

PRACTICE ADVISORY¹

REINSTATEMENT OF REMOVAL

by Trina Realmuto²

April 29, 2013

“Reinstatement of removal” is a summary removal procedure pursuant to § 241(a)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(5), 8 C.F.R. § 241.8. With some statutory and judicial exceptions, discussed below, the reinstatement statute applies to noncitizens who return to the United States illegally after having been removed under a prior order of deportation, exclusion, or removal. Reinstatements generally account for more deportations than any other source.³

This practice advisory provides an overview of the reinstatement statute and implementing regulations, including how the Department of Homeland Security (DHS) issues and executes reinstatement orders. The advisory addresses who is covered by § 241(a)(5), where and how to obtain federal court and administrative review of reinstatement orders, and potential arguments to challenge reinstatement orders in federal court. Finally, the advisory includes a sample reinstatement order, a sample letter to DHS requesting a copy of the reinstatement order, a checklist for potential challenges to reinstatement orders, and an appendix of published reinstatement decisions.

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² Trina Realmuto is a Staff Attorney with the National Immigration Project of the National Lawyers Guild. She wrote this advisory while a consultant to American Immigration Council’s Legal Action Center and updated it at the National Immigration Project. Questions about this advisory can be directed to her at trina@nipnlg.org. Special thanks to Beth Werlin for her valuable comments and detailed edits and to Dan Kesselbrenner for prompting this update.

³ For example, in May 2012, reinstatements accounted for nearly 35% of all removals nationwide. *ICE Bypassing Immigration Courts? Deportations Rise as Deportation Orders Fall*, Transactional Record Access Clearing House Immigration Report, located at: <http://trac.syr.edu/immigration/reports/291/>.

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I. BACKGROUND

A. Who Is Subject to INA § 241(a)(5), and Does An Order Already Exist?

Who is subject to reinstatement of removal?

Unless an individual meets a statutory or judicial exemption, discussed below, § 241(a)(5) applies to noncitizens who return to the United States illegally after having been removed under a prior order of deportation, exclusion, or removal.

The reinstatement statute states:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act,⁴ and the alien shall be removed under the prior order at any time after the reentry.

Even though the language of the statute references only prior orders of “removal,” DHS also may reinstate prior orders of deportation or exclusion. *See* § 309(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)⁵ (deeming “any reference in law to an order of removal . . . to include a reference to an order of exclusion and deportation or an order of deportation”).

Who is statutorily exempt from reinstatement of removal under INA § 241(a)(5)?

The following individuals are statutorily exempt from § 241(a)(5):

- Individuals applying for adjustment of status under INA § 245A (legalization) who are covered by certain class action lawsuits⁶
- Nicaraguans and Cuban applicants for adjustment under § 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)⁷
- Salvadoran, Guatemalan, and Eastern European applicants under NACARA § 203⁸
- Haitian applicants for adjustment under the Haitian Refugee Immigration Fairness Act of 1998⁹

⁴ Some online versions incorrectly use the word “chapter” rather than “Act.”

⁵ Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

⁶ *See* Legal Immigration Family Equity Act (LIFE Act), § 1104(g), Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000). The relevant class action law suits include *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.* 509 U.S. 43 (1993); and *Zambrano v. INS, vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993).

⁷ LIFE Act § 1505(a)(1) amending NACARA § 202(a)(2); 8 C.F.R. § 241.8(d).

⁸ LIFE Act § 1505(c).

⁹ LIFE Act § 1505(b)(1) amending HRIFA § 902(a)(2); 8 C.F.R. § 241.8(d).

Who is judicially exempt from reinstatement of removal under INA § 241(a)(5)?

According to several circuit courts, INA § 241(a)(5) does not apply retroactively to individuals who reentered the United States *and* applied for immigration relief (*e.g.*, affirmative adjustment of status, asylum) before the date § 241(a)(5) took effect, April 1, 1997. The First, Seventh, Ninth, Tenth, and Eleventh Circuits have favorable retroactivity decisions, although the First, Seventh, and Eleventh Circuit decisions pre-date the Supreme Court's decision in *Fernandez-Vargas*, 548 U.S. 30 (2009).¹⁰ See § II.B.1, *infra*, for further discussion of these cases.

How does counsel assess whether a client may be subject to INA § 241(a)(5)?

First, determine whether the client has a prior deportation, exclusion or removal order. In addition to asking the client and reviewing any documentation provided, counsel could: (1) call the Executive Office for Immigration Review (800 898-7180); (2) file Freedom of Information Act requests with the DHS and EOIR; and/or (3) file a fingerprint records request with the Federal Bureau of Investigations.

Second, determine whether the client departed under the prior order. The plain language of § 241(a)(5) requires an illegal *reentry* “after having been removed or having departed voluntarily, under an order of removal.” If the client has not departed the country since the removal order, the statute does not apply. However, in this situation, DHS could attempt to execute the outstanding order.

Third, determine whether the client reentered the United States illegally. In general, a person enters legally when they are admitted following inspection and authorization by an immigration officer. However, whether an entry is legal can involve complex entry and admission issues. See § II.B.2, *infra*, for further discussion.

Individuals who meet all three statutory conditions – a prior order, a departure from the United States, and an illegal reentry – and who do not fall under a statutory or judicial exemption are subject to INA § 241(a)(5).

How does counsel find out if DHS issued a reinstatement order?

Some clients, especially those DHS detainees, are not aware that DHS issued a reinstatement order. If counsel provides, or has provided, DHS with a Notice of Entry of Appearance (Form G-28), the regulations require DHS to serve counsel with a copy of the reinstatement order. See 8 C.F.R. § 292.5(a) (requiring notice and service of papers on counsel or the individual if unrepresented). See also 8 C.F.R. § 241.8(b) (mandating that DHS provide written notice of reinstatement determination to the individual). A sample letter to DHS requesting a copy of the reinstatement order and accompanying documentation is at the end of this advisory.

DHS often issues reinstatement orders to individuals charged with criminal prosecution under INA § 276, 8 U.S.C. § 1326 (illegal reentry after deportation) around the same time the prosecutor files the criminal charges. If the client currently is facing or has faced a § 1326

¹⁰ *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799, 810 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1285 (11th Cir. 2004); *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-91 (10th Cir. 2007); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011).

charge, the prosecution likely produced a copy of the reinstatement order in the § 1326 case. In this situation, counsel should contact the individual's federal defender to obtain a copy of the order, any immigration documentation produced in the case, and/or information regarding the disposition of the criminal case.

B. Bar to Statutory Relief, Exemptions, and Other Considerations

After DHS issues a reinstatement order, can a person apply for “relief” from removal?

Under the plain language of § 241(a)(5), once DHS reinstates a prior order, “the [person] is not eligible and may not apply for any relief under this Act. . . .”

Are there any “exemptions” to this statutory bar to “relief”?

Notwithstanding the statutory bar to “relief,” counsel should consider the appropriateness of the following immigration options:

1. Withholding of Removal and the UN Convention Against Torture (CAT)¹¹

DHS must refer individuals who express a fear of return during the reinstatement process to an asylum officer for a “reasonable fear” interview. 8 C.F.R. §§ 208.31; 241.8(e). If an asylum officer determines that the person has a “reasonable fear of persecution or torture,” the person may apply for withholding or relief under CAT before an immigration judge. 8 C.F.R. §§ 208.31(e) (requiring asylum officer to refer case to immigration judge); 1208.31(e) (same); 241.8(e) (same); 1241.8(e) (same); 8 C.F.R. §§ 208.2(c)(2) (immigration judge jurisdiction in referred cases); 1208.2(c)(2) (same). If the immigration judge (IJ) denies the application/s, the person may appeal the IJ's decision to the Board of Immigration Appeals (BIA). 8 C.F.R. § 1208.31(e).

If the asylum officer determines the person did not establish a reasonable fear of persecution, the person may seek review of that determination by an immigration judge. 8 C.F.R. §§ 208.31(f), (g); 1208.31(f), (g). If the IJ *disagrees* with the asylum officer's determination, the person then may apply for withholding and CAT relief. 8 C.F.R. §§ 208.31(g)(2); 1208(g)(2). If the IJ *agrees* with the asylum officer's determinations, the person cannot appeal to the BIA. 8 C.F.R. §§ 208.31(g)(1); 1208.31(g)(1).

2. VAWA Adjustment

Individuals who qualify for adjustment of status under the Violence Against Women Act (VAWA) may consider arguing that § 241(a)(5)'s bar to relief should not preclude adjustment if they establish eligibility for a special VAWA waiver under INA § 212(a)(9)(C)(iii).¹²

¹¹ Under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the United States has agreed not to “expel, return (‘refouler’) or extradite” a person to another state where he or she would be tortured. The Department of Justice takes the position that allowing persons subject to reinstatement to present a claim for withholding of removal or CAT relief is necessary to fulfilling the United States' obligations under Article 3. *See generally* 64 Fed. Reg. 8478 (Feb. 19, 1999).

As Congress enacted waivers to exempt VAWA beneficiaries from virtually all inadmissibility grounds, including INA § 212(a)(9)(C), DHS, and the courts, should similarly equitably construe § 241(a)(5)'s bar to relief as inapplicable. In fact, in 2006, Congress stated that agencies should grant applications to waive inadmissibility for prior orders in these cases.¹³ In a 2009 policy memorandum, DHS simultaneously acknowledged that VAWA self-petitioners who qualify for the special waiver under INA § 212(a)(9)(C)(iii) may seek adjustment of status but nonetheless also determined that § 241(a)(5) applies to VAWA self-petitioners who are inadmissible under INA § 212(a)(9)(C)(i)(II) for reentering illegally after a prior order.¹⁴ Significantly, however, the policy memorandum did not address Congress's 2006 direction to grant I-212 waiver applications, nor has any court. Some practitioners report success with adjusting the status of VAWA self-petitioners who qualify for the special waiver. For more information on VAWA adjustment and § 241(a)(5) and structuring waiver requests, please contact Gail Pendleton at gailpendleton@comcast.net.

3. T and U Nonimmigrant Status

Victims of trafficking who qualify for nonimmigrant status under INA § 101(a)(15)(T) and victims of crime who qualify for nonimmigrant status under INA § 101(a)(15)(U) also may argue that § 241(a)(5) does not apply to them. These individuals may apply for waivers of most inadmissibility grounds. *See* INA § 212(d)(13) (waiver for trafficking victims); INA § 212(d)(14) (waiver for crime victims). On the waiver application, practitioners should specifically seek to waive inadmissibility under INA § 212(a)(9)(A) for a prior order and INA § 212(a)(9)(C)(i)(II) for post April 1, 1997 illegal reentries after a prior order, *see* n.15, *infra*. If DHS were to approve the waiver application, the approval would waive inadmissibility under

¹² Under this section, VAWA self-petitioners are eligible for a waiver of INA § 212(a)(9)(C) if a connection exists between the battering or subjection to extreme cruelty and the person's removal, departure, reentry, or attempted reentry.

¹³ *See* § 813(b) of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006), which provides:

Discretion to Consent to an Alien's Reapplication for Admission.—

(1) In General.—The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion.

(2) Sense of Congress.—It is the sense of Congress that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the [INA] . . . , and relief under section 240A(b)(2) or 244(a)(3) of such Act (as in effect on March 31, 1997) pursuant to [8 C.F.R. § 212.2].

¹⁴ Memorandum from Michael Aytes, USCIS Acting Deputy Director, to USCIS Leadership, "Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241 (a)(5) of the Immigration and Nationality Act in light of *Gonzalez v. DHS*, 508 F.3d. 1227 (9th Cir. 2007)," (May 19, 2009) at p. 6 n.5.

INA § 212(a)(9)(A)&(C)(i)(II) and arguably also would waive the prior order for purposes of INA § 241(a)(5). Moreover, as set forth above in § I.B.2, *supra*, Congress has expressed its intent that agencies should consent to qualifying T and U nonimmigrant status seekers' reapplication for admission after a prior order. One could argue that this sentiment extends to waiver applications under the broader waiver provisions in INA §§ 212(d)(13)&(14).

In addition, the regulations governing U nonimmigrant status provide that orders of exclusion, deportation, or removal *issued by DHS* will be "deemed canceled by operation of law as of the date of USCIS' approval of Form I-918 [petition for U nonimmigrant status]." 8 C.F.R. §§ 214.14(c)(5)(i) & (f)(6). Removal orders issued by DHS include reinstatement orders as well as expedited removal orders under INA §235(b), orders against non-lawful permanent residents with an aggravated felony conviction under INA § 238(b), and orders against entrants under the Visa Waiver Program under INA § 217(b). Thus, USCIS' approval of a petition for U nonimmigrant status will automatically cancel a reinstatement order (as well as any of these other orders).

For more information regarding § 241(a)(5) and T and U nonimmigrant status, please contact Ellen Kemp (ellen@nipnlg.org) or Gail Pendleton (gailpendleton@comcast.net).

4. Consular processing and I-212 Waivers

When assessing whether to file a petition for review of a reinstatement order, counsel should consider whether a client is or eventually may be eligible to consular process; i.e., apply for an immigrant or nonimmigrant visa at a U.S. embassy or consulate abroad. A consular officer may approve such a visa application provided the applicant is admissible under INA § 212 or, if inadmissible, provided DHS approves an application to waive inadmissibility.

If the chances of prevailing on a petition for review are slim and the person eventually could consular process, the individual may decide not to litigate (though of course a person could do both). Individuals considering consular processing in lieu of litigation, however, should understand that courts generally will not review consular decisions to deny an immigrant or nonimmigrant visa application filed abroad.

Section 212(a)(9) of the INA is the ground of inadmissibility that always is relevant to persons with reinstatement orders. After DHS deports someone by reinstating a prior order, that person is inadmissible under (1) INA § 212(a)(9)(A) (previous removal order) and/or; (2) INA § 212(a)(9)(C)(i)(II) (illegal reentry after prior removal order).

A person who is inadmissible under INA § 212(a)(9)(A) may apply for a waiver under INA § 212(a)(9)(A)(iii). 8 C.F.R. §§ 212.2(b) (nonimmigrant visas) and 212.2(d) (immigrant visas). Inadmissibility under INA § 212(a)(9)(C)(i)(II) is slightly more complicated. This inadmissibility ground applies *only* to persons who reentered or attempt to reenter after April 1, 1997.¹⁵ Therefore, if the person's reinstatement order is based on a pre-April 1, 1997 reentry, INA § 212(a)(9)(C)(i)(II) does not apply. However, if the person's reinstatement order is based

¹⁵ See U.S. Department of State cable to the field, transmitted April 4, 1997. See also Memorandum of Paul W. Virtue, INS Acting Executive Associate Commissioner (June 17, 1997).

on a post-April 1, 1997 reentry, INA § 212(a)(9)(C)(i)(II) applies and the person cannot apply for a waiver unless 10 years have elapsed since the date of last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

For people who are inside the United States, a pending or approved I-212 waiver application will not prohibit DHS from reinstating a prior order if the person reentered *after* April 1, 1997 (and therefore is subject to INA § 212(a)(9)(C)(i)(II)).¹⁶ People who reentered before pre-April 1, 1997 and are considering filing an I-212 waiver application should contact Stacy Tolchin at stacy@tolchinimmigration.com.

5. *Duran Gonzales* Class Members and I-212 Waivers

Duran Gonzalez is a Ninth Circuit-wide class action challenging DHS' refusal to follow *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Perez-Gonzalez*, the Ninth Circuit said that individuals who had been removed or deported may apply for adjustment of status (under INA § 245(i)) along with an accompanying I-212 waiver application. In *Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned *Perez-Gonzalez*, deferring to the BIA's holding that individuals who have previously been removed or deported are not eligible to apply for adjustment of status. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Some *Duran Gonzales* class members may argue that they are not subject to reinstatement because they reasonably relied on *Perez-Gonzales* when applying for adjustment with a waiver. *See Duran Gonzales v. DHS*, 09-35174, 2013 U.S. App. LEXIS 6401 (9th Cir. March 29, 2013) (remanding class action to district court for consideration of retroactivity claims). For more detailed and current information on the status of *Duran Gonzales*, please see AIC's website at: <http://www.legalactioncenter.org/litigation/adjustment-status-under-%C2%A7-245i-noncitizens-previously-removed-duran-gonzalez-class-action>.

6. Prosecutorial Discretion

DHS may exercise prosecutorial discretion to cancel a reinstatement order, defer removal, or place someone subject to reinstatement in removal proceedings before an immigration judge under INA § 240. For more information on prosecutorial discretion, *see* AIC's practice advisory entitled *Prosecutorial Discretion: How to Advocate for Your Client* (updated June 24, 2011), located at: <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>.

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¹⁶ *See generally* Memorandum from Michael Aytes, USCIS Acting Deputy Director, to USCIS Leadership, "Adjudicating Forms I-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of [*Duran*] *Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007)," (May 19, 2009). *See also* n.15, *supra*, regarding applicability of INA § 212(a)(9)(C) to post April 1, 1997 reentries.

C. Reinstatement Process and the Agency Record

What is the regulatory process for reinstatement proceedings?

In reinstatement proceedings, a DHS officer conducts an interrogation to determine whether the individual has a prior removal order, actually is the person identified in the prior order, and has unlawfully reentered. 8 C.F.R. § 241.8(a). This interrogation usually takes place under oath, resulting in a written sworn statement. In making this determination, the officer “must obtain the prior order.” 8 C.F.R. § 241.8(a)(1). In cases where there is an identity dispute, the regulations require DHS to compare the person’s fingerprints with those in its file. In the absence of such fingerprints, DHS cannot remove the individual. 8 C.F.R. § 241.8(a)(2).

Section 241(a)(5) applies only to unlawful reentries. In assessing whether a reentry was unlawful, DHS “shall consider all relevant evidence, including statements made by the [individual] and any evidence in the [individual’s] possession” and “shall attempt to verify [the] claim, if any, that [the individual] was lawfully admitted, which shall include a check of Service data systems available to the officer.” 8 C.F.R. § 241.8(a)(3).

The regulations require DHS to ask whether the person has a fear of return. 8 C.F.R. §§ 208.31; 241.8(e). If the person indicates such a fear during reinstatement proceedings and DHS ultimately determines the person is subject to reinstatement, DHS must refer him or her to an asylum officer for a reasonable fear interview. *See* § I.B.1, *supra*, for further discussion of reasonable fear proceedings.

At the conclusion of the interrogation, the officer completes the top portion of Form I-871, titled “Notice of Intent to Reinstatement.” This form contains the factual allegations against the individual, including alienage, the date of the prior order, and the date of illegally reentry. The form also states that there is no right to a hearing before an immigration judge.

DHS generally presents Form I-871 to the individual to sign and to indicate whether he or she wishes to make a statement contesting the determination. 8 C.F.R. § 241.8(a)(3) (“[i]f the alien wishes to make a statement, the officer shall allow the alien to do so and shall consider whether the alien’s statement warrants reconsideration of the determination.”).

Another officer, usually a supervisor, then signs the bottom portion of Form I-871, labeled “Decision, Order and Officer’s Certification.” DHS officers often sign the top and bottom portions of the form on the same day, which renders the order immediately executable.

A sample Form I-871 is attached to the end of this advisory.

Is there a way to correct or supplement the agency’s reinstatement record?

Yes. If the person did not contest (or did not contest adequately) the reinstatement determination *and* there is a basis to challenge the reinstatement order, it is important to correct or supplement the agency’s record in order to:

- Document legal and factual arguments one intends to raise in a petition for review before the circuit court. The reinstatement order and all related documentation constitute the administrative record. *See* Federal Rule of Appellate Procedure 16. Importantly, “the

court of appeals shall decide the petition only on the administrative record on which the order of removal is based.” INA § 242(b)(4)(A).

- Preserve the ability to challenge the reinstatement order on due process grounds. *Miller v. Mukasey*, 539 F.3d 159, 164 (2d Cir. 2008).

In general, there are two ways to correct or supplement a reinstatement record:

- File supplemental documentation directly with DHS (usually ICE).
- File an administrative motion to reconsider or reopen the reinstatement order with DHS. See 8 C.F.R. § 103.5 (governing motions to reopen or reconsider DHS decisions); see also § III.A, *infra*. One court suggested that a person may file a separate petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). But see *Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

II. CHALLENGING REINSTATEMENT ORDERS IN CIRCUIT COURT

What purpose does challenging the reinstatement order in federal court serve?

Before filing a petition for review of a reinstatement order, it is important to consider what impact, if any, a successful challenge will have on the individual’s ability to remain in the United States. Even if the reinstatement order is vacated, DHS arguably still could place the person in removal proceedings pursuant to INA § 240. It is helpful to ask this question: but for the reinstatement order, what immigration relief/status is available to the client?

For example, individuals subject to reinstatement also are subject to inadmissibility under INA § 212(a)(9)(C)(i)(II) for having reentered illegally after a prior deportation if they reentered after April 1, 1997 (see n.15, *supra*). A waiver of this ground is not available until ten years after the person’s departure. INA § 212(a)(9)(C)(ii). Thus, adjustment usually is not a viable relief option for individuals subject to reinstatement (unless the person reentered before April 1, 1997 and, therefore, is not inadmissible under INA § 212(a)(9)(C)(i)(II)).

Similarly, before seeking circuit court review, counsel should consider whether the person meets the statutory requirements of cancellation of removal, asylum, or voluntary departure in the event the court/DHS vacates the reinstatement order and the person is in removal proceedings.

Other considerations that may factor into the decision to challenge a reinstatement order in court include: whether DHS is detaining the person and/or the likelihood of a stay of removal, the strength of the arguments, and the cost of representation to the individual. In addition, the court of appeals retains jurisdiction over a petition for review even if the court denies a stay or the person chooses not to seek a stay.

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A. Jurisdiction, Transfer and Venue

Can a noncitizen appeal a reinstatement order and, if so, to which court?

Yes. Every circuit has held that the court of appeals has jurisdiction over petitions for review of reinstatement orders.¹⁷

Filing a petition for review does *not* automatically stay a person's deportation. The person must separately ask for, and the court of appeals must grant, a stay of removal.¹⁸ However, as mentioned above, a person's deportation does not bar filing or litigating a petition for review to challenge a reinstatement order.

What is the deadline for filing a petition for review?

The deadline for filing a petition for review is 30 days from the date of the order, i.e., the date DHS signed the bottom portion of Form I-871 (entitled Decision, Order and Officer's Certification). INA § 242(b)(1); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 342-43 (1st Cir. 2004); *Lemos v. Holder*, 636 F.3d 365, 366-67 (7th Cir. 2011).

Courts construe this deadline as jurisdictional, meaning that the court will not exercise jurisdiction over an untimely petition for review.¹⁹

What if DHS did not timely serve the reinstatement order?

Attorneys increasingly are reporting that DHS is violating the regulations by not timely serving the reinstatement order. See 8 C.F.R. §§ 241.8(b) (mandating that DHS provide written notice of reinstatement determination to the individual); 292.5(a) (requiring notice and service of papers on counsel or the individual if unrepresented).

Counsel should not rely on the date of service when calculating the petition for review deadline. In *Lemos v. Holder*, 636 F.3d 365, 367 (7th Cir. 2011), the Seventh Circuit held that "formal service" of a reinstatement order by mail is not required where the petitioner signed the notice of intent to reinstate and provided a thumbprint. The court did not expressly decide whether the 30-day clock commences upon service on counsel because, the court concluded, counsel was not "well placed" to make this argument because he filed the petition for review 68 days after

¹⁷ *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 110 (3d Cir. 2003); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 105 (4th Cir. 2001); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 536 (6th Cir. 2004); *Gomez-Chavez v. INS*, 308 F.3d 796, 800 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 326 (8th Cir. 2003); *Chay Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162 n.3 (10th Cir. 2003); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004).

¹⁸ A practice advisory on how to file a motion to stay removal and a sample stay motion are located at:

http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf.

¹⁹ For further information on how to file and litigate a petition for review, see AIC's practice advisory entitled, "How to File a Petition for Review," located at:

http://www.americanimmigrationcouncil.org/sites/default/files/lac_pa_041706.pdf

acquiring actual knowledge of the reinstatement order. *Id.* However, the court strongly suggested it would not find that the petition for review deadline commences upon service of the reinstatement order. *Id.* at 366-67. In contrast, the Sixth Circuit has held that where DHS did not serve the reinstatement order on counsel during the 30-day window for filing a petition for review, the 30-day clock did not start until DHS served the order. *See Villegas de la Paz v. Holder*, 640 F.3d 650, 654-55 (6th Cir. 2010).

Thus, if counsel is aware of a reinstatement order but DHS did not serve the order on petitioner or counsel, counsel still should file a petition for review within the 30-day window even if he or she does not have a copy of the order to attach to the petition (as required by INA § 242(c)). The petition should detail efforts to obtain the reinstatement order,²⁰ let the court know that counsel will file a copy of the order once DHS provides it, and/or ask the court to order DHS to produce the order.

When does the 30-day petition for review clock begin if the person is in reasonable fear proceedings?

To date, only one court has resolved this issue. The Ninth Circuit has held “that where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final [for petition for review purposes] until the reasonable fear of persecution and withholding of removal proceedings are complete.” *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012). Thus, outside the Ninth Circuit, filing a petition for review within 30 days of the reinstatement order (even if reasonable fear proceedings are ongoing) may be necessary to safeguard an individual’s right to judicial review.

This issue was raised in the Second Circuit, although the court ultimately did not resolve it.²¹ *See Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010). Notably, in both the Second and Ninth Circuit litigation, the Office of Immigration Litigation argued that a petition for review filed prior to the conclusion of withholding/CAT proceedings is premature. *Herrera-Molina*, 597 F.3d at 132; *Ortiz-Alfaro*, 694 F.3d at 956.

What is the proper venue for a petition for review of a reinstatement order?

The INA provides that a petition for review “shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” INA § 242(b)(2). If the immigration judge completed proceedings and DHS issued the reinstatement order in the same circuit, venue lies in that circuit.

If the immigration judge completed proceedings in a circuit different from the circuit in which DHS issued a reinstatement order, the person might have a choice of venue. In other words, the individual might file a petition for review either in the circuit in which DHS issued the reinstatement order (where the courts routinely find venue proper) or the circuit in which the

²⁰ See sample letter to DHS requesting a copy of the reinstatement order attached to the end of this advisory.

²¹ Although the Second Circuit has yet to decide this issue, the court once reviewed a petition for review apparently filed within 30 days of the conclusion of withholding and CAT proceedings, not the reinstatement order. *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 144 (2d Cir. 2008).

immigration judge completed proceedings. In the latter situation, based on its actions in at least one case, OIL may move to transfer the petition to the jurisdiction where DHS issued the reinstatement order. Thus, before filing a petition for review in a circuit other than the circuit where DHS issued the reinstatement order, counsel should research whether the court treats INA § 242(b)(2) as a venue provision, in which case the court may adjudicate the petition, or a jurisdictional provision, in which case the court will refuse to adjudicate the petition.²²

What if the person erroneously sought district court review of the reinstatement order?

In this situation, the individual (or counsel) may request that the district court transfer the action to the court of appeals under 28 U.S.C. § 1631 to cure the lack of jurisdiction. Transfer under § 1631 is appropriate if three conditions are met: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action or appeal was filed; and (3) the transfer is in the interest of justice. In the immigration context, courts have invoked the transfer statute in the following situations: where the parties justifiably relied on a statute or court decision in deciding to file in an improper venue; where transfer was necessary to preserve review that would otherwise be time barred; and where transfer would prevent undue delay.²³

What options are available for individuals who miss the petition for review deadline?

Individuals who miss the 30-day petition for review deadline still may file an administrative motion to reopen or reconsider the reinstatement order with DHS and then seek judicial review if that motion is denied, unless DHS issued the order within the jurisdiction of the Seventh Circuit. *Compare Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004) (noting that “[s]hould the eventual disposition of that motion [to reconsider] not be in the petitioner’s favor, he may, of course, file a separate petition for review with respect thereto”) *with Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction). Other circuits have not addressed this issue yet.

Other potential federal court options are beyond the scope of this advisory. However, where petitioner misses the petition for review deadline due to ineffective assistance of counsel or affirmative government misconduct, at least one court has said a motion to reopen is an appropriate procedural vehicle to raise such claims. *Luna v. Holder*, 637 F.3d 85, 104-05 (2d Cir. 2011).

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²² See, e.g., *Avila v. United States AG*, 560 F.3d 1281, 1284 (11th Cir. 2009) (citing circuit cases treating INA § 242(b)(2) as a nonjurisdictional venue provision and according similar treatment); see also *Trejo-Mejia v. Holder*, 593 F.3d 913, 916 n.2 (9th Cir. 2010) (declining to decide whether INA § 242(b)(2) is a venue or jurisdictional statute).

²³ See, e.g., *Castro-Cortez v. INS*, 239 F.3d 1037, 1046-47 (9th Cir. 2001) *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (transferring case where “petitioners had good reason to believe that direct review was not available and that a habeas corpus petition was their only avenue to secure judicial review”); *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) (finding that, without transfer “the petitioner will have lost his opportunity to present the merits of the claim due to a statute of limitations bar”); *Ruiz v. Mukasey*, 552 F.3d 269, 276 (2d Cir. 2009) (stating that “although Petitioners’ claims likely would be timely if filed anew in the district court, a transfer would expedite their review, thereby furthering the interest of justice”).

Are there some reinstatement-related decisions that the circuit court will not review?

Yes. For example, the Ninth Circuit lacks jurisdiction to review decisions terminating removal proceedings to allow DHS to issue a reinstatement order because these decisions do not meet the definition of a final order of removal under INA § 101(a)(47), as construed in prior case law, and the court only reviews final orders. *Galindo-Romero v. Holder*, 640 F.3d 873, 877-81 (9th Cir. 2011); *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir. 2009). Similarly, the Seventh Circuit lacks jurisdiction to review the denial of a U visa petition and inadmissibility waiver. Despite the petitioner’s argument that the denials are inextricably intertwined with DHS’ ability to issue a reinstatement order, among other reasons, the court held that decisions denying visa petitions by U.S. Citizenship and Immigration Services are not reviewable under INA § 242. *Torres-Tristan v. Holder*, 656 F.3d 653, 663 (7th Cir. 2011).

If a petitioner has criminal convictions that would preclude the court of appeals from reviewing a petition or review, does the statutory bar also apply to reinstatement orders?

Yes, the statutory bar to review of cases involving certain criminal convictions, INA § 242(a)(2)(C), applies to review of reinstatement orders. However, pursuant to INA § 242(a)(2)(D), courts nevertheless may review questions of law or constitutional issues. *See* INA § 242(a)(2)(D); *see also Debeato v. AG*, 505 F.3d 231, 234 (3d Cir. 2007); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006).

B. Potential Arguments for Challenging Reinstatement Orders

1. Retroactivity

Did “reinstatement” exist prior to IIRIRA?

Yes, but the only individuals subject to reinstatement under former INA § 242(f) (1995) were individuals previously deported (not excluded) on grounds relating to certain criminal convictions, failing to register, falsification of documents, or security or terrorist related grounds. Under pre-IIRIRA reinstatement procedures, the former Immigration and Naturalization Service (INS) issued an Order to Show Cause charging the individual with deportability under former INA § 242(f). 8 C.F.R. § 242.23 (1995). At a deportation hearing, an IJ would determine deportability and adjudicate any relief application.

In 1996, Congress enacted § 305 of IIRIRA, which amended and redesignated former INA § 242(f) by expanding the scope of individuals subject to reinstatement, purporting to bar reopening and review of the prior order, and barring all relief under the INA.

What did the Supreme Court hold in *Fernandez-Vargas v. Gonzales*?

In *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006), the Court held that § 241(a)(5) may be applied to an individual who (1) reentered the United States before April 1, 1997; and (2) did nothing to legalize his unlawful status before that date. The petitioner in *Fernandez-Vargas* was last deported in 1981 and reentered illegally shortly thereafter. Although he fathered a U.S. citizen son in 1989 (before April 1, 1997), he did not marry the boy’s U.S. citizen mother or file an adjustment application and I-212 waiver application until March 2001 (after April 1, 1997). The decision abrogated decisions of the Sixth and Ninth Circuits, which previously found that § 241(a)(5) did not apply to pre-April 1, 1997 reentrants. *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001).

What was the Supreme Court’s rationale in *Fernandez-Vargas*?

Applying the retroactivity test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court said it could not discern whether Congress intended § 241(a)(5) to apply retroactively or prospectively. 548 U.S. at 38-42. However, the Court also found that application of § 241(a)(5) to petitioner did not have impermissible retroactive effect, reasoning that the person’s illegal reentry does not trigger § 241(a)(5). *Id.* at 44. Rather, “it is the conduct of remaining in the country after entry that is the predicate action” triggering § 241(a)(5)’s application, the Court said. The Court further stated that § 241(a)(5) does not penalize illegal reentry but, rather, establishes a process to “stop an indefinitely continuing [immigration] violation.” 548 U.S. at 44.

Because the petitioner continued his illegal presence after § 241(a)(5) took effect, the Court found his conduct was not completed prior to the change in law. 548 U.S. at 45 (“*Fernandez-Vargas* has no retroactivity claim based on a new disability consequent to a completed act ...”).

Does INA § 241(a)(5) apply retroactively to individuals who took affirmative steps to legalize status prior to April 1, 1997?

Whether § 241(a)(5) applies retroactively to someone who tried to legalize status before April 1, 1997 depends on the facts of the case and circuit case law. In *Fernandez-Vargas*, the Court expressly declined to decide this issue. *See Fernandez-Vargas*, 548 U.S. at 46.²⁴ Examples of affirmative steps to legal status include, but are not limited to, filing an adjustment application, an immigrant visa petition, labor certification application, or asylum application, or seeking temporary protective status.

Pre-*Fernandez-Vargas* decisions holding that § 241(a)(5) does not apply retroactively to petitioners who applied for adjustment before April 1, 1997 arguably remain good law because the Supreme Court’s rationale does not change the retroactive effect analysis employed by those courts. *Arevalo v. Ashcroft*, 344 F.3d 1, 4 (1st Cir. 2003); *Faiz-Mohammed v. Ashcroft*, 395 F.3d 799, 810 (7th Cir. 2005); *Sarmiento-Cisneros v. Ashcroft*, 381 F.3d 1277, 1278 (11th Cir. 2004). *Accord Valdez-Sanchez v. Gonzales*, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (discussing ongoing validity of these cases).

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²⁴ *See also* 548 U.S. at 33 (limiting holding to the “continuing violator of the INA now before us”); 36 n.5 (referring to pre-IIRIRA marriage or adjustment application as “facts not in play here”); 44 n.10 (petitioner “never availed himself of [cancellation, adjustment or voluntary departure] or took action that enhanced their significance to him in particular . . .”); 47 (“§ 241(a)(5) has no retroactive effect when applied to aliens like *Fernandez-Vargas* . . .”).

The following table summarizes circuit court decisions since the *Fernandez-Vargas* decision:

Upholding Retroactive Application	Rejecting Retroactive Application
<i>Molina Jerez v. Holder</i> , 625 F.3d 1058, 1070 (8th Cir. 2010) (pre-4/1/1997 asylum application).	<i>Chay Ixcot v. Holder</i> , 646 F.3d 1202, 1213 (9th Cir. 2011) (pre-4/1/1997 asylum application). Decision arguably not limited to asylum applications. ²⁵
<i>Silva Rosa v. Gonzales</i> , 490 F.3d 403, 410 (5th Cir. 2007) (pre-4/1/1997 marriage to a U.S. citizen and approved visa petition, but adjustment application filed after 4/1/1997). ²⁶	<i>Valdez-Sanchez v. Gonzales</i> , 485 F.3d 1084, 1091 (10th Cir. 2007) (pre-4/1/1997 application to remove condition on lawful permanent residency).
<i>Herrera-Molina v. Holder</i> , 597 F.3d 128, 132, 137-38 (2d Cir. 2010) (pre-4/1/1997 marriage to a U.S. citizen, but visa petition and adjustment application filed after 4/1/1997). ²⁷	*Per discussion above, § 241(a)(5) should not apply retroactively to petitioners who applied for adjustment before 4/1/1997.

2. Manner of Entry

Did DHS follow the regulations for determining whether reentry was illegal?

The reinstatement regulations provide that the DHS “officer shall consider all relevant evidence, including statements made by the [individual] and any evidence in the [individual’s] possession” and “shall attempt to verify [the] claim, if any, that [the individual] was lawfully admitted, which shall include a check of Service data systems available to the officer.” 8 C.F.R. § 241.8(a)(3). DHS violates this regulation when it fails to consider all relevant evidence or does not attempt to verify a claim that entry was lawful. The viability of this argument may depend on whether the violation prejudiced the person. *See* § II.B.5 below, discussing regulatory violations.

What if the reentry was legal but the agency record lacks evidence of it?

The plain language of INA § 241(a)(5) requires that the person “has reentered the United States illegally,” therefore, DHS should not issue reinstatement orders to people who reenter the country *legally*. However, whether a person’s entry was lawful can involve complex entry and admission issues. If the DHS officer did not understand why the person’s reentry was legal or did not have evidence establishing or supporting a lawful reentry, counsel should try to provide the explanation and/or evidence (for example, a declaration from the client). Counsel first should submit the explanation/evidence to DHS in writing and follow-up directly with the officer on the case by either phone or written correspondence. In addition, or as an alternative, counsel

²⁵ *See Chay Ixcot*, 646 F.3d at 1213 (holding that “the post IIRIRA reinstatement provision is impermissibly retroactive . . . when applied to an immigrant, such as Chay, who applied for immigration relief prior to IIRIRA’s effective date”) (emphasis added).

²⁶ *See also Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005) (upholding retroactive application) (decided prior to *Fernandez-Vargas*). *But see Lopez-Flores v. DHS*, 376 F.3d 793, 795 (8th Cir. 2004) (rejecting retroactive application) (decided prior to *Fernandez-Vargas*).

²⁷ *See also Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 110 (4th Cir. 2001) (same) (decided prior to *Fernandez-Vargas*).

could file with DHS a motion to reopen or reconsider the reinstatement order pursuant to 8 C.F.R. § 103.5. *See* § I.C, *supra*, for details regarding supplementing the agency record via direct submission or administrative motion.

When arguing to the court of appeals that a person's reentry was lawful, it is imperative that the administrative record contains some evidence to support the claim because the court's review is limited to the administrative record and will treat DHS' factual findings as "conclusive unless any reasonable adjudicator would be compelled to the contrary." INA § 242(b)(4)(A)&(B). If the administrative record does not contain such evidence, counsel should consider filing a motion to supplement the administrative record pursuant to Federal Rule of Appellate Procedure 16(b).

Is a reentry after inspection and admission by an immigration officer a legal entry?

If a U.S. Customs and Border Protection officer inspects and admits someone after a prior order, there is an *argument* – supported by the definitions of "admission" and "admitted" in INA § 101(a)(13)(A) and BIA precedent and rules of statutory construction – that such a reentry is not an "illegal" reentry.

The premise of the argument is that an entry following inspection and admission is a procedurally regular entry and, therefore, a legal entry. The BIA consistently differentiates between a procedurally regular and substantively legal entries. A procedurally regular entry occurs where the individual presents himself or herself to immigration officers at a port of entry (thereby subjecting oneself to the grounds of inadmissibility) and the immigration officer inspects and admits the person. A procedurally regular entry includes entries where the immigration officer waves the person through at a port of entry. A substantively legal entry similarly requires inspection and admission by an immigration officer but, unlike a procedurally regular entry, the individual actually meets the substantive legal requirements for admission (i.e., holding a valid visa/status and demonstrating eligibility for admission under INA § 212). *See Matter of G*, 3 I&N Dec. 136 (BIA 1948); *Matter of V--- Q---*, 9 I&N Dec. 78 (BIA 1960); *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980); *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). The Board considers "procedurally regular" entries lawful, unless a noncitizen makes a false claim to United States citizenship. *Matter of Areguillin*, 17 I&N Dec. at 301 n.3; *Matter of Quilantan*, 25 I&N Dec. at 293.

In addition, the regulation expressly requires that, when determining whether a person unlawfully reentered the United States, DHS officers "shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession" and "shall attempt to verify [the] claim, if any, that [the individual] was lawfully admitted..." 8 C.F.R. § 241.8(a)(3) (emphasis added). Notably, DHS officers are bound by the BIA's interpretation of the procedurally regular entry standard as set forth in *Matter of Areguillin* and *Matter of Quilantan*, *supra*. 8 C.F.R. § 103.10(b). Thus, under the plain language of 8 C.F.R. § 241.8(a)(3), DHS cannot deem a reentry "illegal" if the entrant was lawfully "admitted."

The First Circuit has suggested that someone who DHS inspected and allowed entry did not reenter the country illegally. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 (1st Cir. 2004). In this situation, the Court said, "the reinstatement provision would appear to be inapplicable by its express terms." *Id.*

However, the Second, Fifth, Ninth, and Tenth Circuits have rejected the argument that a procedurally regular entry is a legal entry. *Beekhan v. Holder*, 634 F.3d 723 (2d Cir. 2011); *Anderson v. Napolitano*, 611 F.3d 275, 277-79 (5th Cir. 2010); *Tamayo-Tamayo v. Holder*, 709 F.3d 795 (9th Cir. 2013); *Cordova-Soto v. Holder*, 659 F.3d 1029 (10th Cir. 2011). Nonetheless, future petitioners arguably might distinguish their cases from those decisions.

The Second and Tenth Circuit cases involved reentries by someone using a false passport (*Beekhan*) and someone who was a passenger in a vehicle that a CBP officer “waved through” at a port of entry (*Cordova-Soto*). The courts reasoned, at least in part, that because such reentries are illegal under INA § 276(a) (illegal reentry after deportation), they are similarly illegal for purposes of INA § 241(a)(5). *Beekhan*, 634 F.3d at 725; *Cordova-Soto*, 659 F.3d at 1034. However, neither court discussed the statutory distinction between INA §§ 241(a)(5) and 276(a). Specifically, under INA § 276(a), a reentry is illegal unless the Attorney General consents to the person’s reapplication for admission (i.e., an approved I-212 Form) whereas INA § 241(a)(5) does not similarly require the Attorney General’s consent. In addition, neither court addressed 8 C.F.R. § 241.8(a)(3).

The Ninth Circuit case, *Tamayo-Tamayo*, involved someone who knowingly presented an invalid alien registration card. However, the court did not receive briefing on the interplay between the term “illegal reentry” in INA § 241(a)(5) and the definitions of “admission” and “admitted” in INA § 101(a)(13)(A) as interpreted by the BIA, or how rules of statutory construction support the argument that a procedurally regular reentry is not an illegal reentry for § 241(a)(5) purposes. A rehearing petition, with *amici* support, has been filed.

The Fifth Circuit also considered whether a petitioner who self-deported in 1994 and reentered using a passport under her married name in 1996 could prove she lawfully entered. *Anderson v. Napolitano*, 611 F.3d 275, 277-79 (5th Cir. 2010). Even though the record contained a copy of an “admitted” stamp in the petitioner’s passport, the court upheld the reinstatement order, reasoning that DHS’ factual finding that the reentry was illegal was conclusive pursuant to INA § 242(b)(4)(B). *Id.* at 279 (stating that “[w]hile nothing in the administrative record supports the Department’s finding [that petitioner illegally reentered], nothing introduced before the Department or on appeal contradicts it either. Without some affirmative evidence undermining this finding, our hands are tied.”). Notably, the court did not address the distinction between procedurally regular and substantively legal entries above.

3. Collateral Challenges to the Prior Removal Order

Do the federal courts have jurisdiction to consider a challenge to a prior order?

Because the prior order underlies the reinstatement order, any legal or factual challenge to the prior order is considered collateral to the reinstatement order. Although § 241(a)(5) says the prior order “is not subject to being . . . reviewed . . .,” courts may review prior orders in certain cases.

If the prior order already is the subject of a pending petition for review when DHS issues the reinstatement order, § 241(a)(5)’s bar to review does not moot the petition for review. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2584 n.8 (2010); Resp. Br. 44 n.18, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, No. 09-60 (Mar. 2010) (stating that § 241(a)(5)’s bar to review “does not bar review of the prior order on direct judicial review under 8 U.S.C.

1252(a)(1) where, as here, such proceedings remain pending at the time of the reinstatement of the prior order of removal.”).

If the prior order is not the subject of a pending petition for review, whether the court will collaterally review the prior order depends on the facts of the case and developing circuit case law. By way of background, prior to the REAL ID Act of 2005,²⁸ with little or no analysis, some courts stated that they could not review prior removal orders.²⁹ Other courts recognized habeas jurisdiction to review the prior order if the person was denied judicial review in the prior proceeding.³⁰

In 2005, through the REAL ID Act, Congress enacted INA § 242(a)(2)(D), which provides for review of legal and constitutional questions notwithstanding the criminal and discretionary bars to judicial review (INA §§ 242(a)(2)(B) & (C)) or any other provision of the INA which “limits or eliminates judicial review,” other than a provision within INA § 242. The bar to review of the prior order in INA § 241(a)(5) is a provision “which limits or eliminates judicial review” and is not within INA § 242. Thus, it follows that courts may review only legal and constitutional challenges to prior removal orders.

Keep in mind, however, that because § 242(a)(2)(D) does not provide review where it is barred by a provision in INA § 242 (other than the criminal and discretionary bars), courts likely will find that they lack jurisdiction to review the prior orders in the following situations:

- where the prior order is an expedited removal order (review curtailed by INA §§ 242(a)(2)(A) & (e));
- where the person did not exhaust administrative remedies in the prior proceedings by appealing to the BIA (review curtailed by INA § 242(d)); and
- where the person did not timely file a petition for review of the prior order (review curtailed by INA § 242(b)(1)).

The post-REAL ID case law regarding collateral review continues to develop. In general, however, all the post-REAL ID Act collateral review case law is bad; even in cases where the court reviews the prior order, courts have upheld both the prior order and the reinstatement order. Counsel should carefully examine the case law of their circuit, and consider seeking *amici* assistance, when raising a collateral challenge in a petition for review.

²⁸ Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

²⁹ See, e.g., *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 115 (3d Cir. 2003); *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 295 (5th Cir. 2002); *Gomez-Chavez v. INS*, 308 F.3d 796, 801 (7th Cir. 2002); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-28 (8th Cir. 2003); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173 (9th Cir. 2001); *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063-64 (10th Cir. 2004).

³⁰ *Smith v. Ashcroft*, 295 F.3d 425, 428-29 (4th Cir. 2002) (district court’s then improper dismissal of habeas petition and court of appeals’ dismissal of transferred case effectively deprived petitioner of judicial review); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963-64 (9th Cir. 2004) (deprivation of judicial review alleged to have resulted from ineffective assistance of counsel).

The following table represents the general state of the law as of the date of this advisory.

Post-REAL ID Act Collateral Review Cases

Circuit, Decision and Holding	Circuit Exception
Second: <i>Garcia-Villeda v. Mukasey</i> , 531 F.3d 141, 150 (2d Cir. 2008) (finding lack of review of prior order does not offend due process, without discussion of INA § 242(a)(2)(D)).	
Third: <i>Debeato v. AG</i> , 505 F.3d 231, 234-35, 237 (3d Cir. 2007) (INA § 242(a)(2)(D) permits review of legal and constitutional challenges to the prior BIA order; standard of review is “gross miscarriage of justice”).	
Fifth: <i>Ramirez-Molina v. Ziglar</i> , 436 F.3d 508, 513-15 (5th Cir. 2006) (INA § 242(a)(2)(D) permits review of legal and constitutional challenges to the prior stipulated removal order; standard of review is “gross miscarriage of justice”).	INA § 242(a)(2)(D) is subject to INA § 242(d), i.e., no review where petitioner failed to exhaust administrative remedies in the prior proceeding. <i>Ramirez-Molina</i> , 436 F.3d at 515.
Sixth: <i>Villegas de la Paz v. Holder</i> , 614 F.3d 605, 610 (6th Cir. 2010) (INA § 242(a)(2)(D) permits review of legal and constitutional challenges to the prior IJ order; no specified standard of review).	
Seventh: <i>Torres-Tristan v. Holder</i> , 656 F.3d 653, 656 (7th Cir. 2011) (stating court will not “look behind the reinstatement to entertain challenges to the earlier, underlying removal order, citing pre-REAL ID case law and without discussing INA § 242(a)(2)(D)).	
Ninth: <i>de Rincon v. Mukasey</i> , 539 F.3d 1133, 1138-39 (9th Cir. 2008) (INA § 242(a)(2)(D) permits review of legal and constitutional challenges to the prior order).	INA § 242(a)(2)(D) is subject to INA § 242(e), i.e., no review where prior order is an expedited removal order. <i>de Rincon</i> , 539 F.3d at 1138-39.
Tenth: <i>Lorenzo v. Mukasey</i> , 508 F.3d 1278, 1281 (10th Cir. 2007) (INA § 242(a)(2)(D) permits review of legal and constitutional challenges to the prior order).	INA § 242(a)(2)(D) is subject to INA § 242(e), i.e., no review where prior order is an expedited removal order. <i>Lorenzo</i> , 508 F.3d at 1282-84. INA § 242(a)(2)(D) is subject to INA § 242(b)(1), i.e., no review where petitioner did not timely file petition for review of prior stipulated removal order. <i>Cordova-Soto v. Holder</i> , 659 F.3d 1029, 1032 (10th Cir. 2011)
Eleventh: <i>Avila v. United States AG</i> , 560 F.3d 1281, 1284 (11th Cir. 2009) (finding lack of	

jurisdiction to review prior order because petitioner “failed to exhaust his administrative remedies or seek timely review of his [prior] deportation order,” without discussion of INA § 242(a)(2)(D)).	
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What is the standard of review on collateral review?

Where INA § 242(a)(2)(D) acts to restore jurisdiction over legal and constitutional challenges to the prior order, courts arguably should apply a *de novo* standard of review because *de novo* is the standard the courts apply to such challenges on direct review. However, where review is collateral, some circuits (*e.g.*, Third, Fifth, and Ninth) apply a “gross miscarriage of justice standard.”

When arguing that a prior order constitutes a “gross miscarriage of justice,” BIA case law is helpful. The BIA consistently applies this standard of review in immigration cases involving a collateral attack on an earlier proceeding. *See, e.g., Matter of Farinas*, 12 I&N Dec. 467, 471-73 (BIA 1967); *Matter of Malone*, 11 I&N Dec. 730, 731 (BIA 1966); *Matter of Roman*, 19 I&N Dec. 855, 856-57 (BIA 1988); *Matter of G-N-C-*, 22 I&N Dec. 281, 285 (BIA 1998). Under Board case law, DHS’ failure to prove a charge in the prior proceeding, *Matter of Malone*, 11 I&N Dec. at 31, and subsequent case law rendering the prior order “improper,” *Matter of Farinas*, 12 I&N Dec. at 473, constitute gross miscarriages of justice.

What if the IJ or BIA reopens the prior order after DHS issued the reinstatement order?

As a general rule, if the BIA or IJ reopens the prior proceeding, the reinstatement order collapses. As the Supreme Court and the lower courts have indicated or held explicitly, reopening vacates the underlying removal order. *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009) (“[A] determination that the BIA should have granted Nken’s motion to reopen would necessarily extinguish the finality of the removal order”).³¹ If the order underlying the reinstatement order no longer exists, it follows that the reinstatement order similarly can no longer exist.

It is uncertain, however, whether reopening *automatically* extinguishes the reinstatement order. Thus, to avoid future confusion or potential problems, counsel always should ask DHS to officially cancel the reinstatement order.

What if a criminal court declares the prior order unlawful in dismissing a criminal charge for illegal reentry after deportation under 8 U.S.C. § 1326?

In criminal prosecutions for illegal reentry after deportation (8 U.S.C. § 1326), the district court judge may consider the legality of a prior order, which is an element of the criminal prosecution. If the court determines the prior order is unlawful, the court will dismiss the criminal charge. A finding that the prior order is unlawful as an element of a *criminal* charge does not necessarily

³¹ *See also Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (holding that “the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings”); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (“The BIA’s granting of the motion to reopen means there is no longer a final decision to review”).

mean that the prior order cannot be used to sustain a reinstatement order. Nonetheless, the prevailing arguments in the criminal case may support a collateral attack in the reinstatement case. Furthermore, DHS/OIL may be more likely to consider vacating the reinstatement order where a person has defeated a criminal reentry charge.

4. Asylum

Individuals who fear persecution in their home countries may have an argument that they are eligible for asylum under INA § 208 notwithstanding § 241(a)(5)'s bar to relief. The premise of this argument is that Congress intended the asylum statute to apply to “*Any alien* who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien’s status. . . .” INA § 208(a)(1) (emphasis added). In order to harmonize the asylum and reinstatement statutes, individuals must not be precluded from applying for asylum.

In a somewhat analogous situation, courts refused to permit individuals with reinstatement orders to apply for relief under INA § 245(i) (adjustment of status for certain persons who entered without inspection).³² However, unlike INA § 245(i), Congress amended the asylum statute to include broad language about asylum eligibility at the same time it amended the reinstatement statute to include the bar on relief.³³ Furthermore, also unlike INA § 245(i), the asylum statute is protective in nature and grounded in U.S. treaty obligations.

Note also that the Supreme Court indicated that asylum remains available to individuals subject to reinstatement. *See Fernandez-Vargas v. Holder*, 548 U.S. 30, 35 n.4 (2006); *see also Herrera-Molina v. Holder*, 597 F.3d 128, 139 n.8 (2d Cir. 2010) (noting Supreme Court’s acknowledgement of the availability of asylum in *dicta*).

5. Regulatory Violations and Due Process Considerations

What if DHS failed to follow the reinstatement regulations?

DHS officers must follow agency regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). In the reinstatement context, for example, the regulations require DHS officers to obtain the prior removal order and to ask the individual if he or she has a fear of return. *See* § I.C, *supra*, for additional regulatory requirements. To prevail on a regulatory violation, most courts require a showing of prejudice. Where the regulation protects a fundamental statutory or constitutional right, however, some courts will presume, or not require, prejudice. *See, e.g., Leslie v. A.G. of the United States*, 611 F.3d 171, 180 (3d Cir. 2010). For example, the regulations at 8 C.F.R. § 241.8(a)(2) require DHS to compare the person’s fingerprints with those in its file where there is an identity dispute and prevent DHS from removing the person in the absence of such fingerprints. Arguably, a person has a fundamental right to avoiding deportation based on mistaken identity and, arguably, courts should presume prejudice in this situation. Counsel should research the applicable circuit law.

³² *Delgado v. Mukasey*, 516 F.3d 65, 71 (2d Cir. 2008) (rejecting argument and discussing similar decisions of the First, Sixth, Seventh, Tenth, and Eleventh Circuits).

³³ Prior to IIRIRA, the asylum statute stated that: “an alien . . . irrespective of such alien’s status” could apply for asylum (emphasis added). INA § 208(a) (1995). In 1996, Congress changed this language to read: “*Any alien* . . . irrespective of such alien’s status (emphasis added).” *See* IIRIRA § 604.

What are the due process concerns in the reinstatement process?

The due process concerns that might arise in the reinstatement process include, but are not limited to:

- Lack of a full and fair hearing;
- Lack of an impartial adjudicator;
- Lack of meaningful opportunity to present and rebut evidence;
- Lack of a meaningful opportunity to cross-examine witnesses;
- Inability to develop an adequate administrative record;
- Failure to serve the reinstatement order;
- Right to counsel issues, including lack of access to counsel during the reinstatement process and lack of notice to existing counsel in violation of 8 C.F.R. § 292.5; and
- Lack of notice of the right to seek federal court review.

How have the circuit courts ruled on due process claims?

Some courts have expressed concern regarding the lack of due process protections in the reinstatement process.³⁴ Nonetheless, all courts have upheld the reinstatement procedures.³⁵ In most cases, however, the petitioner did not demonstrate actual and specific prejudice from the alleged due process violation. Petitioners who challenge the existence (or, possibly, the legality) of the prior order, departure, or reentry arguably could establish prejudice.

6. Factual Arguments and Citizenship Claims

Can someone challenge the existence of the factual elements of reinstatement?

Yes, a person can challenge a reinstatement order by arguing that he or she was not previously ordered removed, did not depart under a removal order, and/or reentered the country legally. For example, if the administrative record does not contain the prior order, the absence of the existence of a prior order is a basis for challenging the reinstatement order. Similarly, if the immigration judge previously granted voluntary departure and the individual timely departed, whether a prior order existed constitutes a factual challenge. When confronted with this situation,

³⁴ See, e.g., *Castro-Cortez v. INS*, 239 F.3d 1037, 1047-50 (9th Cir. 2001) *abrogated on other grounds by* *Fernandez-Vargas*, 548 U.S. 30, 36 & n.5 (2006); *United States v. Charleswell*, 456 F.3d 347, 356-57 (3d Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004); *Bejjani v. INS*, 271 F.3d 670, 675-76 (6th Cir. 2001); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002) *overruled on other grounds, Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).

³⁵ See, e.g., *Lattab v. Ashcroft*, 384 F.3d 8, 20-21 (1st Cir. 2004); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150-51 (2d Cir. 2008); *Ponta-Garcia v. AG of the United States*, 557 F.3d 158, 162-65 (3d Cir. 2009); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 302 (5th Cir. 2002); *Warner v. Ashcroft*, 381 F.3d 534, 539 (6th Cir. 2004); *Gomez-Chavez v. INS*, 308 F.3d 796, 802 (7th Cir. 2002); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 847-48 (8th Cir. 2006); *Briseno-Sanchez v. Heinauer*, 319 F.3d 324, 327-28 (8th Cir. 2003); *Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 495-97 (9th Cir. 2007) (en banc); *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162-63 (10th Cir. 2003); *De Sandoval v. United States AG*, 440 F.3d 1276, 1285 (11th Cir. 2006); *Avila v. United States AG*, 560 F.3d 1281, 1286 (11th Cir. 2009).

the Ninth Circuit transferred the case to the BIA to resolve this factual dispute. *Rafaelano v. Wilson*, 471 F.3d 1091, 1098 (9th Cir. 2006). For a discussion on challenging the manner of entry, see § II.B.2, *supra*.

Who has the burden of proving the factual elements, and what is the standard of proof?

Before DHS can reinstate a prior order, DHS should bear the burden of establishing the existence of a prior order of removal, a subsequent departure from the United States under that order, and an illegal reentry. *Cf.* 8 C.F.R. § 241.8(a) (“In establishing whether an alien is subject to [INA § 241(a)(5)], the immigration officer shall determine the following: . . .”).

The reinstatement statute does not provide an express standard of proof to meet this burden. *Compare* INA § 240(c)(3)(A) (providing “the Service has the burden of establishing by clear and convincing evidence that . . .the alien is deportable. No decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence”) *with* INA § 241(a)(5) (silence as to standard of proof). As such, DHS arguably must meet its burden of proof by “clear, convincing and unequivocal evidence.” *Woodby v. INS*, 385 U.S. 276, 277 (1966).

When reviewing a challenge to a factual element of a reinstatement order, the courts of appeals only may review the “administrative record on which the [reinstatement] order is based” and the court treats DHS’ factual findings as “conclusive unless any reasonable adjudicator would be compelled to the contrary.” INA § 242(b)(4)(A)&(B). For these reasons, the administrative record must contain evidence supporting any factual challenge. Counsel may wish to consider correcting or supplementing the administrative record via a direct filing or motion to reopen or reconsider, see § I.C, *supra*, or moving to supplement the administrative record pursuant to Federal Rule of Appellate Procedure 16(b).

Can the federal courts consider claims to U.S. nationality raised in a petition for review of a reinstatement order?

Yes, pursuant to INA § 242(b)(5), the court of appeals can decide a nationality claim or transfer any case involving a genuine issue of material fact to the district court. *See, e.g., Batista v. Ashcroft*, 270 F.3d 8, 17 (1st Cir. 2001) (transferring case to district court to resolve genuine issue of fact regarding citizenship claim made by person subject to reinstatement order).

7. Fourth Amendment Violations

What arguments are available if DHS’ made an arrest and/or collected evidence underlying the reinstatement order in violation of the Fourth Amendment?

DHS sometimes issues reinstatement orders following a home or work place raid, traffic stop, unauthorized stop, or a deceptive ruse. For example, in one case DHS went to a petitioner’s address pretending to be the police looking for a suspect and showed a picture of a man as a ruse to gain consent to enter. Where DHS or another law enforcement entity makes an arrest or obtains evidence underlying the reinstatement order in violation of the Fourth Amendment, arguably DHS cannot use the arrest and/or the evidence to support its reinstatement decision.

In these cases, counsel should consider supplementing the agency's reinstatement record with evidence of the Fourth Amendment violation (*e.g.*, declarations, police reports, etc.). *See* § I.C, *supra*.

For further information on Fourth Amendment violations, *see* AIC's practice advisory *Motions to Suppress in Removal Proceedings: A General Overview* (updated October 12, 2011), located at: <http://www.legalactioncenter.org/sites/default/files/practice-advisory-motions-to-suppress-in-removal-proceedings-a-general-overview.pdf>.

What remedies are available if DHS' made an arrest and/or collected evidence underlying the reinstatement order in violation of the Fourth Amendment?

In addition to filing a petition for review seeking to vacate the reinstatement order and terminate reinstatement proceedings, counsel should consider filing a damages action in federal court (or referring the client to a civil rights attorney for assessment of the claim). It also is appropriate to ask DHS for prosecutorial discretion, for example, cancellation of the reinstatement order, initiation of removal proceedings before an immigration judge under INA § 240, or deferral of removal. In at least one case, DHS vacated a reinstatement order based on alleged Fourth Amendment violations after the petitioner filed her opening brief.

8. *Judulang v. Holder*

What arguments are available under *Judulang v. Holder*?

In *Judulang v. Holder*, ___ U.S. ___, 132 S. Ct. 476, 485 (2011), the Supreme Court rejected as arbitrary and capricious a rule that categorically precluded a group of individuals from applying for immigration relief where the BIA failed to consider "germane" factors. *Id.* at 485. The Court expressed some disdain for immigration policies that allow deportation officers' discretionary charging decisions to determine whether relief is available. *Judulang*, 132 S. Ct. at 486 (criticizing system that turns on the "fortuity of an individual officer's decision"); at 487 (stating that deportation decisions cannot be made into a "sport of chance") (citation omitted); at 490, 485, 486, 488 (analogizing agency's policy to the flip of a coin).

With respect to reinstatement, DHS' practices are similarly left to the whim of the charging officer. DHS either issues a Notice to Appear initiating a removal proceeding before an IJ under INA § 240 (where the person can apply for all available relief) or issues a reinstatement order (where the person is barred from all relief and denied an immigration judge hearing). Arguably, like the process at issue in *Judulang*, the reinstatement process also is arbitrary and capricious.

III. ADMINISTRATIVE MOTIONS

A. Motions to Reopen or Reconsider

Can an IJ or the BIA reopen or reconsider a prior order if DHS has not (yet) issued a reinstatement order?

Although the reinstatement statute says the prior order "is not subject to being reopened or reviewed," this language only applies after DHS issues a reinstatement order. In other words, only a reinstatement order triggers the bar to reopening. Thus, the BIA or IJ should adjudicate

motions that precede a reinstatement order.³⁶ Importantly, however, filing the motion may prompt DHS to arrest the individual (if DHS knows his or her address) and/or prompt criminal charges under 8 U.S.C. § 1326. If DHS subsequently issues a reinstatement order, however, one might argue that § 241(a)(5)'s bar to reopening conflicts with the statutory right to file a motion to reopen.

Can an IJ or the BIA reopen or reconsider a prior order if DHS already has issued a reinstatement order?

As explained above in § II.B.3, a reinstatement order should collapse if the prior order is reopened (or favorably reconsidered). Thus, reopening (or reconsideration) is an attractive option. However, case law on reopening orders underlying reinstatement orders is sparse.

Unless and until the relevant circuit court holds that the agency lacks jurisdiction to review motions to reopen or reconsider, counsel should consider pursuing a motion to reopen or reconsider based on any argument meriting such a motion. Filing a motion where there is a valid basis for doing so, is useful in demonstrating that the individual pursued all possible options. *See Morales-Izquierdo v. Ashcroft*, 486 F.3d 484, 496 n.13 (9th Cir. 2007) (en banc) (“The INA does have a procedure an alien may use to reopen an in absentia removal order based on a claim of lack of notice, *see* INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii), but Morales has failed to avail himself of it.”) (emphasis added).

Even if the IJ or the Board denies the motion, the individual may appeal the denial to the Board or the court of appeals via a petition for review, respectively. In general, the courts of appeals have jurisdiction to review denials of motions to reopen and motions to reconsider by the BIA. *See* INA § 242(a); *see also Kucana v. Holder*, 130 S. Ct. 827, 834, 838-39 (2010) (protecting judicial review of statutory motions to reopen in light of the importance of such motions). Moreover, the courts should consolidate a petition for review of the denial of a motion to reopen with any petition for review of the reinstatement order and, therefore, consider both administrative records when reviewing the petitions. *See* INA §§ 242(b)(6) (requiring consolidation of review of motion to reopen or reconsider the order with review of the order); 242(b)(4)(A) (court of appeals review limited to the administrative record on which it is based).

Can DHS reopen or reconsider a reinstatement or expedited removal order?

Yes, the regulations at 8 C.F.R. § 103.5 govern motions to reopen or reconsider DHS decisions, which should include reinstatement decisions and expedited removal decisions.³⁷ Whether the

³⁶ To date, nine courts of appeals have invalidated the “departure bar” regulations at 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), which the Board of Immigration Appeals interprets as barring the Board and immigration judges, respectively, from adjudicating motions filed by noncitizens whom DHS has deported or who have departed the United States. For further information on post departure motions, *see* AIC and NIPNLG’s practice advisory entitled *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (March 14, 2012), located at: http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_Departure_Bar_Practice_Advisory_March2012.pdf.

³⁷ The regulations include the following:

court of appeals will review DHS' denial of such a motion is not settled. *Compare Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004) (“Should the eventual disposition of that motion [to reopen or reconsider the reinstatement order] not be in the petitioner’s favor, he may, of course, file a separate petition for review with respect thereto.”) *with Tapia-Lemos v. Holder*, 696 F.3d 687 (7th Cir. 2012) (dismissing petition for review of DHS’ denial of motion to reopen reinstatement order for lack of jurisdiction). Notably, if the court of appeals has jurisdiction over the denial, the INA requires the court to consolidate review of the denial with its review of the reinstatement order. INA § 242(b)(6).

B. Opposing a DHS Motion to Terminate Removal Proceedings

Individuals facing a motion to terminate removal proceedings to allow DHS to reinstate a prior order should oppose termination. DHS cannot simply cancel a Notice to Appear (NTA) after filing it with the immigration court. *See Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007). Instead, DHS must move to terminate proceedings based on one of the reasons specified in the regulations. *See* 8 C.F.R § 239.2(c). When seeking to terminate to reinstate, DHS generally argues the NTA was “improvidently issued.” 8 C.F.R § 239.2(c)(6). The immigration judge (or the BIA if the case is on appeal) must then review the motion and make “an informed adjudication . . . based on an evaluation of the factors” set forth in DHS’ motion. *Matter of G-N-C-*, 22 I&N Dec. at 284.

Arguably, an NTA is not “improvidently issued” where DHS exercised its prosecutorial discretion to initiate removal proceedings. This is especially true where termination wastes judicial resources because DHS was on notice of a prior removal order at the time it issued the NTA, immigration proceedings are ongoing (and lengthy), DHS trial counsel is adequately representing the agency’s position in removal proceedings, and/or where the individual is eligible for withholding of removal or CAT if placed in reinstatement proceedings. In the last situation, termination also would require duplicative proceedings.

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- 8 C.F.R. § 103.5(a)(2) (“A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence”).
 - 8 C.F.R. § 103.5(a)(3) (“A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy”).
 - 8 C.F.R. § 103.5(a)(1)(i) (providing 30 day deadline to file motions to reopen or reconsider and noting that the deadline for reopening “may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner”).

SAMPLE REINSTATEMENT ORDER

U.S. Department of Homeland Security

Notice of Intent/Decision to Reinstate Prior Order

File No. [redacted]
Event No: SN70808000264
Date: [redacted]

Name: [redacted]

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Secretary of Homeland Security intends to reinstate the order of Removal entered against you. This intent is based on the following determinations:

- 1. You are an alien subject to a prior order of deportation /exclusion/removal entered on [redacted] at [redacted]
2. You have been identified as an alien who:
[X] was removed on [redacted] Pursuant to an order of deportation/exclusion/removal.
[] departed voluntarily on [redacted] pursuant to an order of deportation / exclusion /removal on or after the date on which such order took effect (i.e., who self-deported).

3. You illegally reentered the United States on or after [redacted] at or near [redacted]

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may contest this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement contesting this determination, were communicated to the alien in the ENGLISH/SPANISH language.

[redacted] (Printed or typed name of official)
[Signature] (Signature of officer)
Immigration Enforcement Agent (Title of officer)

Acknowledgment and Response

I [X] do [] do not wish to make a statement contesting this determination.
[redacted] (Date) [Signature] (Signature of Alien)

Decision, Order, and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241 (a)(5) of the Act.

[redacted] (Date) [redacted] (Location)
[Signature] (Signature of authorized deciding official)
SDDO (Title)

**SAMPLE LETTER TO DHS
REQUESTING COPY OF REINSTATEMENT ORDER
AND ACCOMPANYING DOCUMENTATION**

[ATTORNEY LETTERHEAD]

[Name]

_____, District Director

_____ District Office

U.S. Immigration and Customs Enforcement

Department of Homeland Security

[Address]

RE: [Name]

[A Number]

**Urgent Request for Reinstatement Order under INA § 241(a)(5)
and All Related Documents**

Dear _____:

As evidenced by the enclosed Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative), this office represents [name]. We previously submitted a Form G-28 on [date] in conjunction with [_____].

We understand that Immigration and Customs Enforcement (ICE) has issued an order of reinstatement pursuant to § 241(a)(5) of the Immigration & Nationality Act against [name]. By this letter, we are requesting that your office provide us with all documentation related to the order, including, but not limited to, the reinstatement order and any sworn statement taken in conjunction with issuance of the order, any documentation related to [name]'s expressed fear of return if deported, the prior order underlying the reinstatement order, any evidence regarding [name]'s manner of entry to the United States, and any fingerprint analysis verifying [name]'s identity. *See* 8 C.F.R. § 292.5(a) (requiring notice and service of papers on counsel or the individual if unrepresented). *See also* 8 C.F.R. § 241.8(b) (mandating that DHS provide written notice of reinstatement determination to the individual).

As you are aware, should [name] wish to exercise his statutory right to federal court review, there is a 30 day deadline for filing a petition for review. Given this approaching deadline [, and without knowing the date ICE issued the reinstatement order], we request expedited processing of this request to safeguard [name]'s right to judicial review.

Thank you for your immediate attention to this matter. Please email or fax the requested documents to us at [insert contact info].

Sincerely,

[Attorney's Name]

Enclosure: Form G-28

REINSTATEMENT CHECKLIST

1. Is client **subject to** § 241(a)(5)? _____
 - a. prior order/s? Yes / No (_____ asked client; _____ FOIA; _____ called EOIR #; _____ FBI check)
 - date of prior order/s: _____
 - location of prior proceedings (IJ): _____
 - type of prior order (expedited removal, BIA, stip order, § 238(b) order): _____
 - b. departure/deportation under prior order (_____ asked client; _____ checked FOIA)
 - c. illegal reentry (_____ asked client; _____ reviewed entry documents)
 - d. do any statutory or judicial **exemptions** apply? Yes / No
 - _____ *CSS, LULAC, Zambrano* class member; _____ NACARA AOS
 - _____ NACARA Suspension/Special Rule Cancellation; _____ HRIFA AOS
 - _____ reentry and efforts to legalize status before 4/1/1997 (*see* retroactivity)
2. **Copy** of the reinstatement order, sworn statement, etc.? Yes / No
_____ client provided copy; _____ request to DHS w/G-28 (see sample); _____ called DHS
3. Need to **supplement or correct the reinstatement record** before DHS? Yes / No
_____ supplement via letter to DHS; _____ reopening/reconsideration under 8 C.F.R. § 103.5
4. Reinstatement order **timely served**? _____ on client; _____ on counsel (after submitting G-28)
5. Has **petition for review deadline** passed? Yes / No
Date of reinstatement order (bottom of I-871 Form) is _____
PFR deadline is _____ (within 30 days of the order or, in the 9th Circuit, the conclusion of reasonable fear proceedings)
6. **Stay of removal** needed? Yes / No (_____ client detained; _____ client already deported)
7. **Eligible for relief** if reinstatement order vacated and placed in 240 proceedings?
Yes: (_____ asylum; _____ cancellation _____ AOS if pre-4/1/1997 reentry; _____ pros. disc.)
No: client's objective/reason for challenging order is: _____
8. **Other avenues** (_____ withholding/CAT; _____ VAWA AOS, T, U Status; _____ consular processing; _____ *Duran Gonzales* class member; _____ prosecutorial discretion)
9. **Potential legal arguments**
 - _____ retroactivity (reentry + affirmative step to legalize status before 4/1/1997)
 - _____ manner of entry:
 - _____ w/valid documentation;
 - _____ procedurally regular but w/o valid documentation or waved through at POE
 - _____ collateral challenge to prior order
 - _____ asylum
 - _____ regulatory violation / due process
 - _____ factual challenge to: _____ identity; _____ existence of prior order, departure, or reentry
 - _____ nationality/citizenship claim
 - _____ 4th Amendment violation
 - _____ *Judulang*
10. **Motion to reopen or reconsider the prior order**
 - _____ filed prior to issuance of reinstatement order (_____ informed client of risks)
 - _____ filed after issuance of reinstatement order
11. **Motion to reopen or reconsider the reinstatement order** under 8 C.F.R. § 103.5

ADDENDUM OF REINSTATEMENT DECISIONS

Supreme Court

Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006)

First Circuit

Batista v. Ashcroft, 270 F.3d 8 (1st Cir. 2001)

Arevalo v. Ashcroft, 344 F.3d 1 (1st Cir. 2003)

Ponta-Garca v. Ashcroft, 386 F.3d 341 (1st Cir. 2004)

Lattab v. Ashcroft, 384 F.3d 8 (1st Cir. 2004)

Second Circuit

Cruz v. Ridge, 383 F.3d 62 (2d Cir. 2004)

Delgado v. Mukasey, 516 F.3d 65 (2d Cir. 2008)

Garcia-Villeda v. Mukasey, 531 F.3d 141 (2d Cir. 2008)

Miller v. Mukasey, 539 F.3d 159 (2d Cir. 2008)

Herrera-Molina v. Holder, 597 F.3d 128 (2d Cir. 2010)

Beekhan v. Holder, 634 F.3d 723 (2d Cir. 2011)

Third Circuit

Avila-Macias v. Ashcroft, 328 F.3d 108 (3d Cir. 2003)

Dinnall v. Gonzales, 421 F.3d 247 (3d Cir. 2005)

United States v. Charleswell, 456 F.3d 347 (3d Cir. 2006)

Debeato v. AG, 505 F.3d 231 (3d Cir. 2007)

Ponta-Garcia v. AG of the United States, 557 F.3d 158 (3d Cir. 2009)

Fourth Circuit

Velasquez-Gabriel v. Crocetti, 263 F.3d. 102 (4th Cir. 2001)

Smith v. Ashcroft, 295 F.3d 425 (4th Cir. 2002)

Fifth Circuit

Ojeda-Terrazas v. Ashcroft, 290 F.3d 292 (5th Cir. 2002)

Ramirez-Molina v. Ziglar, 436 F.3d 508 (5th Cir. 2006)

Silva Rosa v. Gonzales, 490 F.3d 403 (5th Cir. 2007)

Anderson v. Napolitano, 611 F.3d 275 (5th Cir. 2010)

Sixth Circuit

Bejjani v. INS, 271 F.3d 670 (6th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 & n.5 (2006)

Warner v. Ashcroft, 381 F.3d 534 (6th Cir. 2004)

Villegas de la Paz v. Holder, 640 F.3d 650 (6th Cir. 2010)

Seventh Circuit

Gomez-Chavez v. Perryman, 308 F.3d 796 (7th Cir. 2002)

Faiz-Mohammed v. Ashcroft, 395 F.3d 799 (7th Cir. 2005)

Labojewski v. Gonzales, 407 F.3d 814 (7th Cir. 2005)

Lino v. Gonzales, 467 F.3d 1077 (7th Cir. 2006)

Lemos v. Holder, 636 F.3d 365 (7th Cir. 2011).

Torres-Tristan v. Holder, 656 F.3d 653 (7th Cir. 2011)
Tapia-Lemos v. Holder, 696 F.3d 687 (7th Cir. 2012)

Eighth Circuit

Alvarez-Portillo v. Ashcroft, 280 F.3d 858 (8th Cir. 2002) *overruled by Gonzalez v. Chertoff*, 454 F.3d 813, 818 n.4 (8th Cir. 2006).
Briseno-Sanchez v. Heinauer, 319 F.3d 324 (8th Cir. 2003)
Lopez v. Heinauer, 332 F.3d 507 (8th Cir. 2003)
Flores v. Ashcroft, 354 F.3d 727 (8th Cir. 2003)
Lopez-Flores v. DHS, 376 F.3d 793 (8th Cir. 2004)
Ochoa-Carrillo v. Gonzales, 437 F.3d 842 (8th Cir. 2006)
Ochoa-Carrillo v. Gonzales, 446 F.3d 781 (8th Cir. 2006)
Molina Jerez v. Holder, 625 F.3d 1058 (8th Cir. 2010)

Ninth Circuit

Castro-Cortez et al. v. INS, 239 F.3d 1037 (9th Cir. 2001) *abrogated by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 & n.5 (2006)
Gallo-Alvarez v. Ashcroft, 266 F.3d 1123 (9th Cir. 2001)
Alvarenga-Villalobos v. Ashcroft, 271 F.3d 1169 (9th Cir. 2001)
Padilla v. Ashcroft, 334 F.3d 921 (9th Cir. 2003)
Arreola-Arreola v. Ashcroft, 383 F.3d 956 (9th Cir. 2004), *overruled by Morales-Izquierdo v. Ashcroft*, 486 F.3d 484 (9th Cir. 2007) (en banc)
Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004), *overruled in part by Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007)
Rafaelano v. Wilson, 471 F.3d 1091 (9th Cir. 2006)
Morales-Izquierdo v. Ashcroft, 486 F.3d 484 (9th Cir. 2007) (en banc)
Martinez-Merino v. Mukasey, 525 F.3d 801 (9th Cir. 2008)
de Rincon v. Mukasey, 539 F.3d 1133 (9th Cir. 2008)
Alcala v. Holder, 563 F.3d 1009 (9th Cir. 2009)
Chay Ixcot v. Holder, 646 F.3d 1202 (9th Cir. 2011)
Duran Gonzales v. U.S. Dept. of Homeland Sec., -- F.3d --, 2013 U.S. App. LEXIS 6401 (9th Cir. Mar. 29, 2013)
Galindo-Romero v. Holder, 640 F.3d 873 (9th Cir. 2011)
Tamayo-Tamayo v. Holder, 709 F.3d 795 (9th Cir. 2013)

Tenth Circuit

Duran-Hernandez v. Ashcroft, 348 F.3d 1158 (10th Cir. 2003)
Garcia-Marrufo v. Ashcroft, 376 F.3d 1061 (10th Cir. 2004)
Fernandez-Vargas v. Ashcroft, 394 F.3d 881 (10th Cir. 2005), *affirmed* 547 U.S. 30 (2006)
Berum-Garcia v. Comfort, 390 F.3d 1158 (10th Cir. 2004)
Valdez-Sanchez v. Gonzales, 485 F.3d 1084 (10th Cir. 2007)
Lorenzo v. Mukasey, 508 F.3d 1278 (10th Cir. 2007)
Cordova-Soto v. Holder, 659 F.3d 1029 (10th Cir. 2011)

Eleventh Circuit

Sarmiento-Cisneros v. Ashcroft, 381 F.3d 1277 (11th Cir. 2004)
De Sandoval v. United States AG, 440 F.3d 1276 (11th Cir. 2006)
Avila v. United States AG, 560 F.3d 1281 (11th Cir. 2009)