No. 07-74277

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARDINO EDUARDO MEJIA-HERNANDEZ,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS
(Agency No. A70-957-121)

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Mary Kenney
Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)

CORPORATE DISCLOSURE STATEMENT UNDER RULE
Fed. R. App. P. 26.1

I, Mary Kenney, attorney for the Amicus, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

DATED: October 1, 2010

s/ Mary Kenney
_____
Mary Kenney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Legislative History

I. INTRODUCTION AND STATEMENT OF *AMICUS CURIAE*

Pursuant to FRAP 29, *amicus curiae* American Immigration Council submits this *amicus* brief to assist the Court in its consideration of the ongoing validity of *Ekimian v. INS*, 303 F.3d 1153 (9th Cir. 2002), following the Supreme Court's decision in *Kucana v. Holder*, 130 S. Ct. 827 (2010). In *Ekimian*, the Court held that it cannot review the Board of Immigration Appeals' (BIA or Board) denial of a *sua sponte* motion to reopen because the regulation granting the BIA discretion to reopen *sua sponte* does not specify a standard. 303 F.3d at 1157-58 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985) and 5 U.S.C. § 701(a)(2)).

As a consequence, *Ekimian* permits the agency to insulate itself from judicial review by adopting an authorizing regulation that contains no standards. This is precisely what the Supreme Court in *Kucana* said is not permissible. The Supreme Court in *Kucana* emphasized that an agency cannot be permitted "a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'" *Kucana*, 130 S. Ct. at 840. Only Congress – not the agency – determines whether a decision is reviewable.

While normally a panel is bound by controlling circuit precedent such as *Ekimian*, this is not the case where "the reasoning or theory of [the] prior

circuit authority is clearly irreconcilable with the reasoning or theory" of an intervening Supreme Court decision. *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003). In such a case, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled. *Id.*

Amicus curiae submit that such is the case here and that the panel is bound by *Kucana* rather than *Ekimian*. As discussed in detail below, the *Ekimian* holding is irreconcilable with the Supreme Court's clear directive in *Kucana* that an agency cannot determine the extent of a federal court's jurisdiction, thereby insulating its own decisions from review. In fact, this Court recognized the conflict between these decisions in *Zetino v. Holder*, 596 F.3d 517 (9th Cir. 2010), *amended by* 2010 U.S. App. LEXIS 18421 (9th Cir. Aug. 30, 2010). There, the Court amended a precedent decision that, applying *Ekimian*, had found no jurisdiction over a BIA denial of a motion to file an out-of-time brief; the amended decision held that the court did have jurisdiction and rejected the government's arguments to the contrary "in light of *Kucana*." *Zetino v. Holder*, No. 08-70390, 2010 U.S. App. LEXIS 18424, at *11 n.2 (9th Cir. Aug. 30, 2010).[1]

[1] It is immaterial that the Court in *Kucana* declined to take a position on the reviewability of *sua sponte* motions since that issue was not before it. 130 S. Ct. at 839 n18. Under *Miller*, the irreconcilability of the "reasoning

Alternately, should the panel find that the *Miller v. Gammie* standard for reexamining a controlling precedent has not been met, *amicus curiae* would urge the panel instead to call for *en banc* review due to the irreconcilable conflict between the Court's precedent decisions *Ekimian* and *Zetino*, which found no jurisdiction and jurisdiction, respectively, in indistinguishable circumstances. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (noting that the court will normally grant *en banc* review in these circumstances). Already, a panel of the Sixth Circuit has urged the court to review *en banc* its precedents on *sua sponte* motions to reopen, after finding that *Kucana* "casts considerable doubt" on these precedents. *Gor v. Holder*, 607 F.3d 180, 182 (6th Cir. 2010), *pet. for reh'g filed*, (Aug. 2, 2010); *see also id.* at 197 (Cole, J., concurring).

Amicus curiae the American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. *Amicus curiae* has a direct interest in ensuring that noncitizens are not

---

or theory" of the intervening precedent is what matters, not the precise issue. 335 F.3d at 893. Here, the reasoning of *Ekimian* is clearly contrary to that of *Kucana.*

unduly prevented from accessing the courts and seeking review of immigration decisions.

II. RECENT SUPREME COURT PRECEDENT COMPELS A FINDING THAT THE BIA'S DENIAL OF A *SUA SPONTE* MOTION TO REOPEN IS REVIEWABLE.

A. *Kucana* Precludes An Agency From Insulating Its Decisions From Review By Making Them Discretionary.

This Court's pre-*Kucana* precedent on *sua sponte* reopening, *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002), cannot stand because it allows the agency to shield its own decisions from review simply by making them discretionary. *Kucana* made clear that where an agency, by regulation, provides itself with unfettered discretion, doing so does not then shield it from judicial review. *Kucana*, 130 S. Ct. at 840. The Supreme Court stressed that this was a "paramount factor" in its decision. *Id.* at 839. Moreover, the Court also explained that any such "delegation of authority" would be "extraordinary" and would have to come from Congress. *Id*. at 840 (finding that no such delegation could be "extracted from the statute").

Thus, the Supreme Court emphasized that it is Congress – not the agencies by virtue of their making a decision discretionary – that must decide whether a decision is reviewable. *Id.* at 839-40; *see also Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998) (noting that to

determine if the discretionary exception to judicial review applies, "we first look at the statute itself") (citing *Webster v. Doe*, 486 U.S. 592, 600 (1988)). In addition, *Kucana* instructs that when it comes to immigration decisions (and discretionary decisions in particular), Congress knows how to limit review, and if it intends to limit review, it will say so. *See Kucana*, 130 S. Ct. at 837-39.

The fact that *Kucana* interpreted a provision of the Immigration and Nationality Act limiting review, 8 U.S.C. § 1252(a)(2)(B)(ii), as opposed to the APA's limit on review in 5 U.S.C. § 701(a)(2), does not make the Court's holding inapplicable here. The Supreme Court's analysis is guided by the general presumption in favor of judicial review of administrative action and that the presumption is overcome only where there is "clear and convincing evidence" that *Congress* intended to bar review. *See Kucana*, 130 S. Ct. at 839 (internal citations omitted).

Thus, *Kucana* confirms what the Supreme Court indicated in its seminal case on 5 U.S.C. § 701(a)(2), *Heckler v. Chaney*, 470 U.S. 821 (1985). *Heckler* makes clear

> that *Congress* can restrict the jurisdiction of federal courts over certain agency actions under the APA by deeming them 'discretionary' and drafting 'statutes' that provide a court no meaningful standard against which to judge the agency's exercise of discretion.'… [*Heckler*] does not support a conclusion that an *agency* can strip a court of jurisdiction to

> review its own actions by enacting regulations that deem these actions discretionary. Recognizing such authority would fundamentally alter the constitutional checks and balances put in place by the separation of powers doctrine.

Zetino, 596 F.3d at 530 (Lawson, J., concurring) (emphasis in original) (quoting *Heckler*, 470 U.S. at 830); *see also Diebold v. U.S.*, 961 F.2d 97, 99 (6th Cir. 1992) (noting that "[t]he question under the Administrative Procedure Act is what is the intent of Congress, not the intent of the executive agency whose action is being reviewed").

Moreover, *Kucana's* applicability to the case at hand is confirmed by this Court's application of it in *Zetino.* The issue in *Zetino* was whether the court could review, under an abuse of discretion standard, the BIA's denial of the petitioner's motion to file an untimely brief. *See Zetino*, 596 F.3d at 522-23. Such decisions are governed only by regulations which contain no standards but which, like the *sua sponte* regulations, provide the BIA discretion to act. *See id.* at 523-25. Relying on *Ekimian*, the original panel decision held it had no jurisdiction to decide this issue due to a lack of meaningful standards by which to judge the agency's action. *Id.* at 519, 523-24. Judge Lawson concurred in the result but opposed the application of *Ekimian*. He opined that, following *Kucana*, it was clear that the court in *Ekimian* had misapplied *Heckler v. Chaney* by allowing the agency to shelter its own actions from judicial review. *Zetino*, 596 F.3d at 528-34 (Lawson,

J., concurring). Subsequently, the Court issued an amended decision holding that it had jurisdiction over the challenge to the denial of the late-filed brief, and summarily rejecting the government's argument that it lacked jurisdiction: "We find this argument unpersuasive in light of *Kucana v. Holder*, 130 S.Ct. 827, 831, 175 L.Ed. 2d 694 (2010)." *Zetino*, 2010 U.S. App. LEXIS 18424, at *11 n.2. There is no material distinction between *Ekimian* and *Zetino*, and the two holdings are irreconcilable.

Moreover, there also is no evidence that Congress intended to shield *sua sponte* motions from review. The relevant statutory provision, 8 U.S.C. § 1103(g)(2), provides the Attorney General power to establish regulations necessary for carrying out responsibilities under the INA. Nothing in this provision suggests, let alone provides, clear and convincing evidence that Congress intended to limit court review of regulations promulgated under this provision. If this statutory provision were to be interpreted as limiting review, "*any* agency decision made under a regulation in which the agency grants itself discretion to act would be beyond judicial review where Congress granted general authority to the agency to make rules, which is to say, in virtually every case. That result directly contradicts *Kucana's* central holding." *Gor*, 607 F.3d at 190.

Nonetheless, in *Ekimian*, this Court permitted an agency to shield its decision from review by making it discretionary. The Court did not consider what *Kucana*, *Heckler* and this Court require as the first step in determining whether review is limited: assessing whether *Congress* intended to limit review of *sua sponte* motions. Had the *Ekimian* Court looked to the INA and 8 U.S.C. § 1103(g)(2), it would have found that Congress did not express an intent to limit review over *sua sponte* motions.

B. The Supreme Court Has Interpreted 5 U.S.C. § 701(a)(2) Narrowly to Apply Only in Situations Not Applicable Here.

It is well settled that the exception to judicial review in 5 U.S.C. § 701(a)(2) is "very narrow," only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). A narrow interpretation of § 701(a)(2) is consistent with the equally well-settled presumption favoring judicial review over administrative action. *See Kucana*, 130 S. Ct. at 839 (citing *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63-64 (1993)). In accord with this presumption, courts may limit access to judicial review only where there is "clear and convincing evidence" that Congress intended to restrict judicial review. *Id.*; *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); *Diebold v. U.S.*,

961 F.2d 97, 98-99 (6th Cir. 1992) (citing Supreme Court precedent on this point).

When it first interpreted § 701(a)(2), the Supreme Court recognized that not all discretionary decisions could fall within its bounds, since such an expansive construction would render meaningless another critical provision of the APA, the "arbitrary, capricious, or [] abuse of discretion" standard of review found in 5 U.S.C. § 706(a)(2)(A). *Heckler*, 470 U.S. at 829. To avoid this conflict, in all of its decisions addressing § 701(a)(2), the Court has limited its applicability to situations in which courts traditionally exercised no review over agency action because the action was committed to the agency's absolute discretion. *See*, *e.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). As a result, the Supreme Court has found that § 701(a)(2) precludes review in cases in which two conditions are met: first, where there are no standards by which to evaluate the agency's action; and second, where courts traditionally have refrained from reviewing agency action because of this lack of standards. *Id.*

With respect to the first factor, this Court has made clear that "[t]he mere fact that a statute contains discretionary language does not make agency action unreviewable." *Helgeson v. Bureau of Indian Affiairs,* 153 F.3d 1000, 1003 (9th Cir. 1998) (quoting *Beno v. Shalala,* 30 F.3d 1057,

1066 (9th Cir. 1994)). *Cf. Kucana*, 130 S. Ct. at 834 (affirming that discretionary motions to reopen are not *per se* shielded from review). Instead, "[w]hether any particular statute meets this standard is 'statute specific and relates to the language of the statute and whether the general purposes of the statute would be endangered by judicial review.'" *Beno*, 30 F.3d at 1066 (quoting *Esmeralda v. Department of Energy*, 925 F.2d 1216, 1218-19 (9th Cir. 1991)); *see also Argabright v. U.S.*, 35 F.3d 472, 475 (9th Cir. 1994) (considering the language, structure and legislative history of a statute to determine if Congress intended to commit the decision to the agency's discretion within the meaning of § 701(a)(2)); *Page v. Donovan*, 727 F.2d 866, 868-69 (9th Cir. 1984) (finding standards to review the agency's exercise of discretion in the legislative history of the statute).

As discussed in section II, C, *infra*, the Board's authority to reopen decisions *sua sponte* is governed by reviewable standards and thus is not the type of "absolute" discretion that will trigger the § 701(a)(2) exception.

Under the second factor identified in *Lincoln v. Vigil*, there is no independent tradition of nonreviewability over *sua sponte* motions to reopen. As noted, the Supreme Court has consistently interpreted § 701(a)(2) narrowly "to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as

'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191 (citing *Franklin v. Massachussetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring in part and concurring in judgment); *Webster v. Doe*, 486 U.S. 592, 609 (1988) (Scalia, J., dissenting)). The Court in *Lincoln* found that the question of how an agency allocated funds from a lump-sum appropriation was "an administrative decision traditionally regarded as committed to agency discretion"; this tradition influenced its decision that review over such a decision was precluded by § 701(a)(2). *Linclon*, 508 U.S. at 192. Similarly, in *Heckler*, the Court found that an agency's decision not to take enforcement action "has traditionally been 'committed to agency discretion'" and that Congress "did not intend to alter that tradition" in enacting the APA. 470 U.S. at 832. *See also ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (finding that a "tradition of nonreviewability" supported the application of § 701(a)(2)).

This Court has recognized the importance of this factor, specifically finding that a state's obligations for participation in a federally funded welfare program "does not implicate such traditionally unreviewable concerns." *Beno*, 30 F.3d at 1067. Moreover, and unlike the situation in *Lincoln*, the court also found that the statute at issue "does not reveal a congressional commitment to the unfettered discretion of the Secretary." *Id*.

Finally, judicial review in *Beno* "would not interfere with the purpose" of the statute or "endanger" the statutory scheme. *Id.*

As in *Beno*, this factor weighs in favor of judicial review in the present case. First, there is no *independent* tradition precluding federal court review over the BIA's *sua sponte* motion to reopen decisions. Instead, the sole bar to review of denials of *sua sponte* motions to reopen is § 701(a)(2) itself. *See, e.g.*, *Ekimian*, 303 F.3d at 1158-59; *Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008) (citing cases from ten circuits).

Second, there unquestionably is a long tradition of federal courts reviewing BIA adjudications and motions to reopen in particular, dating back at least to 1916. *See Kucana*, 130 S. Ct. at 834 (citation omitted). This tradition is founded on the recognition that "the motion to reopen is an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings." *Id.* (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2307 (2008)). Moreover, this tradition long preceded Congress's 1996 adoption of a statutory right to file a motion to reopen and thus existed when all such motions – whether by a party or *sua sponte* by the BIA – were regulatory.

The regulation on *sua sponte* motions to reopen is the same one as that for motions to reopen by a party. As Sixth Circuit explained in *Gor v.*

Holder, this regulation lacks any substantive standards for either a motion to reopen by a party or a *sua sponte* motion to reopen. 607 F.3d at 191 ("[8 C.F.R.] § 1003.2 no more fetters the BIA's discretion to deny motions to reopen than it does the BIA's discretion to reopen proceedings *sua sponte*. Nor does the statute pursuant to which this regulation is promulgated, 8 U.S.C. § 1103(g)(2) … provide any evident limit to the agency's authority.").

Despite this lack of a regulatory standard, this and other courts apply the abuse of discretion standard to review the BIA's denial of a party's motion to reopen. *See, e.g., Kalmathas v. INS*, 251 F.3d 1279 (9th Cir. 2001). In fact, this Court has held that it can review the Board's refusal to reinstate an asylum application, despite the absence of a governing statute or regulation, specifically because it is analogous to a motion to reopen. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003).

Given that the two types of motions to reopen arise from the same regulation, the long tradition of review over motions to reopen, the lack of any tradition precluding review over *sua sponte* motions, and the general presumption in favor of review of administrative action, this Court should find that § 701(a)(2) does not apply to the BIA's *sua sponte* motions to reopen.

C. Meaningful Standards Govern *Sua Sponte* Motions to Reopen.

There are meaningful standards against which the court may judge the agency's exercise of discretion over *sua sponte* motions. The standards need not be derived exclusively from the immigration statute, but may be derived from other sources of law, such as agency rules and the Constitution. *See Webster v. Doe*, 486 U.S. 592, 602-04, 602 n.7 (1988); *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (holding that agency memoranda implementing a statute supplied the "law to apply"); *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003) (stating the "no law to apply" rule is applicable where there are "no statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" the agency's actions). Here, BIA precedents (both published and unpublished), administrative law, and the Constitution all provide "law" for the Court to apply.

First, the Board has established a framework for adjudicating *sua sponte* motions. Specifically, it has held that an "exceptional situations" standard applies. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). BIA cases have shaped the contours of what constitutes an exceptional circumstance. For example, a significant development in the law constitutes

such a circumstance. *See, e.g.*, *Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* a case where Ninth Circuit interpreted meaning of crime of violence differently from BIA); *Matter of G-D-*, 22 I&N Dec. 1132, 1135-36 (BIA 1999) (declining to reopen or reconsider *sua sponte* where case law represented only an "incremental development" of the law and respondent's case did not turn on cited authority); *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998) (statutory change in definition of "refugee" warranted *sua sponte* reopening), *overruled by Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).

Prior to *Kucana*, this and several other courts considered whether *Matter of J-J-* and cases applying the "exceptional situations" standard establish law governing *sua sponte* motions and concluded that they did not. *See Ekimian*, 303 F.3d at 1158-59; *Tamenut v. Mukasey*, 521 F.3d at 1004-05; *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003). The reasoning in these cases cannot stand after *Kucana*. Central to these courts' reasoning is the fact that neither *Matter of J-J-* nor the regulation "requires" the BIA to reopen in "exceptional situations" (i.e., that despite the "exceptional situations" standard, the ultimate decision is discretionary). *See Ekiminian*, 303 F.3d at 1158 (cited in *Calle-Vujiles*, 320 F.3d at 475, and *Tamenut*, 521 F.3d at 1004-05). As *Kucana* made clear, the fact that that the

immigration judges and the BIA have discretion to reopen proceedings does not mean that the decision is unreviewable. In fact, after and "in light of" *Kucana*, this Court found jurisdiction over precisely this type of a decision. In *Zetino*, the Court reviewed the denial of a motion to file an out-of-time brief under a regulation that, like the *sua sponte* regulation, simply stated that the BIA "may" grant such a motion. 2010 U.S. App. LEXIS 18424, at *11 n.2; *see also Gor*, 607 F.3d at 191 ("If courts nonetheless retain jurisdiction to review the BIA's discretionary decision not to grant a motion to reopen, it is difficult to understand how the BIA's equally broad discretion not to reopen proceedings *sua sponte* entirely bars judicial review"); *supra* II, B.

In addition to the *Matter of J-J-* line of cases, the Board "routinely" finds that an exceptional situation exists where a conviction that serves as the basis of a removal order is later vacated. *See Cruz v. Attorney General*, 452 F.3d 240, 242, 246 (3d Cir. 2006). As the Third Circuit pointed out, "we have not found a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes. So long as alien has not 'slept on his rights' in bringing a vacatur … to the BIA's attention, the Board has granted untimely motions to reopen proceedings." *Id.* at 246 n.3 (citing unpublished BIA

decisions). Thus, the BIA has established a precedential rule regarding *sua sponte* motions. *See Davila-Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994) (nonpublication of a decision does not permit an agency to take a view of the law in one case that is contrary to the view it set out in earlier cases, without explaining why it is doing so) (cited in *Perez-Vargas v. Gonzales*, 478 F.3d 191, 194 n.3 (4th Cir. 2007)); *Shardar v. Attorney General*, 503 F.3d 308, 315 (3d Cir. 2007) (regardless whether decision is "precedential," agency must treat similarly situated individuals similarly).

The Board also has provided guidance regarding the content of a *sua sponte* motion and who bears the burden of proof. In *Matter of Beckford*, the Board held where a noncitizen seeks *sua sponte* reopening to attack a prior finding of removal, he or she bears the burden of showing that if the motion is granted, there is a reasonable likelihood of success upon reopening. *See* 22 I&N Dec. 1216, 1218-19 (BIA 2000). The BIA went on to describe the type of evidence and analysis it would expect the noncitizen to provide in the *sua sponte* motion, thus establishing standards to apply in subsequent cases. *Id.* at 1219.

In addition to the BIA case law, this Court provides standards for reviewing decisions on *sua sponte* motions, standards taken from the analogous motion to reopen context. That such an approach is proper is

evident from this Court's decision in *Mendez-Gutierrez v. Ashcroft*, which involved the denial of a request to reinstate an asylum application. 340 F.3d 865, 869 (9th Cir. 2003). Although there were no statutory or regulatory standards applicable to motions to reinstate asylum applications, the court applied the standards for motions to dismiss, finding the two "analogous." *Id.*

As this Court has said, "[a]n abuse of discretion will be found when the [decision] was arbitrary, irrational or contrary to law." *Azanor v. Ashcroft*, 364 F.3d 1013, 1018 (9th Cir. 2004) (quoting *Watkins v. INS*, 63 F.3d 844, 847 (9th Cir. 1995)). An error of law is an abuse of discretion. *Mejia v. Ashcroft*, 298 F.3d 873, 878 (9th Cir. 2002). Additionally, to avoid an abuse of discretion finding, the BIA must "indicate with specificity that it heard and considered petitioner's claims." *Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (citation omitted). It must consider all pertinent facts and indicate how it weighed the evidence presented and arrived at its conclusion. *Georgiu v. INS*, 90 f.3d 374, 376 (9th Cir. 1996).

There are numerous situations where application of these principles would provide sufficient standards for reviewing the BIA's denial of a *sua*

sponte motion. For example,

-- where the BIA denies a *sua sponte* motion on the basis that the noncitizen failed to submit any evidence in support of his factual claims, when in fact he did submit several supporting documents that were ignored.

-- where the BIA denies a *sua sponte* motion on the basis that the noncitizen would not be eligible to adjust his status if the case were reopened, but this was a legal error and the person was statutorily eligible.

-- where the BIA fails to offer any reasons for denying a *sua sponte* motion.

Likewise, where the petitioner raises a constitutional claim – such as a due process violation – the Constitution provides applicable law. *See Zetino v. Holder*, 596 F.3d at 525 (finding that petitioner's "due process challenge is, of course, governed by a meaningful standard"), *amended by* 2010 U.S. App. 18421 (9th Cir. Aug. 30, 2010); *see also Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) (finding that a constitutional claim "does not involve a matter that Congress committed to agency discretion"); *Tamenut*, 521 F.3d at 1005 (in a challenge to a denial of a *sua sponte* motion, the court notes that although it generally does have jurisdiction over a colorable constitutional claim, none was raised); *Lenis v. Atty. Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) (recognizing, but not deciding, that the court may review a due

process claim); *Joelson v. United States*, 86 F.3d 1413, 1420 (6th Cir. 1996) (finding colorable constitutional claims reviewable).

III. CONCLUSION

For the reasons set forth above, the Court should find that it may review the Board's decision on a *sua sponte* motion to reopen.

October 1, 2010

Respectfully submitted,

s/ Mary Kenney

_____

Mary Kenney
Beth Werlin
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)
mkenney@immcouncil.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 4,368 words.

DATED: October 1, 2010

s/ Mary Kenney

Mary Kenney

CERTIFICATE OF SERVICE

When All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 07-74277

I, Mary Kenney, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 1, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Mary Kenney

Mary Kenney
American Immigration Council

Date: October 1, 2010