No. ________

In The
Supreme Court of the United States

JUAN RAMON TARANGO,
also known as RAMON TARANGO,

Petitioner,

v.

LORETTA LYNCH, United States Attorney General,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals is correct that it has no jurisdiction over challenges to the BIA's failure to exercise its *sua sponte* authority to reopen.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's petition for rehearing, *Tarango v. Holder*, No. 13-60869 (Jan. 20, 2015) is unreported.

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review for lack of jurisdiction, *Tarango v. Holder*, No. 13-60869 (5th Cir. Dec. 5, 2014) is unreported.

The decision of the Board of Immigration Appeals denying Petitioner's motion to reopen, *Juan Ramon Tarango*, A90-398-253, (BIA, Nov. 20, 2013) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on March 5, 2014 and his petition for rehearing en banc on May 16, 2014. 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."

APPLICABLE LAW

5 U.S.C. § 701(a)(2), which provides,

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

8 U.S.C. § 1252(a)(2)(B)(ii), which provides,

no court shall have jurisdiction to review –

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(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)(1), which provides,

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

8 U.S.C. § 1252(a)(2)(D), which provides,

> 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.

5 U.S.C. § 706(1), which provides,

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; . . .

STATEMENT OF THE CASE

Petitioner, Mr. Juan Ramon Tarango, is a native and citizen of Mexico. Certified Administrative Record ("AR") at 414.

On May 9, 1996, he pled guilty to the state jail felony of simple possession of less than one gram of cocaine under the Texas Penal Code, wherein he received three years of deferred adjudication. AR at 270.

On November 13, 1996, legacy INS issued an Order to Show Cause charging Petitioner with deportability on the basis of the 1996 conviction. *Id.*

On May 27, 1998, the Immigration Judge (hereinafter "IJ") terminated proceedings concluding that Petitioner's deferred adjudication was not a conviction for immigration purposes. AR at 37.

On September 30, 1998, in response to the INS' appeal, the BIA vacated and remanded the case back to the IJ based on its decision in *Matter of Punu*, Interim Decision 3364 (BIA 1998). AR at 37-38.

On December 8, 1998, the IJ, on remand, changed its position and held that Petitioner was an aggravated felon and that he was not eligible for a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act (hereinafter "INA") since the form of relief had been repealed. AR at 40, 42. As such, the IJ ordered Petitioner deported to Mexico. AR at 40.

On June 25, 2001, the United States Supreme Court decided *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001), holding that Section 212(c) relief remained available to aliens, irrespective of when they were put into proceedings, so long as their "convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect."

Under this precedent, Petitioner met the requirements for Section 212(c) relief, and, on March 7, 2002, he appealed his case to the BIA. AR at 301-02.

On June 10, 2002, the BIA, without opinion, affirmed the IJ's decision to find Petitioner had committed an aggravated felony and had no relief. AR at 300.

On June 25, 2002, Petitioner filed with the Fifth Circuit Court of Appeals a petition for review. AR at 142.

The Fifth Circuit, without opinion, dismissed Petitioner's petition for lack of jurisdiction in *Tarango v. Ashcroft*, No. 02-60505 (5th Cir. July 22, 2002). AR at 53.

On December 5, 2006, the Supreme Court decided *Lopez v. Gonzales*, 127 S. Ct. 625, 633 (2006) holding that conduct which is a felony under state law but merely a misdemeanor under the Controlled Substances Act is not a felony punishable under the Controlled Substances Act, and, hence, such conduct is not considered to be an aggravated felony under federal immigration law. Under this precedent, Petitioner was not only eligible for Section 212(c) relief, but he was also eligible for cancellation of removal, as his state conviction was not considered to be an aggravated felony under federal immigration law.

In March of 2009, Petitioner was physically deported to Mexico, where he has remained ever since. AR at 29.

On June 14, 2010, the Supreme Court decided *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2582 (2010) holding that a "recidivist possession" was not an aggravated felony unless it was "based on the fact of" the prior conviction.

Under this precedent, as well as the previous Supreme Court cases, Petitioner was eligible for relief, and, on February 21, 2012, he filed a motion to reopen with the BIA. AR at 72, 80.

On August 20, 2012, the BIA denied Petitioner's motion to reopen, holding that the "departure bar" regulations barred him from filing a motion subsequent to his removal from the United States. AR at 64. Specifically, the Board stated:

> The respondent may not file a motion subsequent to his removal from the United States. See 8 C.F.R. § 1003.2(d);. . . . The respondent contends that the departure bar regulation is invalid. However, the respondent relies on a number of cases from other circuits, which are not binding in this proceeding.

Id.

However, just one month later, on September 27, 2012, the Fifth Circuit decided the cases of *Garcia-Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) and *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012) holding that an alien's removal from this country does not preclude his or her statutory right to file a motion to

reopen or reconsider proceedings and that the "departure bar" regulations under 8 C.F.R. §§ 1003.23(b)(1) and 1003.2(d) are *ultra vires*.

On June 18, 2013, Petitioner filed another motion to reopen with the BIA, arguing that, based on this Court's holdings in *Garcia-Carias* and *Lari*, 1) he had a statutory right to file a motion to reopen his proceedings despite his physical removal and 2) he was eligible to apply for Section 212(c) relief. AR at 9.

On November 20, 2013, the BIA denied Petitioner's motion, holding that his motion did "not fall within any exception to the time and numerical limits for a motion to reopen" and that, even if Petitioner's 1996 conviction was no longer considered to be an aggravated felony, it was still a controlled substance violation that warranted removal. AR at 3.

On February 18, 2014, Petitioner timely petitioned the Fifth Circuit Court of Appeals for review of the BIA's denial of his motion to reopen.

On December 5, 2014, the Fifth Circuit denied Petitioner's petition for review. Noting that Petitioner argued that the BIA abused its discretion in not reopening his proceedings *sua sponte*, the Court stated "we have repeatedly held that this court lacks jurisdiction over challenges to the BIA's failure to exercise its *sua sponte* authority to reopen, as the authority to sua sponte reopen deportation proceedings is entirely discretionary." App. 5.

On January 20, 2015, Petitioner filed a petition for rehearing with the Fifth Circuit Court of Appeals.

On February 13, 2015, the Fifth Circuit denied Petitioner's petition for rehearing without opinion. App. 11.

Respondent timely filed with this Court his Petition for Certiorari.

HOW THE ISSUES WERE DECIDED BELOW

The Fifth Circuit held that it lacks jurisdiction to review the BIA's failure to exercise its *sua sponte* authority to reopen cases

The Fifth Circuit mistakenly asserts it lacks jurisdiction over challenges to the BIA's failure to exercise its *sua sponte* authority to reopen: "However, we have repeatedly held that this court lacks jurisdiction over challenges to the BIA's failure to exercise its *sua sponte* authority to reopen, as '[t]he authority to *sua sponte* reopen deportation proceedings is entirely discretionary.'" (citing *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 250 (5th Cir. 2004) ("[A] reviewing court has no legal standard against which to judge an IJ's decision not to invoke its *sua sponte* authority.") (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (interpreting 5 U.S.C. §701(a)(2) to preclude judicial review where "a court would have no meaningful standard against which to judge the agency's exercise of discretion.")).

REASONS THE WRIT SHOULD BE GRANTED

I. The Fifth Circuit applied a flawed understanding of the jurisdictional framework applicable in the immigration context

The Fifth Circuit should have interpreted the Immigration and Nationality Act to preserve jurisdiction to review decisions of the Board of Immigration Appeals which are issued pursuant to their *sua sponte* authority. Instead, the Fifth Circuit relied on the faulty assumption that the broader, more general Administrative Procedure Act ("APA") jurisdictional-stripping provisions are applicable in the immigration context. This approach fails to consider the INA's narrower, more specific jurisdiction-stripping provisions which contradict that of the APA. The Fifth Circuit should have applied long-standing canons of statutory interpretation which would render the APA provision as inapplicable in the immigration context.

A. The Fifth Circuit is mistaken in its holding that the APA governs this jurisdictional determination

The Fifth Circuit's holding is predicated on the false assumption that 5 U.S.C. § 701(a)(2) governs. This provision limits judicial review where "agency action is committed to agency discretion *by law*."

> (a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that –
>
> (1) statutes preclude judicial review; or

> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a) (emphasis added).

B. The APA jurisdictional provision contradicts that of 8 U.S.C. § 1252(a)(2)(B)(i) and (ii)

In contrast to the APA, 8 U.S.C. § 1252(a)(2)(B)(ii)[1] states:

> no court shall have jurisdiction to review –
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
>
> (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)(B)(ii) (emphasis added).

Where the APA would appear to limit review of all decisions made discretionary by *any law* (be it

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[1] Section 306(c) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

statute, regulation, or even decisional law),[2] the INA's jurisdiction-stripping provision is limited to matters specified as discretionary by statute only. *See Kucana v. Holder*, 558 U.S. 233 (2010) (Section 1252(a)(2)(B)(ii) only precludes review over those matters specified as discretionary by statute). More specifically, § 1252(a)(2)(B)(ii) would appear to limit judicial review only of decisions made discretionary by a narrow set of statutes, those found in subchapter 2 of Chapter 12 of Title 8, 8 U.S.C. §§ 1151-1381. *See Kucana*, 558 at 840 (Alito, J., concurring).

C. The "specific over general" canon of statutory construction favors the construction that 8 U.S.C. § 1252(a)(2)(B)(i) and (ii) is an exception to 5 U.S.C. § 701(a)(2)

The jurisdictional framework of 8 U.S.C. § 1252(a)(2)(B)(i) and (ii), which is germane to discretionary matters within the immigration context, must be read as an exception to 5 U.S.C. § 701(a)(2). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission

[2] " 'Law,' without an article, properly implies a science or system of principles or rules of human conduct, answering to the Latin "jus;" as when it is spoken of as a subject of study or practice. In this sense, it includes the decisions of courts of justice, as well as acts of the legislature." Black's Law Dictionary 700 (2d ed. 1910).

or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (citing *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)).

D. An additional canon of statutory interpretation supports reading 8 U.S.C. § 1252(a)(2)(B) as an exception to the APA, namely, that (a)(2)(B)(ii) must have an independent meaning from 5 U.S.C. § 701(a)(2)

Courts must construe statutes to give effect, if possible, to every provision. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). Congress, by enacting 8 U.S.C. § 1252(a)(2)(B), clearly intended to modify the APA as it applied to review of discretionary agency action in the immigration context. *See Stone v. INS*, 514 U.S. 386, 393, 115 S. Ct. 1537, 1543 (1995) ("Had Congress intended review of INS orders to proceed in a manner no different from review of other agencies, as petitioner appears to argue, there would have been no reason for Congress to have included the consolidation provision. The reasonable construction is that the amendment was enacted as an exception, not just to state an already existing rule."). Ultimately, 8 U.S.C. § 1252(a)(2)(B) would lack meaning were it not intended to alter the agency jurisdiction-stripping scheme in the immigration context. In other words, if

Congress had intended to eliminate all judicial review of discretionary agency action, it could simply have mirrored the language of the APA, stating 'no court shall have jurisdiction to review any decision . . . of the Attorney General or Secretary of Homeland Security the authority for which is committed to agency discretion by law.' Indeed, Congress could have achieved the same effect by not including 8 U.S.C. § 1252(a)(2)(B)(ii) at all and simply allowing 5 U.S.C. § 701(a)(2) to fill the gap. However, it did neither. Therefore, the only explanation which gives meaning to §1252(a)(2)(B)(ii) is that Congress intended to alter the scope of judicial review of discretionary agency action in 5 U.S.C. § 701(a)(2).

E. Where discretion is derived from regulations, its exercise is reviewable

Because 8 U.S.C. § 1252(a)(2)(B)(ii) governs, and it expressly limits jurisdiction stripping to matters "the authority for which is specified under this subchapter to be in the discretion of the Attorney General" as opposed to where authority is committed to agency discretion "by law," (the APA standard) anything over which the Attorney General has provided for her own discretion through means of regulation remains subject to abuse of discretion review and arbitrary and capricious review under 5 U.S.C. § 706(1).

F. Therefore the BIA's failure to exercise *sua sponte* authority is reviewable

The Attorney General's *sua sponte* authority is made discretionary by regulation, 8 C.F.R. § 1003.2(a), (or to be more precise, the Attorney General's *sua sponte* authority ultimately derives from Subchapter 2 of the INA, which provided the power to create the *sua sponte* authority regulation). Because the INA does not strip jurisdiction over decisions that are made discretionary under Subchapter 2, the courts maintain jurisdiction to review the exercise of *sua sponte* authority. If they have jurisdiction they are bound to exercise it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

CONCLUSION

Based on the foregoing, the courts of appeals should interpret the Immigration and Nationality Act to preserve jurisdiction to review decisions of the Board of Immigration Appeals which are issued pursuant to their *sua sponte* authority. Therefore, we ask that the Court vacate the decision of the Fifth Circuit Court of Appeals in this case and remand the case to the court of appeals.

Petitioner prays the Court grant certiorari.

Respectfully submitted,

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JUAN RAMON TARANGO, also known as Ramon Tarango, Petitioner,
v.
ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL, Respondent.

No. 13-60869.

United States Court of Appeals, Fifth Circuit.

Filed: December 5, 2014.

Before: KING, JOLLY, and COSTA, Circuit Judges.

PER CURIAM.*

Juan Ramon Tarango petitions this court for review of a decision of the Board of Immigration Appeals denying his request to reopen his case *sua sponte*. For the reasons that follow, we dismiss the petition for lack of jurisdiction.

I. Factual and Procedural Background

Juan Ramon Tarango, a citizen of Mexico, entered the United States in 1974 without inspection. He adjusted his status to that of a lawful permanent resident in 1988. In May 1996, Tarango was convicted, pursuant to a guilty plea, of unlawfully, intentionally, and knowingly possessing a controlled substance

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(less than one gram of cocaine) in Harris County, Texas. The court entered a deferred adjudication of guilt and placed him on two years' probation.

In November 1996, the former Immigration and Naturalization Service ("INS") issued an Order to Show Cause and Notice of Hearing charging that Tarango was deportable based on his controlled substances conviction. Tarango contended that his deferred adjudication did not amount to a "conviction" for purposes of deportation. On May 27, 1997, the Immigration Judge ("IJ") agreed and terminated Tarango's deportation proceedings. On appeal, the Board of Immigration Appeals ("BIA") vacated the decision and remanded the proceedings based on recent authority holding that a deferred adjudication under the Texas Code of Criminal Procedure constituted a "conviction" for immigration purposes. On remand, the IJ determined that Tarango was subject to deportation and that there was "no relief or discretionary consideration potentially available to" Tarango.[1] The IJ ordered Tarango deported to Mexico. Tarango again appealed to the BIA, which – after temporarily administratively closing the case –

[1] The IJ did not conclude, as Tarango contends, that Tarango was not entitled to relief under former Section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), because he committed an aggravated felony. Rather, the IJ determined that Tarango could not have been placed in removal proceedings – as opposed to deportation proceedings – because the Order to Show Cause was issued in November 1996 and removal proceedings could not be instituted until April 1, 1997.

affirmed the IJ's decision without opinion. Tarango petitioned this court for review; we dismissed the petition for lack of jurisdiction on July 22, 2002. Tarango was deported to Mexico in March 2009.

On February 21, 2012, Tarango submitted to the BIA a motion to reopen his case, arguing that he should have been placed in removal proceedings (rather than deportation proceedings) and that he was eligible for cancellation of removal. The BIA denied the motion, determining that the "departure rule" – which prohibits a party from filing a motion subsequent to his removal from the United States, 8 C.F.R. § 1003.2(d) – applied to bar Tarango's motion. The BIA alternatively found that there was no merit to Tarango's argument that he should have been placed in removal proceedings, and that because he was placed in deportation proceedings, he was ineligible for cancellation of removal. Subsequently, the Fifth Circuit held that the departure rule is not a valid basis for denying a statutorily authorized motion to reopen or reconsider. *See Garcia-Carias v. Holder,* 697 F.3d 257, 265 (5th Cir. 2012); *Lari v. Holder,* 697 F.3d 273, 278 (5th Cir. 2012).

On June 18, 2013, Tarango filed a second motion to reopen, requesting that the BIA reopen his proceedings *sua sponte* pursuant to 8 C.F.R. § 1003.2(a), so that he could apply for a waiver of deportation under former Section 212(c) of the INA. On November 20, 2013, the BIA denied the motion, deeming it "untimely and number-barred," and concluding that "such a motion does not fall within any exception to

the time and numerical limits for a motion to reopen." Moreover, the BIA declined to exercise its authority to reopen the proceedings *sua sponte,* as Tarango did not contest that his cocaine possession conviction supports the charge of deportability. The BIA also concluded that Tarango was statutorily ineligible for relief under Section 212(c) because he is no longer lawfully admitted for permanent residence in the United States. Tarango timely petitioned this court for review of that order.

II. Discussion

Tarango raises various arguments relating to the merits of his deportation and the propriety of the decisions below – none of which we have the power to reach. The applicable regulations make clear that a party may file only one motion to reopen before the BIA, and that the motion must be filed within ninety days of the final administrative decision rendered in the proceeding sought to be reopened. *See* 8 C.F.R. § 1003.2(c). Accordingly, Tarango's second motion to reopen – filed years after his deportation – is both time and number-barred. Tarango therefore must rely on the BIA's power to *sua sponte* reopen proceedings. *See id.* § 1003.2(a).[2] Furthermore, Tarango's petition for review challenges only the BIA's November 20,

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[2] Tarango has conceded that he "is not contending before this Court that his [second] motion to reopen was timely."

2013 denial of this second motion to reopen.[3] Tarango argues that "the [BIA] abused its discretion in not reopening [the proceedings] *sua sponte*." However, we have repeatedly held that this court lacks jurisdiction over challenges to the BIA's failure to exercise its *sua sponte* authority to reopen, as "[t]he authority to sua sponte reopen deportation proceedings is entirely discretionary." *Lopez-Dubon v. Holder,* 609 F.3d 642, 647 (5th Cir. 2010); *Ramos-Bonilla v. Mukasey,* 543 F.3d 216, 220 (5th Cir. 2008) ("[T]his court lacks jurisdiction to review the BIA's denials of Ramos's motions to reopen."); *see also Enriquez-Alvarado v. Ashcroft,* 371 F.3d 246, 250 (5th Cir. 2004) ("[A] reviewing court has no legal standard against which to judge an IJ's decision not to invoke its *sua sponte* authority.").

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[3] Tarango makes clear that he "is not seeking review of [the BIA's August 2012] decision" denying his first motion to reopen. Indeed, Tarango could have challenged that decision only by filing a separate petition for review of that order. *See* 8 U.S.C. § 1252(b)(6); *Kane v. Holder,* 581 F.3d 231, 238 n.14 (5th Cir. 2009) ("[T]he statutory text of 8 U.S.C. § 1252(b)(6) . . . contemplates the filing of separate petitions for review following both the BIA's initial order and the resolution of any subsequent motion to reconsider or reopen."); *Cardona-Morales v. Holder,* 576 F. App'x 374, 374 (5th Cir. 2014) (unpublished) ("Although Cardona-Morales raises several challenges to the determinations made by the IJ and the BIA with respect to the IJ's denial of her motion to reopen and the BIA's denial of her two subsequent motions for reconsideration, the only petition for review before this court challenges the BIA's May 2013 denial of Cardona-Morales's first motion for reconsideration. Accordingly, this court's jurisdiction is limited to those arguments relating to the BIA's May 2013 decision.").

Although we have never recognized an exception to this rule, Tarango argues that we have jurisdiction to hear a challenge to the BIA's refusal to *sua sponte* reopen proceedings where the refusal constitutes a "gross miscarriage of justice." However, Tarango offers no support for that proposition, citing only cases holding that a gross miscarriage of justice is a prerequisite to a collateral attack on a removal order. *See Ramirez-Molina v. Ziglar,* 436 F.3d 508, 514 (5th Cir. 2006); *Lara v. Trominski,* 216 F.3d 487, 492-94 (5th Cir. 2000). But these cases do not involve challenges to the BIA's failure to reopen proceedings *sua sponte,* and there is no authority suggesting any "gross miscarriage of justice" exception to our lack of jurisdiction over such orders. Indeed, in an unpublished opinion, we determined that we lacked jurisdiction even where the petitioner "suggest[ed] that the BIA's failure to exercise its sua sponte authority to reopen her removal proceedings has resulted in a gross miscarriage of justice." *Cardona-Morales v. Holder,* 576 F. App'x 374, 374 (5th Cir. 2014) (unpublished). Similarly, although Tarango has not raised a due process claim related to the BIA's refusal to exercise its *sua sponte* authority,[4] we have rejected

[4] Tarango briefly notes, without further discussion or argument, that "his previous removal [was] unlawful as his due process was abridged" and that "a motion to reopen is a critical due process protection." This is insufficient to raise a due process claim, as "[i]t is not enough to merely mention or allude to a legal theory" to properly raise it. *United States v. Scroggins,* 599 F.3d 433, 446 (5th Cir. 2010) (internal quotation marks omitted).

such claims because "there is no liberty interest at stake in a motion to reopen." *Altamirano-Lopez v. Gonzales,* 435 F.3d 547, 550 (5th Cir. 2006); *see also Khan v. Holder,* 384 F. App'x 355, 356 (5th Cir. 2010) (unpublished) ("The BIA may reopen a matter sua sponte at any time but the decision to do so is entirely within its discretion. . . . To the extent that Khan argues that the denial of the motion to reopen violates his due process rights, he has no constitutionally protected interest in discretionary relief."). Thus, we lack jurisdiction over Tarango's petition.

III. Conclusion

For the foregoing reasons, the petition for review is DISMISSED for lack of jurisdiction.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 20530

Decision of the Board of Immigration Appeals

File: A090 398 253 – Houston, TX Date: NOV 20 2013

In re: JUAN RAMON TARANGO a.k.a. Ramon Tarango

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

APPLICATION: Reopening

The motion to reopen is untimely and number-barred. *See Matter of Oparaft,* 23 I&N Dec. 1 (BIA 2000). This case was last before the Board on August 20, 2012, when we denied the respondent's motion to reopen. The final administrative order was entered in these proceedings on June 10, 2002, when the Board dismissed the respondent's appeal. The current motion to reopen was filed on June 18, 2013. The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be denied.

The respondent is seeking reopening to apply for relief under the former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), but such a motion does not fall within any exception to the time and numerical limits for a motion to reopen.

8 C.F.R. § 1003.2(c)(3) (setting forth exceptions to the time and number limits).

The respondent urges that he warrants sua sponte reopening because he is no longer removable as an aggravated felon pursuant to the United States Supreme Court's decisions in *Lopez v. Gonzales,* 549 U.S. 47 (2006) and *Carachurri-Rosendo v. Holder,* 560 U.S. 563 (2010). He further asserts that in light of this recent case law, his removal proceedings should be reopened because he is statutorily eligible for relief under former section 212(c) of the Act, despite his involuntary removal from the United States on March 2009. However, the respondent does not contest that his 1996 cocaine possession conviction continues to support the charge of deportability under former section 241(a)(2)(B)(i) of the Act, 8 U.S.C. § 1251(a)(2)(B)(i) (1996), as a controlled substance violation (Exh. 1; Respondent's Br. at 3). As such, the respondent's removal from the United States in March 2009 was lawful and this removal served to terminate the respondent's lawful permanent residence status. *See Mauer of Lok,* 18 I&N Dec. 101, 106 (BIA 1981); *Matter of Mosqueda,* 14 I&N Dec. 55, 56-57 (R.C. 1972). Consequently, the respondent is statutorily ineligible for relief under the former section 212(c) because he is no longer lawfully admitted for permanent residence. *See* 8 C.F.R. § 1212.3(f)(2); *see also Matter of M-S-,* 22 I&N Dec. 349, 354 (BIA 1998). Since the respondent has not demonstrated prima facie eligibility for any immediately available

forms of relief, we do not find reopening is warranted. Accordingly, the motion will be denied.

ORDER: The motion is denied.

/s/ [Illegible]
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60869

JUAN RAMON TARANGO, also known as Ramon Tarango,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

(Filed Feb. 13, 2015)

Before KING, JOLLY, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is [denied].

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE