s/ Frank M. Hull
United States Circuit Judge